UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MULUGETA HAILU et al.,

Plaintiffs,

v.

UNIQUE N. MORRIS-HUGHES, in her official capacity as Director of the DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES et al.,

Defendants.

Civil Action No 1:22-cv-00020

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
(ORAL ARGUMENT REQUESTED)

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This case challenges the District of Columbia's egregious and systemic violations of core constitutional and statutory rights when administering the District's unemployment-benefits program. Defendant District of Columbia (and the other Defendants in their official capacities) have denied, reduced, or prematurely terminated Plaintiffs' unemployment benefits without providing adequate notice of the rationale for those actions and an opportunity to challenge them. Plaintiffs are likely to prove that in so doing, Defendants have violated their rights secured by the Due Process Clause of the Fifth Amendment, the federal Social Security Act, and the D.C Code and Municipal Regulations. Defendants also have subjected Plaintiffs to continuing irreparable harm, by violating their constitutional rights and depriving them of the ability to provide for their essential needs.

For these and the other reasons set forth in the accompanying Memorandum, Plaintiffs move the Court under Counts I-III and V of the Complaint for a preliminary injunction that (a) prohibits Defendants from denying, terminating or reducing (through offset) unemployment beneficiaries' benefits in the future without first providing a written rationale in a form acceptable to the District's Office of Administrative Hearings ("OAH") to initiate an appeal of those actions; (b) requires OAH to hear administrative appeals of decisions denying, terminating or reducing unemployment benefits regardless of whether the District has issued such decisions in writing; (c) orders payment of back benefits to Plaintiffs whose benefits were denied or terminated without notice; and (d) orders refunds of offsets to Plaintiffs whose benefits were offset without notice.

Plaintiffs respectfully request the Court to hear oral argument on the motion.

Counsel for Plaintiffs has conferred with counsel for Defendants, who stated that Defendants oppose the motion.

Respectfully Submitted,

/s/ Drake Hagner
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Civil Action No _____

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This case challenges the District of Columbia's egregious and systemic violations of core constitutional and statutory rights when administering the District's unemployment-benefits program. Under both federal and D.C. law, it is axiomatic that the District cannot deny, reduce, or prematurely terminate a claimant's unemployment benefits without providing adequate notice of the rationale for those actions and an opportunity to challenge them. Nevertheless, the District's Department of Employment Services ("DOES") has repeatedly violated those requirements with respect to numerous unemployment-benefit claimants that include Plaintiffs. DOES has denied, prematurely terminated, and/or reduced their benefits, without issuing written notice of a rationale for those actions. Remarkably, another District agency (the Office of Administrative Hearings ("OAH")) has then penalized Plaintiffs for DOES's failings. When DOES denies, terminates or reduces benefits without issuing a written decision (as it has done here), OAH refuses to hear an administrative appeal of the benefit denial, termination, or reduction. Whipsawed between DOES and OAH, Plaintiffs are trapped in an indefinite state of bureaucratic limbo, deprived of critical subsistence benefits without any effective way to object. Meanwhile, DOES has fully insulated its own harmful actions from administrative appellate review. The only way to prevent these continuing, clear-cut violations of fundamental rights is for the Court to intervene.

Plaintiffs respectfully move the Court to issue a preliminary injunction to redress this deprivation of their notice and hearing rights. Plaintiffs are likely to prove that Defendants have violated their rights secured by the Due Process Clause of the Fifth Amendment, the federal Social Security Act, and the D.C Code and Municipal Regulations. Defendants also have subjected Plaintiffs to continuing irreparable harm, by violating their constitutional rights and depriving them of the ability to provide for their essential needs. For these and the other reasons set forth below, the Court should grant Plaintiffs' motion for preliminary injunction.

STATUTORY AND REGULATORY BACKGROUND

A. The District of Columbia Unemployment Compensation System

The District of Columbia's unemployment compensation system is part of a cooperative federal-state program established in response to the Great Depression. State governments (including the District) administer the program in accordance with federal standards. The purpose of the program (codified at Title III of the Social Security Act, 42 U.S.C. § 501 *et seq*.) is to provide cash assistance to workers as quickly as possible when they lose employment through no fault of their own. The District of Columbia Unemployment Compensation Act (codified at D.C. Code §§ 51-101 to 51-181) sets out the District's requirements for the program. The District's highest court has ruled that the "unemployment compensation statute is remedial in nature and must be liberally construed" (*Wright v. D.C. Dep't of Emp. Serv*s, 560 A.2d 509, 511 (D.C. 1989)) and that "the purpose of the Unemployment Compensation Act, [is] namely to protect employees against economic dependency caused by temporary unemployment and to reduce the necessity of other welfare programs." *Jones v. Dist. of Columbia Unemployment Comp. Bd.*, 395 A.2d 392, 395 (D.C. 1978).

The District's unemployment compensation program is financed in part by grants provided by the federal government pursuant to the Social Security Act, 42 U.S.C. §§ 501-503. Accordingly, the District's program must meet certain minimum standards established by federal statutes and regulations. The standards require the District to create provisions for "such methods of administration . . . as are found by the [Secretary of Labor] to be reasonably calculated to insure full payment of unemployment compensation when due" and that insure the "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. §§ 503(a)(1), (a)(3).

The District's statutes and regulations also govern administration of its unemployment compensation program, including the designation of DOES as the administering agency. D.C. Code §§ 51-101 to 51-181; 7 D.C. Mun. Regs. §§ 300-399. The District of Columbia operates its unemployment compensation system through DOES. D.C. Code § 1–1504.01. The District's Office of Administrative Hearings ("OAH") adjudicates administrative appeals of DOES unemployment compensation determinations. D.C. Code § 2–1831.03(b)(1).

B. Eligibility for Unemployment Compensation Benefits

To be eligible for unemployment compensation benefits, claimants seeking benefits from the District may not have lost their most recent work for a disqualifying reason. D.C. Code § 51–110. Other basic requirements include that the claimant must have sufficient earnings in the 12-month base period to satisfy the wage eligibility requirements and must be physically able to work. D.C. Code §§ 51–109(2), (3). Further, claimants must file weekly continuing claim forms, be available for work and are required to actively inquire about employment, with a minimum of two contacts for new work in a given week, unless the Director of DOES waives or alters these requirements. D.C. Code § 51–109(1)(4). Claimants may still be eligible for unemployment benefits if they work part-time, provided they report their wages to DOES and such wages do not exceed the statutory formular for partial benefit payments. D.C. Code § 51-107(e).

As a result of the COVID-19 pandemic (and the associated massive job loss), the number of District workers who lost income (and were required to file an unemployment claim in the District to gain access to safety-net benefits) increased dramatically. Between March 2020 and September 2021, DOES reported receiving more than 250,000 unemployment compensation claims. Dep't of Emp. Servs., UNEMPLOYMENT COMPENSATION CLAIMS DATA, DIST. OF COLUMBIA, (Sept. 28, 2021), https://does.dc.gov/publication/unemployment-compensation-claims-data. In fiscal year 2018 (October 1, 2017 through September 30, 2018), DOES reported

receiving 29,283 unemployment compensation claims. Dep't of Emp. Servs., RESPONSES TO FISCAL YEAR 2018-2019 PERFORMANCE OVERSIGHT QUESTIONS, at 58 (Feb. 15, 2019), https://dccouncil.us/wp-content/uploads/2019/02/DOES-2019-PO-responses-02-18-19.pdf. On March 27, 2020, Congress passed the federal Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), in part in response to the dramatic increase in the need for unemployment benefits and to account for the fact that the requirements of regular unemployment benefits would exclude many workers who were adversely affected by the unprecedented job loss caused by the pandemic. 15 U.S.C. §§ 9021-9032.

