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

FLORENTINA FLORES DE VEGA, HTOO
LER PAW, HEATHER FRANKLIN, VICKI
PETROTTA, WARREN CHAN, BRENDA
COOK, LISA EXTEROVICH, KINNARI
SHAH, ABDELKADIR ABDELKADIR
MOKRANI, DIANA OROPEZA, DAVID
KNELL, BRITTNEY CIANI, STACEY
QUINTERO, KATHY SELVAGGIO,
TRACY SOLORZANO, TERRY
PATTERSON, and ERIN LACERRA, on
behalf of themselves and all others similarly
situated,

Petitioners,

v.

OREGON EMPLOYMENT DEPARTMENT
and DAVID GERSTENFELD,

Respondents.

Case No. 20CV23377

DECLARATION OF DAVID GERSTENFELD
IN SUPPORT OF OPPOSITION TO
PETITIONERS' MOTION FOR SUMMARY
JUDGMENT AND RESPONDENTS' CROSS
MOTION FOR SUMMARY JUDGMENT

ORS 20.140 - State fees deferred at filing

I, David Gerstenfeld, make this declaration based upon a combination of personal
knowledge and in reliance upon records, which are regularly maintained in the ordinary course
of business. I hereby declare:

1. I am the Acting Director of the Oregon Employment Department (OED). I have
been in this position since June 2020. Before then, I was the Director of the Paid Family and
Medical Leave Insurance Division at the Employment Department for about six months, and was
the Unemployment Insurance Division Director for about nine years before that. Before then, I
was the Presiding Administrative Law Judge for about five years, conducting contested case
hearings and overseeing the hearings conducted of the work performed by many different

1 agencies, including the Employment Department's unemployment insurance program.

2 2. I have also served as the Chair of the National Association of State Workforce
3 Agencies' (NASWA) Unemployment Insurance Policy Subcommittee, on the NASWA
4 Unemployment Insurance Integrity Center's Steering Committee, and I currently serve on
5 NASWA's Unemployment Insurance Information Technology Support Center Steering
6 Committee.

7 3. In March 2020, Governor Brown issued several executive orders to declare a state
8 of emergency due to the COVID-19 pandemic, close all schools, ban public gatherings, declare
9 an abnormal market disruption, close restaurants (except for take-out), bars, and non-essential
10 stores, and postpone non-essential health care, among other things.

11 4. The pandemic's effect on so many businesses took Oregon from a low
12 unemployment rate of 3.5% to a high rate of 14.5% in just a few weeks in March and April of
13 2020. The current recession is bigger in magnitude than the Great Recession of 2007-2009, and
14 it happened essentially overnight making it impossible for OED to hire and train new employees
15 fast enough to immediately meet the tsunami-like need.

16 5. By contrast, "normal" recessions take much longer to develop. For example, the
17 agency received peak numbers of unemployment claims two years after the Great Recession
18 commenced. In other words, if this were a "normal" recession, Oregon would not yet be at peak
19 unemployment, and the agency would have time to ramp up its staffing in tandem with the
20 economic decline.

21 6. On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic
22 Security (CARES) Act which significantly expanded traditional UI. The CARES Act included,
23 among other provisions, three types of additional benefits: (1) Federal Pandemic Unemployment
24 Compensation (FPUC) to increase the weekly benefits by \$600; (2) Pandemic Unemployment
25 Assistance (PUA) which makes UI benefits available to many workers specifically excluded
26 from receiving traditional UI; and (3) Pandemic Emergency Unemployment Compensation

1 (PEUC), an extension program providing 13 weeks of additional benefits for people who use up
2 their regular UI benefits. The CARES Act also made other changes, including modifying the
3 Extended Benefits (EB) program, the Short Time Compensation program (called Work Share in
4 Oregon), and changing many ways that other normally applicable UI provisions apply, including
5 how some benefits are paid for. Midway through the pandemic, the federal government
6 instituted yet another unemployment program. That program, called the Lost Wages Assistance
7 Program (LWA), was funded through the Federal Emergency Management Agency (FEMA),
8 and provided \$300 in additional unemployment compensation for six weeks.

9 7. On March 27, 2020, the same day the CARES Act passed, the State of Oregon
10 entered into the required agreements with the U.S. Department of Labor (U.S. DOL) to
11 administer new benefit programs and other aspects of the CARES Act. Exhibit 1. These
12 agreements require Oregon, and other states entering into such agreements, to administer those
13 federal programs consistent with federal requirements and that failure to do so can result in the
14 U.S. DOL cancelling those agreements, making the corresponding benefits no longer available to
15 people who could otherwise get those benefits in Oregon.

16 8. This year has been extraordinary; its dual presidentially declared disasters caused
17 OED to implement Disaster Unemployment Assistance twice in less than one year, whereas the
18 program had not been triggered in Oregon in over a decade. While these new programs have
19 increased potential for unemployment benefits, they have also slowed down the process for
20 granting (or denying) benefits as states, including Oregon, have worked to navigate a series of
21 shifting program frameworks on top of carrying out their normal duties, for huge numbers of
22 people, during the pandemic.

23 9. Congress and the Oregon Legislature have enacted a complicated set of standards
24 providing that certain out-of-work people are entitled to benefits while others are not.

25 10. Under those standards, OED must first determine if the applicant has sufficient
26 hours and earnings from covered employment during the "regular base year" (the first four of the

1 last five completed calendar quarters) and that they do not have an open and valid claim in
2 another state. If the applicant does not qualify under a regular base year, OED reviews if the
3 applicant is eligible under an "alternative base year" (the most recent four completed calendar
4 quarters) and in some cases an "extended base year" (looking at more than four calendar
5 quarters). Depending on the applicant's employment history, this process can include
6 verification of and requesting wages from the federal government or other states. This process
7 can also include a review of the applicant's earnings using a fact specific, multi-factor balancing
8 test in ORS 670.600 to determine if the work the applicant performed was as an employee or an
9 independent contractor.