The CARES Act created three new sources of federally-funded unemployment benefits: Federal Pandemic Unemployment Compensation ("FPUC"), Pandemic Emergency Unemployment Compensation ("PEUC"), and Pandemic Unemployment Assistance ("PUA"). These programs were extended by the federal Continued Assistance for Unemployed Workers Act and the American Rescue Plan Act. The Families First Coronavirus Response Act ("FFCRA"), enacted March 18, 2020, also allowed states to suspend work search requirements for all unemployment compensation programs, which the District did from March 2020 until August 30, 2021. FFCRA, Pub. L. No. 116-127, 134 Stat. 178 (2020); COVID-19 Response Supplemental Emergency Amendment Act of 2020, D.C. Act 23-286, D.C. Reg. 4178 (Apr. 10, 2020) (temporarily lifting the weekly work search requirement of D.C. Code §§ 51-109(4)-(5)). *See* Dep't of Emp. Servs., WORK SEARCH REQUIREMENTS FACT SHEET, https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/One%20Pager.pdf (reinstating the work search requirement on August 30, 2021).

PUA allowed some workers typically ineligible for unemployment benefits (including self-employed or contract workers or workers unable or unavailable for work due to a COVID-19

related reason) to collect unemployment benefits. PUA payments were available from February 2, 2020 until September 6, 2021. To be eligible for PUA, a claimant must have been determined to be ineligible for other unemployment compensation (including regular benefits, extended benefits, or PEUC). 15 U.S.C. § 9021(a)(3)(A)(i). Further, claimants were required to self-certify that they were unemployed, partially unemployed, or unable or unavailable to work due to a specifically-enumerated reason related to COVID. 15 U.S.C. § 9021(a)(3)(A)(ii).

PEUC extended the period of regular unemployment compensation benefits for claimants who had exhausted all rights to regular unemployment compensation. 15 U.S.C. § 9025. PEUC went into effect in March 2020 and was extended through September 6, 2021. Suzan Levine, *Unemployment Insurance Program Letter ("UIPL") No. 14-21*, at 9-10, DEP'T OF LAB., (Mar. 15, 2021), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_14-21.pdf. To be eligible for PEUC, a claimant must have exhausted rights to unemployment compensation or Extended Benefits from the District of Columbia or any other state. 15 U.S.C. § 9025(a)(2)(A)-(C). Claimants also were required to be able to work and available to work in order to qualify for PEUC. *Id.* § 9025(a)(2)(D).

FPUC supplemented payments for unemployment compensation, PUA, PEUC, and Extended Benefits (see below) by providing federal funding to promote full wage replacement for the typical worker. 15 U.S.C. § 9023. FPUC offered an additional $600 payment on top of regular state or CARES Act unemployment benefits per claimant per week from the week ending April 4, 2020 through the week ending July 31, 2020, and a $300 payment per claimant per week from December 27, 2020 through September 6, 2021. 15 U.S.C. § 9023(b)(3). Claimants who established their eligibility for any other unemployment compensation were automatically eligible for FPUC during the specified periods.

The CARES Act also modified the pre-existing Extended Benefits unemployment compensation program. Extended Benefits is a longstanding federal-state program that turns on (or "triggers") during periods of high unemployment, allowing claimants to receive benefits for an extended period of time. *See* 20 C.F.R. § 615 (1988). Extended Benefits were available to claimants who exhausted PEUC. The CARES Act ensured full federal funding of Extended Benefits until September 6, 2021. John Pallasch, *UIPL No. 24-20*, at 3-4, DEP'T OF LAB., (May 14, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_24-20.pdf.

C. Application Process for Unemployment Compensation Benefits

1. Processes for Initial Claims

a. Regular Unemployment Compensation Benefits

When an individual files an initial claim for unemployment compensation in the District, DOES must issue a Notice of Monetary Determination. This Monetary Determination declares whether claimants are monetarily eligible for unemployment compensation based on a comparison between the District's wage requirements and the claimant's earnings during a 12-month base period based on when the claimant filed the initial claim. D.C. Code § 51-107; *see also* Dep't of Emp. Servs., *D.C. Unemployment Insurance Claimant's Rights and Responsibilities*, at 1-5, DIST. OF COLUMBIA, (Apr. 2011), https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/DOES_UI_Book.pdf. If the claimant has insufficient wages in the base period, DOES issues a Monetary Determination denying benefits on the ground that the claimant is monetarily ineligible. D.C. Code § 51-107(c). If DOES finds that the claimant has sufficient wages in the base period (and is therefore monetarily eligible), the agency issues a Monetary Determination that includes the claimant's maximum weekly benefit amount and maximum potential benefit amount. *See generally* D.C. Code § 51-107(b).

The Monetary Determination also includes DOES's preliminary assessment of whether there are issues with a claim unrelated to the base period wage requirements. If no such issues are identified, DOES must promptly issue the benefits. If DOES detects a potential issue, the Non-Monetary Determination System automatically assigns the claim to a DOES Claims Examiner. DOES then conducts fact finding by contacting the claimant, the employer, and any other necessary parties. Dep't of Emp. Servs., *Standard Operating Procedures ("SOPs") - Adjudication*, at 6-7 (Nov. 19, 2014); *see also* D.C. Code §§ 51-109, 51-110. DOES must promptly conduct and conclude these fact-finding investigations. *Id.* § 51-111(b).

If the fact-finding investigation leads the Claims Examiner to conclude the claimant is eligible and qualified to receive benefits, DOES must promptly issue the benefits. *Id.* If the fact-finding investigation leads the Claims Examiner to disqualify or hold the claimant ineligible for benefits, the Claims Examiner must promptly issue a Determination by Claims Examiner to the claimant. D.C. Code §§ 51-111, 2-509(e); *see also* D.C. Dep't of Emp. Servs., *Standard Operating Procedure ("SOPs") - Adjudication*, at 6-7, 21-24 (Nov. 19, 2014); Dep't of Emp. Servs., *D.C. Unemployment Insurance Claimant's Rights and Responsibilities*, at 9, DIST. of Columbia, (Apr. 2011),

https://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/DOES_UI_Book.pdf. The claimant is entitled to an administrative appeal of that determination under both federal and District law. 42 U.S.C. § 503(a)(3); D.C. Code § 51-111 (b).

b. PUA and PEUC Benefits

DOES required claimants to file a separate application for PUA benefits (after the agency denied their initial application for regular benefits). How to File a PUA Claim: Filing for Pandemic Unemployment Assistance (PUA), *Filing for Pandemic Unemployment Assistance (PUA)*, D.C. Dep't of Emp. Servs., (last visited Dec. 9, 2021),

https://does.dcnetworks.org/claimantservices/How%20to%20File%20a%20PUA%20Claim.PDF. PUA benefit determinations are subject to the same procedural protections (including notice and a hearing) as regular unemployment compensation benefits. *See* 15 U.S.C. § 9021(h) (requiring states to follow existing Disaster Unemployment Assistance regulations at 24 C.F.R. Part 625 to the administration of PUA unless contradicted by this section); 20 C.F.R. 625.11 (requiring states to apply state law to the claims for and payment of DUA); 20 C.F.R. 625.14 (g) (requiring states to apply notice provisions of 20 C.F.R. 625.09 and appeal provisions of 20 C.F.R. 625.10 to DUA overpayment procedures); John Pallasch, *UIPL No. 16-20*, at I-9, I-11 to I-12, U.S. DEP'T OF LAB., (Apr. 5, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf. An award of PUA benefits would also result in an entitlement to FPUC supplemental benefits, which were also subject to the same procedural protections (including notice and a hearing) as regular unemployment compensation benefits. 15 U.S.C. § 9023(f)(4); John Pallasch, *UIPL No. 15-20*, at I-6, U.S. DEP'T OF LAB., (Apr. 4, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf.

Claimants were eligible to apply for PEUC benefits (during the existence of that program) if they had exhausted their regular unemployment compensation entitlements or if their benefit year had expired. 15 U.S.C. § 9025(a)(2). PEUC benefits were subject to the same procedural protections (including notice and a hearing) as regular unemployment compensation benefits. *See* 15 U.S.C. § 9025(e)(3-4) (requiring states to apply state law when issuing determinations and offsetting PEUC overpayments). *See also* John Pallasch, *UIPL No. 17-20*, at I-7 to I-8, U.S. DEP'T OF LAB., (Apr. 10, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_17-20.pdf.

2. Process for Continued Claims

For all of the foregoing programs, a claimant must certify each successive week of unemployment by filing a weekly continued claim form with DOES. The continued claim form

determines an individual's weekly eligibility for unemployment benefits by assessing the claimant's ability to work, availability to work, compliance with work search requirements (when not waived), wages earned or work completed, and other factors. D.C. Code §§ 51–109, 51–110.

The initiation of benefit payments creates a presumption of continuing eligibility as to future payments during the applicable time period. "[B]ased on [the] initial determination and in the absence of facts clearly establishing current ineligibility, the State agency presumes the claimant's continued eligibility until it makes a determination otherwise." Grace Kilbane, *UIPL No. 04-01*, at ¶ 7, U.S. DEP'T OF LAB., (Oct. 27, 2000), https://wdr.doleta.gov/directives/attach/UIPL4-01.cfm. The state agency can pause benefits for a brief 14-day period to investigate facts that could indicate ineligibility, but it must then turn benefits back on or produce a written notice. *Id.* ¶ 6. In the event that DOES makes a decision that a claimant is no longer eligible for benefits or denies benefits for any particular week, the claimant is entitled to the same procedural protections that apply to initial determinations, including notice and an administrative appeal. 42 U.S.C. § 503(a)(3); D.C. Code § 51-111(b).

D. Reduction of Benefits Through Offset to Recoup Overpayments

An overpayment occurs when DOES pays a claimant some amount of benefits that the claimant is not entitled to receive. D.C. Code § 51-119(d)(1). When investigating a potential overpayment, DOES must "continue to make timely [unemployment compensation] payments (if due) and wait to commence recovery of overpayments until an official determination of ineligibility is made." Portia Wu, *UIPL No. 1-16*, at ¶ 4(a), U.S. DEP'T OF LAB., (Oct. 1, 2015), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_01-16_Acc.pdf.

If DOES identifies an overpayment issue, it must notify the claimant of the potential overpayment, give the claimant an opportunity to be heard, and send the claimant a determination of overpayment and notice of appeal rights before seeking to recoup the overpayment. *Id.* The

same procedural protections that apply to denials of benefits as discussed above – including notice and the right to administrative appeal – also apply to determinations of overpayments. *See* 42 U.S.C. § 503(g)(1); D.C. Code §§ 51-119(d)(2), (e)(2).

Under some circumstances, DOES may recoup overpayments by offsetting future benefits. To pursue an offset, DOES must first determine whether the overpayment qualifies for offset. To qualify, the overpayment must fall outside the scope of statutory provisions prohibiting an offset if (1) "such sum is received by [the claimant] without fault on his part and such recoupment would defeat the purpose of this subchapter" or (2) "would be against equity and good conscience." D.C. Code § 119(d)(1). In addition, DOES may make a discretionary decision to waive recoupment. *Id*. DOES must "clearly communicate the potential availability of a waiver to individuals when establishing an overpayment and, if an individual requests a waiver, make an official determination on the waiver request before initiating overpayment recovery." Portia Wu, *UIPL No. 1-16*, at ¶ 4(a), U.S. DEP'T OF LAB., (Oct. 1, 2015), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_01-16_Acc.pdf.

FACTUAL BACKGROUND

Plaintiffs are claimants for unemployment benefits that DOES has denied, prematurely terminated and/or reduced through offset without any written notice of a rationale for those actions.

A. Mulugeta Hailu

Mulugeta Hailu is a taxicab driver who lost his job in or around May 2020 because he had no customers in light of the COVID-19 pandemic. He applied for unemployment benefits and started receiving them beginning in May 2020, and he continued to take the weekly actions necessary to keep qualifying for benefits. He received benefits for more than nine months. Then, beginning in March 2021, the benefits stopped for eleven weeks. Benefits resumed again in May and continued into September 2021. He lost $5,269 in benefits during the eleven-week gap. That

loss has caused him financial, mental, and emotional distress, undermining his ability to afford rent, fuel for his car, food for himself, or support for his children. He has had to use up all of his savings and is afraid of losing his home. He is in debt to friends from whom he had to borrow during the period when benefits stopped. Declaration of Mulugeta Hailu ("Hailu Decl.") at ¶¶ 1-6, 8-11, 15, 22-25.

Mr. Hailu has never received a notice from DOES explaining why benefits stopped during the eleven-week gap. DOES has not responded to more than ten inquiries by him and his counsel about the basis for stopping the benefits. When he looks at the DOES online portal it indicates, without explanation, that he has been "disqualified and/or held ineligible" for part the period at issue and that the benefits have been taken to offset an overpayment for another part of the period at issue. Mr. Hailu has never received any notice from DOES explaining why (or even indicating that) there has been an overpayment. He also has never received any receipt from DOES indicating that the benefits were taken as an offset against an overpayment. *Id*. ¶¶ 7, 12-14, 16-17, 21.

B. Mizan Werede

Mizan Werede worked as a server at the Willard Inter-Continental Hotel restaurant for almost seven years before she lost her job on March 17, 2020, as a result of the COVID-19 pandemic. She has been unemployed since that time. She applied for unemployment benefits and started receiving them in May 2020, and she continued to take the weekly actions necessary to keep qualifying for benefits. She received benefits until early January 2021. Then the benefits stopped for fourteen weeks, into mid-April. She ultimately received benefits again, including receiving retroactive benefits, for a period from the end of January into September 2021 but is still missing $2,964. That loss has caused her financial, mental, and emotional distress from her inability to cover basic expenses such as food, car insurance, utility bills, and telephone bills. Declaration of Mizan Werede ("Werede Decl.") at ¶¶ 1-9, 12, 24-26.

Ms. Werede has never received a notice from DOES explaining the rationale for why she has not received these benefits. DOES did not respond to repeated inquiries from her and her counsel about the basis for the shortfall. When she looks at the DOES online portal, it indicates that for three weeks in January 2021, the benefits have been taken to offset an overpayment. She spoke with a DOES customer service representative, who also indicated that there was an offset as a result of an overpayment. After that discussion, DOES sent her a receipt indicating that benefits for two weeks had been offset to recoup an overpayment; there was no receipt as to the third week. The receipt does not indicate the rationale for claiming that an overpayment occurred. Ms. Werede has never received any notice from DOES explaining why there has been an overpayment (even after she affirmatively requested that any such notices be sent to her). She does not know the basis for a claim that an overpayment occurred or the amount of the claimed overpayment. She received a Monetary Determination in June 2021 that listed wages from the hotel from July to December 2020, but she did not work or earn any money during that time. *Id*. ¶¶ 10-11, 13-15, 17-23.

C. William Perry

William Perry is a mason who has worked in the construction industry his entire adult career. His employer laid him off from a construction job on or around June 6, 2020. Shortly thereafter he filed a claim for unemployment benefits. Nine months later, on or around March 2021, he received a DOES Monetary Determination finding him monetarily ineligible for a benefit year beginning February 28, 2021. In June 2021, in response to a request from DOES, he filed proof of the wages that DOES had not considered, asking the agency to redetermine his monetary eligibility. DOES never sent a determination denying benefits for the first nine months he filed continuing claims (from on or around June 6, 2020 up to the date of his new benefit year on February 28, 2021). Mr. Perry and his attorney have followed up with DOES more than 35 times since then, including an in-person meeting and a discussion with customer service personnel by

phone. Among other things, DOES has told him that his claim is "lost in the system" because of computer problems at the agency. He has now gone seventy-seven weeks without getting any benefits, and he never received a decision from DOES regarding his request to redetermine his monetary eligibility or DOES's effective denial of benefits for the first nine months. He has suffered financial, mental, and emotional distress arising from the withholding of his benefits. Declaration of William Perry ("Perry Decl.") at ¶¶ 4, 6-20.

D. Yohannes Woube

Yohannes Woube is a taxicab driver who lost his job in March 2020 due to COVID-19. He was unemployed for about a year (until February 22, 2021) with the exception of one month working as a temporary driver from approximately mid-November through mid-December 2020. He applied for unemployment benefits in April 2020 but did not receive regular unemployment compensation benefits for any weeks before mid-October 2020, and he did not receive any notice explaining why. He took the weekly actions necessary to keep qualifying for benefits for all but six weeks during the months when he did not receive benefits. He lost $13,760 in benefits for the weeks for which he took the actions necessary to qualify. He suffered financial, mental, and emotional distress as a result of the withholding of benefits. He was unable to pay for rent, and was at times unable to pay for food, and had to leave his home of more than a decade as a result. Declaration of Yohannes Woube ("Woube Decl.") at ¶¶ 1-8, 12, 14-15, 20-23.