10 11. Sometimes, OED must also determine whether an applicant is eligible for benefits
11 through a process called "adjudication."

12 12. ORS 657.267 provides that OED "shall promptly examine each claim for waiting
13 week credit or for benefits and, on the basis of the facts available, make a decision to allow or
14 deny the claim." And Section 303(a)(1) of the Social Security Act requires, as a condition for a
15 state to receive administrative grants for its UI program, that the state's law provide for "such
16 methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated
17 to insure full payment of unemployment compensation when due." 42 U.S.C § 503(a)(1).

18 13. OED must sometimes conduct an individualized determination to make sure each
19 applicant is eligible for compensation and to ferret out fraud. States have must have various
20 "methods of administration" to ensure that eligible claimants are paid promptly only when it is
21 determined that they are eligible, and to ensure that claimants who are not eligible are not paid.
22 The U.S. DOL's interpretation of the methods of administration standard from the Social
23 Security Act is set out at 20 C.F.R. 602.11(a) and requires that state law "provide for such
24 methods of administration as will reasonably ensure the prompt and full payment of
25 unemployment benefits to eligible claimants...with the greatest accuracy feasible." 20 C.F.R. §
26 602.11(a). This regulation requires substantial compliance with 42 U.S.C § 503(a)(1), which

1 also requires states to have methods of administration that protect against improper payments
2 and fraud.

3 14. The U.S. DOL has issued guidance in the form of Unemployment Insurance
4 Program Letters (UIPL) Nos. 1145 and 04-01 providing additional instructions regarding the
5 “payment when due” requirement. See Exhibits 2 & 3. This guidance specifically requiring
6 states to "ensure that payment of benefits is not made when payment is not due." In these and
7 other UIPLs, the U.S. DOL has warned that, "[s]ince the enactment of the Coronavirus Aid,
8 Relief, and Economic Security (CARES) Act of 2020, which created several new temporary
9 unemployment compensation (UC) programs, some with different eligibility requirements, UI
10 fraud has increased significantly, further testing the integrity of individual state systems and the
11 UI program as a whole."

12 15. The federal government recognizes that in implementing the PUA and PEUC
13 programs, states “face significant challenges due to increased fraudulent activity and identity
14 theft amid new and emerging fraud schemes.”

15 16. As noted above, OED determines eligibility and rules out fraud during a process
16 called adjudication, and this process is largely what remains of the pandemic-related eligibility
17 backlog. The fact-intensive, individualized adjudication process can take time, and relies on
18 information provided by the applicant, employers, and other third parties. OED is doing
19 everything in its power to speed timeframes for adjudicating those claims.

20 17. As set forth below, to meet the challenges of the pandemic, OED has exercised its
21 policy-making discretion and taken numerous steps on various fronts to speed its timeframes for
22 processing and paying or deny claims while still maintaining the integrity of its systems.

23 **OED has utilized additional software tools and has contracted with vendors**
24 **to improve systems and increase access.**

25 18. OED has used additional software tools and contracted with vendors throughout
26 the pandemic to improve its systems and increase access to benefits. Some of these efforts

1 include, but are not limited to:

- 2 • OED hired third-party IT consultants to review OED's approach to its work.
- 3 • OED increased capacity and functionality of its document imaging system to help
4 incorporate the massive influx in documents that have been received and entered into
5 workflow.
- 6 • OED engaged with IGNW (a third-party vendor) to develop a new PUA application and
7 weekly certifications (on the Google technology platform).
- 8 • OED worked with Block 81 for an improved OED website to increase capacity to support
9 the large numbers of website hits and to get information to, and receive information from,
10 applicants more effectively.
- 11 • OED translated its updated webpage into 15 different languages.
- 12 • OED implemented the use of a web form to replace overwhelmed email boxes that allows
13 OED to more effectively prioritize issues on the oldest claims, respond to applicants with
14 status updates on their requests, and track the responses and questions to better monitor
15 and respond to trends as they appear.
- 16 • OED worked with various telecom vendors to greatly expand call capacity and stability
17 of the phone system, stand up PUA and Disaster Unemployment Assistance (DUA) hot
18 lines, and add hundreds of phones to OED's Contact Center, including multiple new
19 Contact Center locations.
- 20 • OED worked with Google to create a Chatbot to allow customers another avenue to
21 obtain information.
- 22 • OED automated the resolution of multiple types of issues that used to take manual staff
23 intervention by creating macros and other coding that runs on the mainframe daily to
24 deactivate some claim stops.
- 25 • OED was one of the first states to use the identity verification tool offered by the

26 National Association of State Workforce Agencies' Integrity Center to better prevent

1 fraud without slowing down the processing of claims.

- 2 • OED engaged a third-party vendor to assist OED's adjudication team gather claim
3 specific facts up front before it is assigned to an adjudicator to decrease the amount of
4 time an adjudicator needs to spend reviewing each case to make an eligibility
5 determination.

6 **OED hired hundreds of employees, enlisted the Oregon National Guard, and redirected**
7 **existing personnel to target immediate needs and catch up on processing applications.**

8 19. To face the challenges resulting from the pandemic, OED hired over 500 new
9 claims takers, public service representatives and compliance specialists; trained and redirected
10 hundreds of existing OED employees from their regular job duties to help process claims; and
11 enlisted the Oregon National Guard to help process applications.