Mr. Woube or his counsel has contacted DOES approximately 35 times, over the course of many months, for an explanation of why he did not receive benefits during the period described above. When calling DOES's customer service line, he was typically put on hold for two to three hours. Each time an agent did answer he was given a different explanation for why did not receive the benefits. When Mr. Woube consulted the DOES online portal, there were entries stating that he was not monetarily eligible for two weeks and that DOES has received his claims for other

weeks, but there was no explanation for failing to pay benefits for the remaining weeks. Mr. Woube tried to appeal to OAH, but OAH would not hear the case because he could not provide a written DOES decision explaining the basis for failing to pay benefits. *Id.* ¶¶ 16-19.

ARGUMENT

To justify issuance of a preliminary injunction, Plaintiffs must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in Plaintiffs' favor; and (4) an injunction is in the public interest. *Nat'l Ass'n for Fixed Annuities v. Perez*, 219 F. Supp. 3d 10, 13 (D.D.C. 2016) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Historically, courts in this Circuit have applied a "sliding-scale" approach to the preliminary injunction analysis under which "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). In this case, Plaintiffs have justified entry of a preliminary injunction regardless of whether the Court considers a sliding scale.

I. PLAINTIFFS ARE LIKELY TO PROVE THAT DEFENDANTS VIOLATED THEIR RIGHTS TO NOTICE AND AN OPPORTUNITY TO BE HEARD CONCERNING THE DENIAL, TERMINATION OR REDUCTION OF THEIR UNEMPLOYMENT BENEFITS

Plaintiffs are likely to prove that Defendants violated their rights to notice and an opportunity to be heard concerning the denial, termination, or reduction of their unemployment benefits. These rights are secured by the Fifth Amendment's Due Process Clause, the federal Social Security Act, and the D.C. Code and Municipal Regulations. We address each of these violations in turn.

A. Plaintiffs Are Likely to Prove That Defendants Violated Their Fifth Amendment Due Process Rights

Plaintiffs are likely to prove all three elements of their claim that Defendants violated their Fifth Amendment Due Process rights: "(i) deprivation of a protected liberty or property interest, (ii) by the government, (iii) without the process that is 'due' under the Fifth Amendment." *NB ex rel. Peacock v. Dist. of Columbia*, 794 F.3d 31, 41 (D.C. Cir. 2015) (internal citations omitted).

1. Unemployment Benefits Are a Protected Property Interest

It is settled law that unemployment benefits are a property interest triggering Due Process protections. *Hawkins v. Dist. Unemployment Comp. Bd.*, 381 A.2d 619, 623 (D.C. 1977). The underlying rationale is that an individual with a "legitimate claim of entitlement" to a public benefit has a protected property right in that benefit. *NB ex rel. Peacock*, 794 F.3d at 41. An individual need not prove, on the merits, that she actually *is* entitled to a public benefit in order to establish a legitimate *claim* of entitlement giving rise to Due Process protections. A legitimate claim of entitlement exists when a person *would* be entitled to receive the public benefit *if* she satisfies the legal preconditions to obtaining it. *Id*. Plaintiffs have a legitimate claim of entitlement to the unemployment benefits at issue, because DOES has no discretion to deny Plaintiffs benefits if they qualify for them under applicable D.C. law. The Court should hold that Plaintiffs' unemployment benefits are a protected property interest, consistent with the decisions of numerous other courts. *Hawkins*, 381 A.2d at 623; *see also Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 900 (6th Cir. 2019); *Berg v. Shearer*, 755 F.2d 1343, 1345 (8th Cir. 1985); *Ross v. Horn*, 598 F.2d 1312, 1317-18 (3d Cir. 1979).[1]

[1] Although the Fifth Amendment Due Process Clause applies to the District as a federal entity, case law under the Fourteenth Amendment is equally applicable here, because the "procedural due process components of the two Amendments are the same." *Propert v. Dist. of Columbia*, 948 F.2d 1327, 1330 n.5 (D.C. Cir. 1991).

2. Plaintiffs Are Likely to Prove That Defendants Violated Their Due Process Rights by Depriving Them of Unemployment Benefits Without Adequate Notice of the Rationale for the Deprivation

Plaintiffs are likely to prove that Defendants violated their Due Process rights by denying, terminating, or reducing Plaintiffs' unemployment benefits (which are protected property interests) without adequate notice of the rationale for those actions. "It is universally agreed that adequate notice lies at the heart of due process." *Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C. Cir. 1980). When the government deprives a private party of a protected liberty or property interest, Due Process requires notice that is "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *N.B. v. Dist. of Columbia*, 244 F. Supp. 3d 176, 181 (D.D.C. 2017) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). To assure a meaningful opportunity to object, Due Process requires that the notice must disclose the rationale for the deprivation. *See, e.g.*, *Gray Panthers*, 652 F.2d at 165 (one of the "core requirements of due process" with respect to Medicare benefits is "adequate notice of why the benefit is being denied and a genuine opportunity to explain why it should not be"); *see also Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014) ("the right to know the factual basis for the action" is an "essential component[ ] of due process"); *Reeve Aleutian Airways, Inc. v. United States of Am.*, 982 F.2d 594, 599 (D.C. Cir. 1993) ("[W]hen a notice requires its target to guess among several possible bases for adverse government action, it has not served [the] fundamental purposes" of "due process."). Defendants have repeatedly violated these fundamental constitutional rights.

a. Defendants Prematurely Terminated Benefits Without Adequate Notice

Defendants have terminated unemployment benefits for Plaintiff Mulugeta Hailu without any written notice. DOES terminated Mr. Hailu's benefits for eleven weeks (worth at least $5,269) without providing notice explaining the basis for the termination. When he views the DOES online portal, there is a boilerplate statement that for some of those weeks he has been "disqualified and/or held ineligible." Hailu Decl. ¶¶ 10-11, 12-13, 15, 17, 21. That terse statement is not meaningful, because it gives no rationale, and because disqualification and ineligibility are entirely different issues arising under different statutory provisions. D.C. Code § 51-109 (Eligibility for benefits); D.C. Code § 51-110 (Disqualification for benefits). Plaintiff Hailu is likely to prove that Defendants have violated his Due Process rights by failing to notify him of any rationale for this deprivation of his protected property interests.

b. Defendants Seized Benefits Through Offset Without Adequate Notice

Defendants also have seized unemployment benefits from Plaintiffs Mulugeta Hailu and Mizan Werede, through offset of alleged overpayments, without adequate written notice. In the District's unemployment benefits system, offsets of alleged overpayments require two different determinations by DOES. The first is the determination that there has been an overpayment of a specific sum. D.C. Code § 119(d)(2) (referring to the "determination of any sum as benefits to which he is not entitled"). The second is the determination that the previously-established overpayment qualifies for offset, because it falls outside the scope of two statutory prohibitions on offsets. The D.C. Code specifies that "no such recoupment from future benefits shall be had" if (1) "such sum is received by [the claimant] without fault on his part and such recoupment would

defeat the purpose of this subchapter"[2] or (2) "would be against equity and good conscience." *Id.* § 119(d)(1). Because both determinations are necessary for DOES to seize benefits through offset, basic principles of Due Process require adequate notice of the rationales for both determinations, in order to provide claimants with a meaningful opportunity to challenge them. *Cf. Gray Panthers*, 652 F.2d at 165 (one of the "core requirements of due process" with respect to Medicare benefits is "adequate notice of why the benefit is being denied and a genuine opportunity to explain why it should not be"). Plaintiffs Hailu and Werede are likely to prove that Defendants violated these Due Process requirements.

First, Plaintiffs are likely to prove that Defendants never sent *any* notice at the time they determined that an overpayment occurred. DOES reduced Mr. Hailu's benefits, but he never received an overpayment notice, and DOES did not respond to his lawyer's repeated inquiries—approximately once per week for nine weeks—to send such a notice if it ever existed. Hailu Decl. ¶¶ 12, 14, 19. The only reason that he suspects an overpayment is at issue is that he looked at the DOES online portal and found a boilerplate statement that his "entire benefit" for two weeks "was applied to reduce your overpayment." *Id.* ¶ 13. Similarly, Ms. Werede had her benefits reduced and never received an overpayment notice (or any other notice) explaining why. Werede Decl. ¶¶ 11, 13. She looked at the DOES online portal and found a boilerplate statement that the "entire benefit was applied to reduce your overpayment." *Id.* ¶ 10. DOES did not respond to inquiries by phone and by email to send an overpayment notice if it existed. *Id.* ¶¶ 21-22. She does not know why an overpayment allegedly occurred or the amount of the claimed overpayment. *Id.* ¶ 13. Defendants have violated Plaintiffs' Due Process rights by failing to provide notice of the

[2] "The purpose of the Unemployment Compensation Act, [is] namely to protect employees against economic dependency caused by temporary unemployment and to reduce the necessity of other welfare programs." *Jones*, 395 A.2d at 395.

monetary basis for the offsets. *See, e.g.*, *Ellender v. Schweiker*, 575 F. Supp. 590, 600 (S.D.N.Y. 1983) (notice regarding Supplemental Security Income overpayments was constitutionally insufficient because it omitted the relevant time periods, overpayment amounts, prior repayments, reason for the overpayment, appeal and waiver rights, and limitations period); *cf. Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997) (Due Process required government agency to provide notice of audit calculations and underlying facts documenting the basis for withholding payment of funds).

Second, Mr. Hailu and Ms. Werede are likely to prove that Defendants did not provide any notice of the basis for concluding that the claimed overpayments qualified for offset (i.e., that the claimed overpayments fall outside the scope of the two statutory prohibitions on offsets). Mr. Hailu never received any communication from DOES when his benefits were seized through offset. Hailu Decl. ¶¶ 12, 14. Ms. Werede received a standard-form "offset receipt" from DOES (covering a portion of the reduced benefits) that simply stated the amount offset without explaining why offset was permissible. Werede Decl. ¶ 14. Under DOES standard practice, the only notification that it sends *any* claimant at the time of an offset is such a receipt—instead of a notice explaining why the overpayment qualifies for offset. *See* Declaration of Jennifer Mezey ("Mezey Decl.") ¶¶ 11-12 (attaching standard form offset receipt). The offset receipt falls far short of Due Process notice requirements, because it did not provide a rationale that would assure a meaningful opportunity to object. *See, e.g.*, *Ellender*, 575 F. Supp. at 600 (boilerplate notice violated Due Process requirements because "[t]here can be no doubt that a notice which merely advises OASDI recipients of the fact and amount of alleged SSI overpayments offers the aggrieved plaintiffs no tangible information for them to dispute"); *see also Strouchler v. Shah*, 891 F. Supp. 2d 504, 520 (S.D.N.Y. 2012) ("boilerplate" statement did not satisfy Due Process notice requirements); *Barry*

v. Little, 669 A.2d 115, 124 (D.C. 1995) (same). A boilerplate conclusory statement also is constitutionally insufficient, because the risk of an "erroneous deprivation" of a protected interest "significantly increases as the notice given becomes less detailed and more vague." *Ass'n of Cmty. Orgs. for Reform Now v. Fed. Emergency Mgmt. Agency*, 463 F. Supp. 2d 26, 34 (D.D.C. 2006). Reducing the risk of an erroneous deprivation is a central tenet of Due Process. *Id*. (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Third, the minimal information that Plaintiffs learned by making affirmative inquires to DOES customer service personnel and the agency's online portal did not cure the foregoing Due Process violations. The most that Plaintiffs could obtain through these inquiries were brief conclusory statements to the effect that benefits had been seized through offset—not information about the substantive basis for the offset. Hailu Decl. ¶ 13; Werede Decl. ¶ 10. Furthermore, Plaintiffs had no duty to solicit additional information affirmatively from DOES. A government entity cannot satisfy its Due Process obligations by "requiring individuals to undertake an affirmative inquiry to learn the reasons for their denial" of public benefits. *N.B.*, 244 F. Supp. 3d at 182. Therefore, the fact that a beneficiary "could conduct such an inquiry is irrelevant to the constitutional analysis." *Id*. (emphasis in original) (citing cases).

c. Defendants Effectively Denied Initial Claims for Benefits Without Adequate Notice

Defendants also have egregiously delayed taking action on initial claims for benefits filed by Plaintiffs Perry and Woube. These delays have continued so long that Defendants have effectively denied the claims through inaction. The D.C. Circuit has recognized that agency delay violates Due Process when the "'delay … ripen[s] into deprivation'" of a property interest. *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 660 (D.C. Cir. 2010) (quoting *Schroeder v.*

City of Chi., 927 F.2d 957, 960 (7th Cir. 1991)). That is exactly what has happened here with respect to Plaintiffs' property interest in unemployment benefits.

Mr. Perry applied for benefits in early June 2020. He has never received any benefits. He has never received any notice of a rationale for denying benefits for the first nine months after he filed his claim (i.e., through February 2021). For the period beginning February 28, 2021, DOES denied his claim, asserting that the agency did not have required information that he had in fact provided. He submitted the missing information, and he requested DOES to make a new decision (redetermination) approving his claim for benefits. He and his attorney have repeatedly contacted DOES by phone and in person to obtain information about the status of his claim, but the agency could only respond by saying that it was lost in the computer system. He has gone more than 77 weeks without getting benefits and without getting any written decision regarding his first nine months of benefits or his request for redetermination. Perry Decl. ¶¶ 1-16. Given the passage of time, DOES has effectively denied his claim without any notice of a rationale, thereby violating his Due Process rights.

Mr. Woube applied for benefits in April 2020, and he never has received benefits for the period from April to mid-October 2020. DOES has not responded to repeated inquiries about those benefits. Mr. Woube has never received any notice explaining the rationale for not paying the benefits. The only information available to Mr. Woube is a boilerplate note on his online claimant portal providing that the first two weeks of his benefits are not payable because his claim "remains monetarily ineligible." The entries for his remaining missing weeks provide no information regarding the status of his payment for those weeks. More than twenty months have passed since he filed his application, such that DOES has denied the first two weeks, and

effectively denied the following nine weeks, without any notice of a rationale, thereby violating his Due Process rights. Woube Decl. ¶¶ 6-7, 19.

3. Plaintiffs are Likely to Prove that Defendants Violated Their Due Process Rights by Precluding Any Hearing Where Plaintiffs Could Challenge the Deprivation of Their Unemployment Benefits

It is settled law that "[u]nder the Fifth Amendment, individuals are entitled to a hearing before they are 'finally deprived of a property interest.'" *N.B.*, 244 F. Supp. 3d at 183 (quoting *Mathews*, 424 U.S. at 333). Due Process requirements concerning the details and timing of the hearing may differ depending upon the circumstances. *Id.* Yet the government must always provide for *some* type of hearing at which affected individuals can challenge the government's action. Plaintiffs are likely to prove that Defendants violated their Due Process rights by precluding *any* hearing where Plaintiffs could challenge the deprivation of their unemployment benefits.

First, DOES effectively precluded such hearings by failing to issue written decisions concerning the benefit denials, terminations and offset-seizures. D.C. law provides for hearings on such DOES actions, through an administrative appeal to OAH. *See* D.C. Code §§ 51-111(b), (e); 2–1831.03(b)(1). However, Defendants' inactions described above foreclose Plaintiffs (and numerous other beneficiaries) from pursuing any such appeals. OAH has articulated a policy that it will not hear any appeal of any denial, termination or offset-seizure that is not accompanied by a written decision explaining the rationale for those actions. *See* Declaration of Jeffrey S. Gutman ("Gutman Decl.") ¶¶ 3-4; Mezey Decl. ¶ 13. OAH's Regulations state this "no-appeal" policy explicitly:

> A party requesting a hearing to appeal a DOES Claims Examiner's Determination in an unemployment compensation case shall file a copy of the determination that the party is appealing with the hearing request. If the party does not file a copy of the determination, OAH will issue an order directing the party to file a copy of the

> determination in order to establish OAH's jurisdiction. If the copy is not provided, OAH may dismiss the case.