12 20. And OED has and continues to take significant steps to speed up the adjudication
13 process.

14 21. For example, OED has increased its team of adjudicators from approximately 80
15 in March 2020 to about 300 in October 2020. As these new adjudicators complete their training
16 and ramp up their production, the adjudication backlog decreases. OED is making progress.
17 However, Unemployment Insurance is a weekly eligibility program. Not only can an issue
18 needing adjudication be identified when an initial claim is filed, but it can also crop up during
19 any week of benefits that is claimed. Between the weeks of March 21, 2020 and October 31,
20 2020 there have been over 8.6 million weeks claimed in Oregon. For comparison, between the
21 weeks of March 9, 2019 and October 19, 2019, there were 853,915 weeks claimed.

22 22. This extraordinary influx of work, a ten-fold increase in weeks claimed over last
23 year, is causing delays in the adjudication process. The influx of pandemic-related adjudication
24 claims is exacerbated by new issues identified on claims that were initially paid, statewide
25 wildfires, the federal requirement to review claims individually, the need to maintain the
26 integrity of the program as an increased amount of fraud continues to combat the UI program,

1 and the complexity of the cases that need adjudication. Because of these factors, it is not
2 possible for OED to decide claim eligibility through the adjudication process faster than it is now
3 doing. The agency may experience some gains in efficiency as its newly hired adjudicators
4 come up to full speed.

5 23. OED is continuing to look for innovative ways to improve the adjudication
6 process so that Oregonians can more quickly receive benefits they are eligible for, but at this
7 point it is not realistic to expect that the agency can make decisions within the timeframe
8 Petitioners ask this Court to impose.

9 **OED is providing increased access to LEP applicants.**

10 24. OED is an equal opportunity agency; it values equity and inclusivity, and is
11 committed to ensuring that LEP applicants have meaningful access to all of its programs,
12 services, and benefits. LEP access is a high priority for the agency. To address challenges posed
13 by the flood of applicants during the pandemic, OED has increased access for LEP applicants
14 significantly. OED elevated the position of its Equity and Inclusion Officer, ensuring that that
15 position reports directly to the OED Director's Office and is part of the agency's Executive Team
16 leadership, and has increased LEP access to its website, telephonic LEP access, and outreach
17 activities.

18 25. OED has also increased LEP access to its website. The agency launched a new
19 website, providing applications and website content in the nine languages required by OED
20 policy (Spanish, simplified Chinese, Russian, Vietnamese, Romanian, Lao, Khmer, Mien, and
21 Hmong), along with six additional languages (Korean, Arabic, Farsi, Chuukese, Marshallese, and
22 Somali). By May 27, 2020, all fifteen language pages were posted on the agency's COVID-19
23 website, including translated applications, FAQs, and video resources.

24 26. OED also created a way for LEP individuals to request a callback in their
25 language. On the LEP non-English websites, each page invites LEP individuals to email a newly
26 created mailbox to request service in their language. The language access inbox is staffed by

1 bilingual employees trained in resolving multiple kinds of UI issues, taking initial and weekly
2 claims by phone, and using interpreters whenever needed. To date, these OED employees have
3 responded to over 2,930 LEP contacts through the inbox. OED also partnered with WorkSource
4 Oregon to assist LEP customers. All language pages inform customers that they may call a
5 WorkSource center to speak with an OED employee.

6 27. When an LEP applicant contacts OED by telephone, OED endeavors to match
7 that person with a staff member who speaks that language. OED has 152 qualified bilingual
8 employees that can provide service in Spanish, Russian, Vietnamese, Chinese, Italian, Japanese,
9 Tagalog and French. If no such employee is available, OED workers use a "language line
10 identification card" to determine the customer's preferred language, and then OED uses a vendor
11 to provide translation. While this tool has long been available, in 2020 OED refined its guidance
12 (2020 Access Procedure Section 5.C) to include examples of how to affirmatively notify
13 customers of their right to receive this free interpretation service. The new guidance also updates
14 employee instruction on when it is or is not appropriate to comply with a customer's request that
15 a friend or family member communicate on the customer's behalf, and when an employee should
16 reach out to a contracted interpreter, rather than a bilingual OED staff member.

17 28. Starting in July 2020, OED contracted with Work Systems, Inc. to staff a
18 language access hotline to assist LEP callers. The contract funds 19 bilingual staff part-time
19 over four months, and is being extended. In order to get this service up and running, OED
20 trained the Work Systems, Inc. staff and assigned an OED employee to provide ongoing
21 technical assistance.

22 29. OED has increased its outreach activities to LEP communities. OED markets its
23 services through advertising, by distributing LEP brochures and other promotional materials to
24 LEP communities, and with videos on the OED website. The agency also reaches out to LEP
25 communities through collaborations with community-based organizations, and by
26 communicating through local newspapers, radio, and television stations. OED uses these

1 partnerships to communicate relevant changes to UI claiming due to the pandemic and the
2 availability of the CARES Act unemployment insurance programs. Specific examples of LEP
3 outreach include but are not limited to the following.

4 30. OED's Migrant Seasonal Farmworker (MSFW) outreach representatives
5 contracted 2,477 MSFWs between January and March 2020. Between April and June 2020, the
6 MSFW team conducted an additional 5,067 virtual outreach contacts by phone, email, and
7 calling additional agricultural employers. (Figures for July 2020-present are not yet collected
8 because it constitutes a new program year.)

9 31. OED created CARES Act-related materials, such as PUA applications and
10 CARES Act informational flyers, in target languages.

11 32. OED also authorized groups to file claims on behalf of people facing barriers.