1 D.C. Mun. Regs. § 2981 (2017). Yet Defendants have refused to issue such written decisions as explained above.[3]

Second, the OAH no-appeal policy itself violates Plaintiffs' Due Process rights. There is nothing in the D.C. Code that requires a written DOES decision for OAH to hear an appeal of the decision. OAH's policy of limiting appeals to cases with written decisions violates the Due Process rights of affected beneficiaries, because they have no opportunity to challenge those restrictions on their property rights. For example, Plaintiff Woube filed an appeal challenging the effective denial of his claim for months of benefits as described above. Because DOES never issued a written decision confirming the denial, OAH refused to hear his appeal. Woube Decl. ¶ 17.[4]

The result of the OAH policy is that Plaintiffs and other similarly-situated beneficiaries are caught in a procedural limbo, entirely precluded from pursuing their Due Process right to a hearing for an indefinite period of time. During 2021, there have been periods when OAH refused to hear a significant number of the hundreds of appeals filed each month, because DOES had not issued a written decision. Gutman Decl. ¶ 7. And the problem extends back to at least the fall of 2020.

[3] We understand that under its policy, OAH will never hear an appeal of a DOES decision that an overpayment qualifies for offset. The reason is that an "offset receipt" is the only notification sent to the claimant, and OAH does not consider an offset receipt to be a written decision triggering administrative-appellate review. *See* Mezey Decl. ¶ 12-13.

[4] In an OAH appeal of a DOES denial, termination or reduction of benefits without a written DOES decision, the appropriate disposition would be a summary reversal of the benefit denial, termination or reduction. The claimant should prevail, because DOES would not have justified the denial, termination, or reduction. And summary reversal would be warranted; a full-blown hearing would be a waste of time without a known rationale for the DOES decision. *Gray Panthers*, 652 F. 2d at 168 ("Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than a constitutional process."); *accord Ass'n of Cmty. Orgs. For Reform Now*, 463 F. Supp. 2d at 35.

Mezey Decl. ¶ 10. Caught between DOES's failure to issue written notice and OAH's failure to hear appeals, Plaintiffs (like hundreds of other claimants) had no opportunity to challenge the deprivation of their property rights. *Cf. Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 187 (D.C. Cir. 2013) (describing "the impermissible Catch-22" that occurs when an agency purports to determine rights and then claims that its determination is not the type of decision subject to appeal). Plaintiffs are likely to prove that Defendants have violated their Due Process rights.

4. Plaintiffs are Likely to Prevail on Both of Their Alternative Claims for Due Process Violations

Plaintiffs assert two independent alternative claims for Due Process violations. Count I asserts a private right of action directly under the Fifth Amendment's Due Process Clause. Count II asserts a claim under 42 U.S.C. § 1983 for deprivation of rights secured by the Constitution. Either one of the claims justifies a preliminary injunction, and Plaintiffs are likely to prevail on the merits of both.

a. Plaintiffs are Likely to Prevail on Count II Because a "Policy or Custom" Caused the Due Process Violations

Plaintiffs are likely to prevail on their section 1983 claim (Count II), because they are likely to prove that a "policy or custom" of the District caused the foregoing Due Process violations. Under 42 U.S.C. § 1983, Defendant District of Columbia is, in relevant respects, subject to the liability rules that apply to a municipality. *See, e.g.*, *Byrd v. Dist. of Columbia*, 807 F. Supp. 2d 37, 74 (D.D.C. 2011). A municipality is liable under section 1983 if it caused federal-law violations through a "policy or custom." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). There are a number of ways in which a municipality can establish such a policy or custom. One is to explicitly decide upon a procedure at the policy level. *See Baker v. Dist. of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003). OAH's refusal to hear appeals without a written decision is

such a policy or custom, because OAH has made an explicit decision to follow that procedure. *See supra* section I.A.3.

Another way that a municipality can establish a policy or custom is through *inaction*. A municipality establishes a policy or custom when it "fail[s] . . . to respond to a need . . . in such manner as to show 'deliberate indifference' to the risk that not addressing the need will result in constitutional violations." *Baker*, 326 F.3d at 1306 (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989)). A plaintiff can prove "deliberate indifference" by showing that a municipality "knew or should have known of the risk of constitutional violations" from its inaction. *Baker*, 326 F.3d at 1307 (citing *Farmer v. Brennan*, 511 U.S. 825, 841 (1994)). This is an objective standard—a plaintiff does not need to prove municipal officials' subjective intent. *Id*. To the contrary, if a plaintiff satisfies the objective "knew or should have known" standard, the municipality is liable even if it could produce subjective evidence that municipal officials acted in good faith. *See Owen v. City of Indep., Mo.*, 445 U.S. 622, 638 (1980) (good faith not a defense to municipal liability under 42 U.S.C. § 1983).

Plaintiffs are likely to prove, through objective evidence, that the District knew or should have known that it actually *was* violating Plaintiffs' Due Process rights by failing to provide notice or an opportunity for a hearing. *First*, the District has been informed of these issues in numerous public D.C. Council hearings in which Defendant Morris-Hughes represented the District as its most senior official responsible for administering unemployment benefits. In these hearings, Defendant Morris-Hughes has been informed that DOES makes benefit determinations without written notice.[5] She has been informed that DOES reduces benefits through offset without written

[5] Elissa Silverman, *Budget Oversight Hearing: Committee on Labor & Workforce Development*, at 52:41, COUNCIL OF THE DIST. OF COLUMBIA (June 11, 2021, 9:37AM),

notice.[6] And she has been informed that the failure to issue written notice effectively precludes beneficiaries from pursuing appeals at OAH.[7] It therefore is not surprising that the District has expressly acknowledged that many claimants "who want to appeal . . . cannot because they do not have their 'denial' documents from DOES" and "OAH may only accept an appeal for review after the agency has made a final decision."[8] Defendant Morris-Hughes and others at DOES also (at a minimum) should have known the well-established requirements that govern here: that unemployment benefits are property interests protected by Due Process notice and hearing requirements.

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http://dc.granicus.com/MediaPlayer.php?view_id=45&clip_id=6531 (Christina Henderson to Dr. Morris-Hughes: "But you didn't say how you all are changing to ensure that people are actually getting their determination letter."); *id*. at 54:36 (Elissa Silverman to Dr. Morris-Hughes: "I'll just add in Director that we've gotten many claimants who have come to the committee who haven't received that determination letter and they've checked their spam filter. I just don't understand why it's not a basic part of the process.").

[6] Elissa Silverman, *Joint Public Oversight Roundtable, Committee on Labor & Workforce Development*, at 2:15:00, COUNCIL OF THE DIST. OF COLUMBIA, (May 12, 2021, 9:09 AM), http://dc.granicus.com/MediaPlayer.php?view_id=45&clip_id=6376 (Elissa Silverman to Dr. Morris-Hughes: "My next question is similar. Multiple people testified last week and at previous hearings they had been audited and many without merit and D.O.E.S. was withholding unemployment without notice, determination of overpayment or without telling claimants they have a right to challenge recoupment. I'm sure you all listened to the witnesses' testimony as well. They didn't have a right to charge and pay back the overpayment. If the overpayment is essentially not their fault, and they cannot afford to pay it, what is going on here?"; *id*. at 11:10 (Robert White to Dr. Morris-Hughes: "The council has tried many times to get more information from the mayor's team, including through letters and oversight hearings because we have to sort through the challenges that people are seeing. Which include no payments for weeks, with no advanced notice beforehand, and unclear guidance afterwards as to what happened and when the problem will be rectified.").

[7] Elissa Silverman, *Budget Oversight Hearing: Committee on Labor & Workforce Development*, at 51:24, COUNCIL OF THE DIST. OF COLUMBIA (June 11, 2021, 9:37AM), http://dc.granicus.com/MediaPlayer.php?view_id=45&clip_id=6531 (Christina Henderson to Dr. Morris-Hughes: "There were a lot of people who didn't have a determination letter from DOES in order to even start the OAH process").

[8] **Ex. A**, DOES Responses, Follow-up questions for DOES from May 12, 2021 Joint Oversight Roundtable.

Second, the District has received notice through testimony by representatives of the Legal Aid Society of the District of Columbia addressing the agency's failure to issue written notices in determining or terminating benefits and the related preclusion of OAH appeals in the absence of a written notice.[9]

Third, the District has received repeated notice that numerous specific claimants' benefits have been denied, terminated, or reduced through offset, without a written notice. Beginning April 2020, attorneys at the Legal Aid Society of the District of Columbia started communicating with top DOES officials about specific clients faced with termination, denial and offset of benefits

[9] On June 9, 2021, DOES received notice of testimony by two Legal Aid attorneys that addressed the notice and hearing issues before the D.C. Council. Joint Testimony of Drake Hagner, Supervising Attorney, Legal Aid Society of the District of Columbia & Tonya Love, Program Director & Attorney, Claimant Advocacy Program Before the Committee on Labor & Workforce Development Council of the District of Columbia, Fiscal Year 2021 Budget Oversight Hearing on the Dep't of Emp. Servs., at 3-4 ((June 9, 2021), https://lims.dccouncil.us/downloads/LIMS/47622/Oversight_Hearing_Record/HR24-0075-Oversight_Hearing_Record.pdf. ("First, DOES persistently **denies** unemployment benefits without issuing a written notice. Without a written notice, unemployed workers are unable to obtain an appeal hearing where an Administrative Law Judge from the Office of Administrative Hearings would review the denial decision. . . . Second, DOES also persistently **terminates** unemployment benefits before issuing a written notice in violation of federal rules and District law") (emphasis in original). Legal Aid has provided similar testimony in earlier D.C. Council hearings. *See, e.g.*, Joint Testimony of the Claimant Advocacy Program, First Shift Justice Project, Legal Aid, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Whitman-Walker Legal Services, Public Oversight Hearing on the District's Unemployment Compensation Program During the COVID-19 Pandemic, at 7 (Sept. 16, 2020), https://lims.dccouncil.us/downloads/LIMS/46137/Oversight_Hearing_Record/HR23-0176-Oversight_Hearing_Record.pdf ("*DOES also has not provided PUA applicants with written notification of any decisions*. While some of our clients have received emails from DOES stating that their PUA claim is denied, they have not received the written notice needed to file an appeal at the DC Office of Administrative Hearings.") (emphasis in original); Joint Testimony of Drake Hagner, Supervising Attorney, Legal Aid Society of the District of Columbia & Tonya Love, Program Director & Attorney, Claimant Advocacy Program Before the Committee on Labor & Workforce Development Council of the District of Columbia, Performance Oversight Hearing on the Dep't of Emp. Servs. Unemployment Comp. Program, at 5 (Mar. 3, 2021), https://lims.dccouncil.us/downloads/LIMS/47338/Oversight_Hearing_Record/HR24-0053-Oversight_Hearing_Record.pdf ("Over and over, we uncovered cases where DOES withdrew a claimant's PEUC claims without any written determination and notice of appeal rights.").

without notice. Mezey Decl. ¶¶ 15-16. During the past eighteen months, Legal Aid attorneys have communicated with DOES officials about more than 700 individual unemployment matters, many of which are issues relating to denial of benefits without notice and inadequate notice. In the six-month period between June 3, 2021 and November 17, 2021, Legal Aid notified these officials about 74 clients whose benefits were terminated without any known written determination from DOES and 16 clients who had benefits offset without adequate notice. *Id.* ¶ 17. The clients specifically identified to DOES include all of the Plaintiffs. *Id.* ¶ 17. There can be no serious dispute that the District knew or should have known that it has placed, and is placing, claimants' Due Process rights at risk.

b. Plaintiffs are Likely to Prevail on Count I Regardless of Whether They are Likely to Prove That a D.C. Custom or Policy Caused the Due Process Violations

In the alternative, Plaintiffs are likely to prevail on Count I of the Complaint regardless of whether they are likely to prove that a D.C. custom or policy caused the foregoing Due Process violations. In Count I, Plaintiffs assert a private right of action directly under the Fifth Amendment's Due Process Clause. *See, e.g.*, *Davis v. Passman*, 442 U.S. 228, 242-43 (1979) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)) (confirming implied right of action directly under the Fifth Amendment Due Process Clause for equitable relief against District of Columbia officials). Count I does not assert a claim under section 1983, which is a statutory remedy that enforces substantive federal rights established by other statutes or by the Constitution. *See, e.g.*, *Johnson v. City of Detroit*, 446 F.3d 614, 618 (6th Cir. 2006). Because Count I does not assert a section 1983 claim, it is not subject to any of the limitations that Congress or the courts have placed upon such claims. One of those limitations is *Monell*'s municipal "custom or policy" requirement addressed above. *See Monell*, 436 U.S. at 691-94. That requirement does not apply to claims, like Count I, that assert private rights of action directly under the Constitution and do not involve

section 1983. *See, e.g.*, *White v. Nichols*, No. 5:02-CV-1712-RDP, 2005 U.S. Dist. LEXIS 62478, at *12-13 (N.D. Ala. Aug. 12, 2005) (refusing to apply *Monell* "policy or custom" limitation to claims asserted directly under the Constitution against local officials in their official capacities); *cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1979) ("assum[ing], without deciding, that the respondent could sue under [28 U.S.C.] § 1331" directly under the Constitution "without regard to the limitations imposed by 42 U.S.C.§ 1983").

c. Other Distinctions Between Count I and Count II Do Not Affect the Scope of a Preliminary Injunction

Plaintiffs assert Count I and Count II against different Defendants and ultimately seek different remedies under each Count at final judgment on the merits. These distinctions do not affect the scope of a preliminary injunction. Plaintiffs assert Count I against Defendants Morris-Hughes (the Director of DOES) and Muriel Bowser (the District's Mayor) in their official capacities and seek only prospective equitable relief for that claim. Count I relies upon the longstanding doctrine authorizing a suit against a government official, in her official capacity, for prospective equitable relief that remedies a federal-law violation. *See, e.g.*, *CareFirst, Inc. v. Taylor*, 235 F. Supp. 3d 724, 739-42 (D. Md. 2017) (validating claim against D.C. government official, in his official capacity, for prospective equitable relief to prevent federal-law violation).[10]

[10] Count I derives from the Supreme Court's seminal decision in *Ex Parte Young*, 209 U.S. 123 (1908). In *Ex Parte Young*, the Court drew a sharp distinction between (1) claims against a government entity seeking damages for federal-law violations and (2) claims against a government official in his official capacity seeking to remedy federal-law violations prospectively through equitable relief. The first type of claim was barred by sovereign immunity but the second type was not, because it was not viewed as a suit directly against the government entity. *Id.* at 159-60. *Ex Parte Young* itself involved federal-law violations at the state level, but the same type of claim is available to redress federal-law violations on the municipal level. *See, e.g.*, *Taylor*, 235 F. Supp. 3d at 739-42 (citing *Ex Parte Young* in validating equitable-relief claim against D.C. municipal official in his official capacity); *Fireman's Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928, 957

By contrast, Plaintiffs assert their 42 U.S.C. § 1983 claim (Count II) against Defendant District of Columbia (i.e., the governmental entity itself) and seek both prospective equitable relief and damages upon final judgment. *See, e.g*, 42 U.S.C. § 1983 (establishing remedies both "at law" and "in equity"). At this stage of the case, these differences between Defendants and ultimate remedies are not pivotal; the motion for preliminary injunction seeks only prospective equitable relief, not damages. A preliminary injunction is justified as long as the Court concludes that Plaintiffs are likely to prevail on Count I, Count II, or both.[11]

B. Plaintiffs Are Likely to Prove That Defendant District of Columbia Violated Their Federal Statutory Rights to Notice and an Opportunity to Be Heard

Plaintiffs also are likely to prove that Defendant District of Columbia violated their federal statutory rights to notice and an opportunity to be heard about the benefit denials, terminations and offset-seizures described above. The Social Security Act requires that unemployment beneficiaries must be given an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3).

(9th Cir. 2002) (citing *Ex Parte Young* in validating equitable-relief claims against California municipal officials in their official capacities).