12 33. OED commenced an audio-visual translation project to provide audio files,
13 translated PDFs, and voice over of agency informational videos in a number of target languages.

14 34. OED produced informational CARES Act videos in English and Spanish.

15 35. OED participated in a one-hour Spanish language interview on Radio Poder.
16 Topics discussed included how to apply for UI, PUA, PEUC, and how to contact the agency with
17 questions for language assistance.

18 36. OED participated in a one-hour Russian language interview on Slavic Family
19 Media Center. Topics discussed included how to apply for UI, PUA, PEUC, and how to contact
20 the agency with questions for language assistance.

21 37. OED conducted Spanish language and English language 30-minute webinars for
22 community-based application assistors/case managers contracting with the Oregon Health
23 Authority's Community Partner Outreach Program. These contractors assist a variety of
24 vulnerable and hard-to-reach populations.

25 38. OED participated in a 30-minute Spanish language interview with Univision
26 television.

1 39. OED participated in a one-hour English language presentation for the Oregon
2 Latinx Leadership Network Virtual Townhall.

3 40. OED conducted a one-hour Spanish language presentation for the Latinx Business
4 group of the Hillsboro Chamber of Commerce. OED also assigned a Spanish-speaking OED
5 employee to provide ongoing technical assistance to the Latinx Business group at the Hillsboro
6 Chamber of Commerce.

7 41. OED conducted a one-hour webinar with live, simultaneous interpretation into
8 Russian, Spanish, and Vietnamese to provide information for filing for PUA.

9 42. OED conducted a 45-minute Spanish language seminar about the Spanish
10 language PUA claim filing portal. OED recorded the webinar and posted it to the agency's
11 website.

12 43. In addition, OED created a way for LEP individuals to request a callback in their
13 language. On the LEP non-English websites, each page invites LEP individuals to email a newly
14 created mailbox to request service in their language. The language access inbox is staffed by
15 bilingual employees trained in resolving multiple kinds of UI issues, taking initial and weekly
16 claims by phone, and using interpreters whenever needed. To date, these OED employees have
17 responded to over 2,930 LEP contacts through the inbox. OED also partnered with WorkSource
18 Oregon to assist LEP customers. All language pages inform customers that they may call a
19 WorkSource center to speak with an OED employee.

20 44. A true and correct copy of correspondence dated August 21, 2020 from OED to
21 the U.S. DOL regarding OED's provision of access to LEP applicants is attached hereto as
22 Exhibit 4.

23 **OED increased automated processing of claims.**

24 45. To help process the volume of applications that flooded OED as a result of the
25 pandemic, OED has improved its internal processes to remove several categories of "flags" in its
26 system. A "flag" is an event that automatically stops payment unless and until an OED staff

1 member reviews the issue and manually removes the flag. For example, before the pandemic, if
2 a person's paperwork indicated that they expected to return to work on a certain date, but the
3 person kept claiming weeks after that date, the system used to "flag" that file for manual review,
4 which stopped payment unless and until an employee reapplied for payment. OED now removes
5 that flag in order to speed the agency's ability to pay its customers. The agency is taking similar
6 steps to automatically address claim "restarts" when someone missed a week of claiming benefits
7 or had earnings in one week, then no earnings the next week. These steps have helped the
8 agency to pay claims more quickly.

9 **Current status of unemployment applications pending with OED.**

10 46. In late summer 2020, OED had projected it would return to its pre-pandemic
11 timeframes by November 2020; that projection, unfortunately, has not come to fruition.
12 Projecting timeframes accurately has proven difficult (if not impossible) during these ever-
13 changing and unprecedented circumstances. OED's projection was based in part on models that
14 drew from data from prior years. The events of 2020 have proven to be so unique in so many
15 ways that agency models, based in part on prior year data, are not proving to be predictive. This
16 is especially true where the agency is attempting to predict its progress on brand new programs,
17 like the PUA program, for which there is no prior data.

18 47. In addition, while that projection was based on the best data OED had available at
19 the time, the facts on the ground have changed after the agency made that estimate. The data
20 structures and reports of the UI system are designed primarily around federal requirements and
21 are not well suited to dealing with the never before seen volume of work and the large number of
22 new types of work having to be handled. Getting consistently available, accurate data that helps
23 best manage the work, and project when we can become more timely, has been challenging.
24 Oregon also experienced historic wildfires that not only impacted OED's workload, but many of
25 its staff had to evacuate or help family members evacuate, and the National Guard partners that
26 had been trained to help became less available to help due to various circumstances. And the

1 ever-changing electoral landscape may birth additional new federal programs that may further
2 complicate OED's work and may cause additional, currently unforeseen delays. Finally, the
3 untamed unpredictability of the virus itself may cause unforeseen delays. The current two-week
4 freeze is likely to affect restaurant and hospitality employment, which in turn is likely to affect
5 the agency's workload. All these factors have made it difficult for the agency to meet its prior
6 projections.

7 48. In addition, the state legislature and the federal government have passed laws and
8 implemented programs that created additional work for the agency. The State legislature enacted
9 SB 1701 and SB 1703, which created additional work for the agency, and the federal
10 government's actions permitted the agency to implement the DUA and new LWA programs. The
11 U.S. DOL has also issued changes in federal guidance that have resulted in more significant
12 categories of work that require skilled staff. For example, the U.S. DOL provided more
13 flexibility for how to define "gross earnings" for purposes of PUA applicants and their weekly
14 claim filing.

15 49. Some categories of work have been more challenging than anticipated. For
16 example, even after LWA payments were started, there still remains significant work for IT and
17 agency staff to prepare the federally required reporting, create the structure for tracking
18 overpayments and their recovery, and receiving the LWA certifications from people, among
19 other things. OED has been able to start paying the waiting week to the majority of eligible
20 individuals. However, additional manual work is required for a large number of claims to allow
21 those people to get their waiting week payment.

22 50. As of November 13, 2020, 88,404 people were still awaiting decisions to pay or
23 deny at least one week of benefits. This number includes people in adjudication and people with
24 at least one or more weeks in suspense that might possibly need adjudication. It also includes
25 people whose claims need a decision to pay or deny benefits, even when those people have
26 received benefits for all the weeks they have claimed.

1 51. From March 1, 2020 to November 13, 2020, OED has received 863,663
2 applications. As of November 13, 2020, there were 503 regular UI applications waiting to be
3 processed with the oldest application date of November 11, 2020. There were an additional 71
4 regular UI applications on hold with the oldest application date of October 28, 2020. "On hold"
5 applications are missing information that is needed for processing such as information from the
6 person who filed the application. For PUA the application backlog was 58,226. 83% of those
7 applications were received after September 30, 2020. Many of the applications in that backlog
8 have been reviewed, and are, for example, applications with clearly fictitious names such as
9 those of cartoon characters, completely blank application forms, and applications from people
10 who are already receiving regular UI benefits.

11 52. OED is actively working through this backlog. Predicting when applications will
12 be resolved is very difficult for the reasons discussed above. Our best estimate is that OED will
13 have PUA applications, and any other issues involving PUA weeks that may be "in suspense,"
14 caught up by the end of 2020 so that they are within three weeks of when the application is filed
15 or the week of benefits at issue is claimed. OED had been on track to be caught up by December
16 18, 2020, but the current two-week freeze has increased the agency's workload, and OED is
17 seeing increased line worker call-outs as the pandemic worsens in Oregon.

18 53. OED has paid 512,398 people on 528,357 claims and issued 53,501 decisions for
19 43,846 claims, of those 25,737 were denying decisions on 22,080 claims. Not all issues that need
20 adjudication end the process with a formal decision. Issues that allow people benefits, as
21 opposed to denying them benefits, disproportionately do not require a formal decision.

22 54. OED does not have estimated timeframes for completion of all issues pending in
23 adjudication. The agency's goal is to finish the "Focus Adjudication" claims by the end of the
24 year. As of September 30, 2020, there were 51,931 people in adjudication. This group of the
25 oldest claims are the claims in the Focus Adjudication initiative. On November 13, 2020, that
26 number had been reduced to 22,031. As of November 20, 2020, OED is on track to meet its

1 Focus Adjudication goal, however an increase in new issues potentially requiring adjudication
2 being found, changes in federal or state laws or new federal guidance, and many other factors,
3 could change this.

4 55. Petitioners assert that “[a]t least 96,000 class members have waited as long as
5 seven months during an historic economic crisis to receive critical wage replacement.” Pets.
6 MSJ at 14:11. Petitioners presumably get the 96,000 figure from the deposition they took of
7 OED, which included written answers in a declaration and oral testimony from an OED
8 representative. Petitioners appear to misunderstand this testimony.

9 56. The 96,000 number included all claims then in adjudication and those potentially
10 going into adjudication, even though many of the latter category will be (or have been) resolved
11 much sooner without formal adjudication (suspense lists, etc.). Accordingly, this figure includes
12 many applications that are not "as long as seven" months old, but are much more recent.
13 Moreover, many of the applicants on these claims have received some or all of their payments.
14 And some of those applicants will not meet the legal requirements to get benefits at all.

15 **Petitioners' suggestions will not speed up claims handling timeframes.**

16 57. Petitioners assert that there are many things OED could do but is not now doing to
17 speed its claims handling timeframes. As explained below, Petitioners' suggestions are not
18 practical and will not result in faster timeframes for paying or denying claims.

19 **OED has hired and is training enough adjudicators.**

20 58. As noted above, OED more than tripled the number of adjudicators from 80 to
21 over 300. It is not feasible or desirable to hire more adjudicators; hiring adjudicators is a time-
22 intensive process and training them even more so. Adjudicators are skilled professionals who
23 must receive significant training before they are able to maintain a caseload. OED has
24 streamlined its training as much as possible to meet the current crisis, but training an adjudicator
25 still takes a minimum of three to four weeks with an additional three to six weeks of monitoring
26 to reinforce what the trainees have learned (compared to the prior 16 weeks of training with 3-12

1 weeks of monitoring). Because of the required training time, OED anticipates that hiring
2 additional adjudicators would not provide a practical solution because the agency will have
3 worked through significant amounts of its backlog by the time additional adjudicators are ready
4 to take live cases and it would take existing skilled adjudicators to help train and mentor newly
5 hired adjudicators, preventing them from working on claims themselves. In other words, there is
6 a short-term decrease in the number of issues that can be resolved through adjudication needed to
7 build longer term capacity. The agency is seeing the increasing capacity now from the many
8 adjudicators already hired. Petitioners' suggestion would result in a short term reduction in
9 capacity, with any increase only coming after the time OED is likely to be within the three week
10 target window for adjudication timeliness.

11 59. OED has carefully and thoughtfully modified its training significantly to help
12 meet the challenges from the economic crisis and enable claims to be handled more quickly.
13 This restructuring is geared towards providing as many people as much assistance as legally
14 possible as quickly as possible. Adjudicators must apply a nearly endless variety of facts to a
15 complicated web of state and federal laws, administrative rules, and policies. That job is
16 complicated enough when those sources of law remained static, but the ever-shifting disasters
17 with the associated state and federal policy responses have shifted the eligibility rules several
18 times in 2020. The U.S. DOL has issued repeated guidance about benefit eligibility and related
19 issues, many times coming weeks or months after the programs are already in operation, adding
20 more complexity.

21 60. OED has designed and implemented training strategies to bring new adjudicators
22 online as quickly as possible, while still giving them the training they need to comply with the
23 ever-changing mosaic of regulations. One such strategy is that OED has streamlined its new
24 adjudicator training so new adjudicators specialize in one or two topics, rather than becoming
25 generalists. OED made this reasonable policy choice because training adjudicators in a few
26 specialized areas of law is quicker than training them to be generalists. This streamlined training

1 sped up OED's ability to get the new adjudicators working down the backlog.

2 61. OED has thought innovatively about the adjudication process. OED engaged a
3 third-party vendor to assist OED's adjudication team gather case specific facts before a file is
4 assigned to an adjudicator. This step frees up the adjudicator's time so the adjudicator can focus
5 on applying the rules to the facts to make an eligibility determination, which speeds up the
6 adjudication process. OED has used non-adjudication employees to go through those claims that
7 might need adjudication, resolving some of those issues more quickly and helping adjudicators to
8 focus on those claims that do need adjudication.

9 62. Finally, Petitioners' suggestion that OED just hire more adjudicators does not
10 account for the costs, and limited funding, for administering benefit programs. If OED spends
11 more money now on adjudicators, when that will not help speed up adjudication for those who
12 are waiting, it will mean either having fewer of other types of employees needed to do other parts
13 of the UI claims administration process, or having enough people now, but then not having
14 sufficient funds in the near future, requiring a reduction in employees and corresponding increase
15 in delays of handling people's claims. See Exhibit 5.

16 **OED is properly training its employees.**

17 63. OED is also appropriately training its personnel. As noted above, OED
18 employees must help customers navigate a web of state and federal laws, administrative rules,
19 and policies. OED has designed and implemented training strategies for its workforce. Due to
20 social and physical distancing guidelines, OED implemented online training and increased class
21 sizes from 10 trainees per in-person class to 50 or more. OED designed abbreviated claims
22 training for current OED employees that do not regularly work claims. These employees were
23 reassigned from other areas of the agency. This training can be completed in five to seven days
24 as the staff are already familiar with basic UI eligibility requirements and all of the OED systems
25 needed to process claims. OED has created, and revised, training on newly created or modified
26 programs multiple times since the CARES Act passed.

1 **Petitioners' suggested changes to OED's telephone system are not warranted.**

2 64. OED considered and rejected as not helpful Petitioners' policy preference that
3 OED institute a different phone configuration that would automatically call applicants back. At
4 the height of the unemployment crisis, when wait times were longest, OED reasoned that this
5 kind of system would not have been workable because OED did not then have the staff to call
6 applicants back in a timely fashion. For example, in the month of April, OED received over 20
7 million calls to its main Contact Center phone number. Assuming an average call handle time of
8 six minutes, OED would have needed to hire roughly more than 6,000 workers to call applicants
9 back in a timely fashion. To put it another way, if OED's employees had done no other work
10 beyond returning phone calls and assisting those individuals with issues that can be resolved over
11 the phone it would have taken OED over two years to return the incoming phone calls from
12 April. Instituting Petitioners' policy preference would, therefore, have caused more confusion
13 and frustration than OED's system because OED's automated system would have been promising
14 to call customers back, but OED would not have been able to keep that promise.

15 65. While OED is always considering ways to improve its ability to serve
16 Oregonians, implementing the call-back system now would not affect the current payment delay.
17 This is because OED has largely worked through its UI application processing backlog; the
18 current delay relates to adjudication, which is a separate process. As of November 17, 2020,
19 average call wait times are 52 minutes.

20 **A single application would only cause confusion.**

21 66. OED is charged with implementing a complicated set of unemployment
22 programs, each with different requirements. Petitioners' apparent policy preference would be to
23 mash together all of the applications into one common application. The agency has considered
24 and rejected this option for at least two reasons: (1) a common application would cause
25 consumer confusion; and (2) changing to a common application would have risked unintended
26 IT consequences and delays in implementing new benefit programs.

1 67. First, the agency has determined that mashing all the programs into one
2 application would cause confusion. A combined application, as Petitioners suggest, would be
3 extraordinarily long, and would require applicants to answer many confusing questions that do
4 not apply to their situation. Further, because some program eligibility is mutually exclusive, a
5 common application would have to contain questions that are mutually incompatible. For
6 example, the U.S. DOL published UIPL 17-20, which indicated that a person is eligible for
7 PEUC only if their regular UI benefits are exhausted or expired. See Exhibit 6. Given these
8 constraints, the agency reasoned it would be unworkable to create a simple common application
9 that covered both UI and PEUC, in addition to the myriad other CARES act programs, and
10 whatever new programs Congress creates during this national emergency, with whatever new
11 requirements Congress enacts. It would be especially difficult to create an omnibus application
12 for these many and sometimes mutually exclusive programs in fifteen languages, and have it be
13 easily understood in each. Thus, in the agency's professional judgment, the combined
14 application would cause more confusion, more errors, and more user frustration than separate
15 applications. Accordingly, the agency has acted reasonably in designing its application process.

16 68. Second, in order to create a combined application, OED would have needed to
17 make changes to its underlying UI application. This is risky work; updating the underlying
18 computer code to alter the UI application would have carried additional risk of unintended
19 consequences to regular UI and CARES Act programs. Further, meddling with the application
20 would have caused significant delays in rolling out the new programs and getting benefits out to
21 Oregonians who desperately needed them.

22 **Prioritizing claims where dire circumstances are brought to OED's attention is**
23 **appropriate.**

24 69. OED's general practice and procedure is to process claims as they come in.
25 However, a strict "oldest first" policy during this crisis would in fact slow down processing as
26 not all employee were trained on all parts of the claims process, especially given the large

1 number of new employees that OED has hired to respond to the pandemic. OED employees
2 were first trained on some parts of the work to quickly get through a large number of cases. It is
3 more efficient to resolve large numbers of cases involving more recent simple issues than a
4 smaller number of complex claim issues that only a smaller number of OED employees could
5 work to resolve. As OED employees became more proficient and the composition of the backlog
6 changed, they were, and continued to be, trained on more complex claim issue resolution.

7 70. In addition, in these unforeseen times, OED has received, not surprisingly, urgent
8 requests from various sources-including but not limited to OED's "Contact Us" form, phone
9 calls, written letters, emails, the media, legislators, state and federal agencies and partners,
10 advocacy groups, as well as from Petitioners' own counsel at the Oregon Law Center and Legal
11 Aid-to expedite claim review in particularly dire circumstances. OED also proactively
12 prioritized processing of claims for Oregonians that were impacted by the wildfires based on
13 their home address being within an evacuation zone.

14 **OED streamlined decisions on issues common to large employers when appropriate.**

15 71. Petitioners' motion, at pages 35-36, correctly narrates how OED innovated to
16 streamline its process for certain "gig workers" and school employees. Additionally, OED
17 streamlined its review of independent contractors by adding questions specific to ORS 670.600
18 to the PUA application. This dramatically reduced the number of PUA applications that needed
19 to be manually reviewed by the UI Tax section to determine if the applicant was an independent
20 contractor per Oregon law.

21 **OED made appropriate policy decisions regarding modernization of its computer systems.**

22 72. OED has acted reasonably in pursuing its IT projects. OED received federal
23 funding to update the computer system in 2009, but OED did not immediately modernize its
24 computer system because it was still working through the workload of the Great Recession. That
25 recession produced the greatest number of claims Oregon had ever seen at that time (although
26 they have since been vastly outpaced by the current pandemic induced recession). Because that

1 economic recovery was slow, it took several years for the workload to dissipate. OED reasoned
2 it would not have been smart for the agency to take on a major IT project at that time.

3 73. In 2012, OED still had high workloads but the agency took on several other
4 pending IT projects: Phone System Upgrade; Call Center Consolidation; Identity and Access
5 Management system; Business Intelligence system; Data Warehouse creation; and the Oregon
6 Payroll Reporting System. Some of these projects had real challenges. For example, OED
7 upgraded the agency's imaging system during this timeframe, but that large project was
8 complicated and troubled. During this time, OED also had a series of changes in leadership
9 positions including Agency Director, Agency Deputy Director, and Chief Information Officer
10 (CIO). Thus, OED determined that it would not have been smart to upgrade the its mainframe at
11 that time.

12 74. In 2014, the OSCIO (Office of the State Information Officer), in conjunction with
13 the Legislative Fiscal Office, created the Stage Gate Process to help provide oversight to large
14 scale IT projects. OED's 2015-2017 budget had \$3M to start planning for and creating required
15 Stage Gate documentation (project justification, risk analysis, early scope of work, etc.). In
16 2017, OED formed a dedicated project team and by the end of the 2017-2019 biennium
17 significant work had begun. OED completed all of the required work and documentation and
18 received State Gate 2 endorsement in February 2019. OED policymakers and the OSCIO and
19 others that provide oversight for large, complex information technology projects, were
20 reasonable in their choices to go about replacing the computer system in a responsible and
21 deliberate way.

22 75. In 2019, OED ramped up its computer replacement work. The agency added
23 more staff and began the work on its request for proposal (RFP) to replace the computer system.
24 The RFP process proceeded, and the agency issued a Notice of Intent to Award. However, a
25 company that did not receive the award filed a bid protest. Because of the bid protest, OED
26 withdrew its Notice of Intent to Award. OED is now in the process of continuing phase 4 of the

1 RFP evaluation process. OED are following the state's procurement process for evaluating and
2 awarding contracts of this magnitude.

3 76. While OED is taking action as quickly as possible to modernize its computer
4 systems, in the meantime, OED has and is taking reasonable steps to minimize the impact of
5 older computer systems have on the prompt payment or denial of applications for benefits.

6 These steps include, but are not limited to the following:

- 7 ○ OED IT staff, in consultation with outside IT vendors reviewed OED's approach
8 to doing work.
- 9 ○ OED increased capacity and functionality of OED's document imaging system to
10 help incorporate the massive influx in documents that have been received and
11 entered into workflow.
- 12 ○ Engaging with IGNW (a third-party vendor) to develop a new PUA application
13 and weekly certification form on the Google technology platform.
- 14 ○ Improving OED's website to increase capacity to support the large numbers of
15 website hits and to get information to, and receive information from, applicants
16 more effectively.
- 17 ○ OED translated its updated webpage into 15 different languages.
- 18 ○ OED implemented use of a web form to replace overwhelmed email boxes, which
19 allows OED to more effectively prioritize issues on the oldest claims, respond to
20 people with status updates on their requests, and track responses and questions to
21 better monitor and respond to trends as they appear.
- 22 ○ OED worked with various telecom vendors to greatly expand call capacity and
23 stability of the phone system, stand up PUA and DUA hot lines, and add hundreds
24 of phones and phone lines to OED's Contact Center.
- 25 ○ OED worked with Google to create a Chatbot to allow customers another avenue
26 to obtain information.

- 1 ○ OED implemented automated issue resolution where practicable by creating
- 2 macros and other coding that run on the mainframe daily to deactivate some claim
- 3 stops.
- 4 ○ OED implemented the identity verification tool offered by the National
- 5 Association of State Workforce Agencies' Integrity Center to better prevent fraud
- 6 without slowing down the processing of claims (Oregon was one of the first states
- 7 to implement this tool).
- 8 ○ OED engaged a third-party vendor to assist OED's adjudication team in gathering
- 9 claim specific facts up front before it is assigned to an adjudicator, which
- 10 decreases the amount of time an adjudicator needs to spend reviewing each case
- 11 to make an eligibility determination.

12 77. Petitioners indicate they would like OED to implement a "cloud" computer
13 system, pointing to one example of a system in Rhode Island. That solution is not workable for
14 Oregon. Implementing a Rhode-Island style "cloud" application system would only distract
15 OED from doing its present work, and would not solve the underlying problem. Comparing
16 Rhode Island's COBOL based system to Oregon's COBOL system minimizes the complexity of
17 how each unique system is set up. Although a "cloud" based solution might allow OED to take
18 applications quicker, the application information would still need to map to OED's COBOL
19 mainframe system in a way that allows the processing of payments and meets all state and
20 federal requirements, so there is no guarantee that a "cloud" system would solve the underlying
21 problem. OED did engage with a vendor to create a "cloud" based PUA application. This
22 application is much more user friendly and automated than the agency's original PUA program
23 design. However, that application took approximately 2,000% longer to complete than originally
24 estimated by the vendor based on experience in other states. This delay was primarily due to the
25 complexity of mapping the application to OED's COBOL based system.

26

1 **OED has tried to provide benefits sooner but is restricted by U.S. DOL guidance.**

2 78. Recognizing that many unemployed Oregonians faced hardship while the agency
3 worked to determine their eligibility, OED instituted “Benefits While You Wait” (BWYW), an
4 innovative program that authorized payment to certain applicants before the agency determined
5 which program an applicant qualified for. While additional adjudicators were hired and trained,
6 BWYW allowed benefits to go out to Oregonians without impacting the adjudication workload
7 since it was not adjudicators that performed the outreach about the initiative, processed PUA
8 applications, and released payment to the applicant.

9 79. But the U.S. DOL determined that BWYW exceeded what Congress would
10 permit. That Department provided guidance indicating that OED was prohibited, as a matter of
11 law, from issuing payment before it established which program an applicant qualified for. To
12 continue speeding payment to Oregonians without following each and every one of the federal
13 regulations would have risked losing federal support for the unemployment insurance programs.

14 **U.S. Department of Labor Reports**

15 80. The U.S. DOL reports cited by Petitioners and their expert are based on data
16 reported by states. States throughout the nation had challenges with their systems during the
17 pandemic and some states reported differently than others. And most states, unlike Oregon, have
18 not passed the U.S. Department of Labor data validation requirements, which should be taken
19 into account when determining how much credence to put in the federal reports.

20 81. In addition, the data included in the U.S. DOL reports is backwards looking. The
21 data only reflects work *after it is done*, not work waiting to be done and it only reflects reported
22 work performed pursuant to each state's laws, which often vary in significant respects. Once
23 payments are made, the U.S. DOL data shows how long those people had to wait to receive
24 payment. It does not reflect people who have not yet been paid and are still waiting-whether for
25 a day or several months. As a result, as states catch up on backlogs, timeliness numbers may
26 actually go down-that is because they are paying a lot of the people who have been waiting to get

1 paid. Oregon's numbers will not begin to show progress until OED completes its backlog of
2 claims in adjudication. Conversely, a really high "timely first payment rate" could either reflect
3 a state that is very current and is making all payments timely, or a state that has not yet made
4 significant progress getting caught up on its back log. The federal performance numbers would
5 look the same in either scenario.

6 82. With respect to the U.S. DOL reports, it is also helpful to compare the number of
7 first payments being made to the number of new claims filed. For example, in Oregon, for
8 August 2020, Oregon actually issued more "first time" payments to people than the number of
9 new claims filed. That reflects OED paying a lot of the older claims that were waiting for
10 adjudication or other issues to be resolved. Some of the OED's low timeliness numbers in the
11 U.S. DOL reports upon which Petitioners rely number reflects the agency resolving a high
12 volume of older work. By contrast, California had a significantly higher "first pay timeliness"
13 rate, but they only issued 28% as many new payments as they had new claims. This is consistent
14 with information in the media and the "Strike Team" report issued about California's UI program
15 indicating a backlog that was still growing (at 10,000 claims per day) in August 2020.¹

16 **I hereby declare that the above statement is true to the best of my knowledge and**
17 **belief, and that I understand it is made for use as evidence in court and is subject to penalty**
18 **for perjury.**

19 DATED November 23, 2020.

20

21

s/ David Gerstenfeld
DAVID GERSTENFELD

22

23

24 ¹ <https://apnews.com/article/virus-outbreak-gavin-newsom-california-4f5072d2a67d3641d5c6c924b48ad7aa#:~:text=The%20agency's%20backlog%20of%20unanswe>
25 [red,more%20than%201.6%20million%20claims;](https://calmatters.org/newsletters/whatmatters/2020/09/california-unemployment-benefits-edd-report)
26 [https://calmatters.org/newsletters/whatmatters/2020/09/california-unemployment-benefits-edd-report.](https://calmatters.org/newsletters/whatmatters/2020/09/california-unemployment-benefits-edd-report)