Because *Ex Parte Young* claims such as Count I are limited to prospective equitable relief, they are distinguishable from claims for *damages* asserted against government officials in their official capacities. Such damages claims are considered duplicates of damages claims asserted directly against the government entities that the officials administer. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (citing *Monell*, 436 U.S. at 690 n.55).

[11] We further note that there was no requirement to exhaust administrative remedies before bringing suit in this Court. There is no obligation to exhaust administrative remedies before filing section 1983 claims like Count II. *See, e.g., Nat'l Harbor GP, LLC v. Gov't of the Dist. of Columbia*, 121 F. Supp. 3d 11, 18 (D.D.C. 2015). And it would have been futile for Plaintiffs to have attempted to exhaust their administrative remedies as to Count I before filing suit. As explained above, Defendants prevented Plaintiffs from pursuing administrative appeals by failing to issue the written decisions required by OAH to pursue any appeal. Exhaustion is not required where, as here, administrative remedies are not "accessible and capable of affording a full measure of relief." *Hodges v. Gov't of the Dist. of Columbia*, 975 F. Supp. 2d 33, 44 (D.D.C. 2013). For the same reason, no exhaustion is required for Plaintiffs' claims under D.C. law addressed below.

The U.S. Department of Labor has specified that the term benefit "denial" is a broad one, covering "any case in which there is an adverse determination that places an individual in a less advantageous position with respect to [unemployment compensation] entitlement." Portia Wu, *UIPL No. 1-16*, at ¶ 4(e), U.S. DEP'T OF LAB., (Oct. 1, 2015), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_01-16_Acc.pdf. For all such adverse benefit determinations, the statute requires, among other things, the following specific written notice:

> a written determination which provides sufficient information to understand the basis for the determination and how/when an appeal must be filed and must also include the facts on which the determination is based, the reason for allowing or denying benefits, the legal basis for the determination, and potential penalties or consequences.

Id. ¶ 4(a). For the same adverse benefit determinations, the claimant also "must have the right to appeal." *Id.* ¶ 4(e).[12] The District has violated these statutory notice and hearing rights. *See, e.g.*, *Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir. 1987) (agency violated "fair hearing" requirement of 42 U.S.C. § 503(a)(3) by failing to provide adequate notice and an opportunity to be heard).[13]

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[12] The same procedural requirements (regarding notice and a hearing) that apply to regular unemployment benefits also apply to benefits issued under the PUA, FPUC, and PEUC programs. *See supra* pp. 7-8.

[13] In Count III of the Complaint, Plaintiffs assert private rights of action under 42 U.S.C. § 1983 to redress these federal statutory violations. The Supreme Court established 50 years ago that individuals have a private right of action to sue for violations of section 303 of the Social Security Act (42 U.S.C. § 503). *See Cal. Dep't of Hum. Res. Dev. v. Java*, 402 U.S. 121 (1971). Although more recent Supreme Court decisions have applied a narrow approach when identifying the statutory rights enforceable under section 1983, the Supreme Court has never overruled *Java*. Accordingly, lower courts have followed *Java* as binding precedent and held that private plaintiffs can assert section 1983 claims for violations of section 303 of the Social Security Act. *See, e.g.*, *Zynda v. Arwood*, 175 F. Supp. 3d 791, 812-13 (E.D. Mich. 2016); *Gann v. Richardson*, 43 F. Supp. 3d 896, 903-04 (S.D. Ind. 2014).

In support of their section 1983 claim, Plaintiffs are likely to prove that the federal statutory violations occurred as a result of a "custom or policy" for the reasons described above in the discussion of Due Process. The District knew or should have known that the failure to issue written notices to Plaintiffs would violate their statutory rights to notice and an opportunity to be heard.

First, the District has given Plaintiffs Perry and Woube no notice of a rationale for effectively denying their initial claims for benefits through delay. And OAH will not hear an appeal of the denial without a written decision. *See supra* section I.A.3. The District has violated their right to an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3).

Second, the District's premature termination of the benefits of Plaintiff Hailu is obviously a determination that places him in a less advantageous position (and is therefore a "denial"), such that he is entitled to written notice and an opportunity to appeal. *See also UIPL No. 1-16, at* 4(e) (specifying that notice and appeal rights apply when there is a determination that "[unemployment compensation] benefits must stop because the individual no longer meets the eligibility requirements"). The District has given Plaintiff no written notice regarding premature termination of his benefits and then refused to hear appeals of such actions in the absence of written notice. *See supra* pp. 10-11.

Third, the District's offset-seizure of the benefits of Plaintiffs Hailu and Werede also places them in a less advantageous position that triggers the foregoing notice and hearing rights. The District's determination that there has been an overpayment is the first of two adverse decisions needed to offset benefits. *See supra* section I.A.2.b. The Department of Labor has specifically established that under the statutory fair hearing requirement, the foregoing written notice rights apply to overpayment determinations; that the claimant must receive "an opportunity to be heard before [the state unemployment-benefit agency makes] an overpayment determination," and that

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In addition OAH has adopted a policy not to hear appeals when DOES does not issue written notice.

the claimant must receive the "opportunity to appeal the overpayment . . . determination." *UIPL* No. 1-16, ¶¶ 4(a), (e). The District violated these notice and hearing rights. *See supra* pp. 10-12.

The second adverse decision the District must make to pursue an offset is the determination that an overpayment qualifies for offset. *See supra* section I.A.2.b. As the final prerequisite for an offset, this determination places claimants in a less advantageous position that triggers the foregoing notice and hearing rights. The Department of Labor has specifically established that the statute requires written notice for a determination that "applies a previously determined overpayment . . . for recoupment" as well as "an opportunity to be heard before . . . initiating recovery" of an overpayment. *UIPL* No. 1-16, ¶¶ 4(b), (c). The District also violated these notice and hearing rights. *See supra* pp. 10-12.

Finally, the Social Security Act's fair hearing provision requires that before pursuing an offset, the state unemployment-benefits agency must provide the affected claimant with written notice of any procedure for seeking a waiver of an overpayment determination. The D.C. Code establishes a procedure whereby a claimant can seek waiver of an overpayment by DOES. D.C. Code § 51-119(d)(1). Under the Social Security Act, the District "must clearly communicate the potential availability of a waiver when establishing an overpayment and, if the individual requests a waiver, make an official determination on the waiver request before initiating overpayment recovery." *UIPL No. 1-16*, at ¶ 4(a). By failing to issue written notice, the District also violated this statutory requirement. *See supra* pp. 10-12. The Court should issue a preliminary injunction to prevent the foregoing deprivation of rights secured by federal law.

C. Plaintiffs Are Likely to Prove That Defendant District of Columbia Violated Their D.C. Statutory and Regulatory Rights to Notice and an Opportunity to Be Heard

Plaintiffs also are likely to prove, under Count V of the Complaint, that Defendant District of Columbia violated their D.C. statutory and regulatory rights to notice and an opportunity to be

heard. *First*, the District violated the rights of Plaintiffs Perry and Woube, whose benefits were effectively denied through delay. *See supra* pp. 12-13. When DOES denies an initial claim for benefits, it must "promptly notify" the claimant of the "initial determination and the reasons therefor." D.C. Code § 51-111(b). The notice must necessarily be in writing, because it must be in a form that DOES "mail[s]" or otherwise "actual[ly] deliver[s]." *Id*. The D.C. Municipal Regulations mirror these statutory requirements, mandating written notice that includes the rationale for the benefits determination. 7 D.C. Mun. Regs. § 305.6 (2017) ("When the Director has made a determination of an individual's right to benefits, he or she shall promptly notify the claimant and interested parties of the determination and the reasons for the determination"); *id*. § 306.1 (notice must be mailed or actually delivered). The D.C. Code also gives the affected claimant a right to appeal the denial. D.C. Code § 51-111(b).

Second, the District violated the rights of Plaintiff Hailu, whose benefits were prematurely terminated. *See supra* p. 10-11. When DOES denies benefits after making an initial determination approving benefits (for reasons not stated in the initial determination), the D.C. Code and Municipal Regulations require the name notice and appeal rights described above with respect to initial determinations. *See* D.C. Code § 51-111(b) ("If, subsequent to such initial determination, benefits with respect to any week for which a claim has been filed are denied for reasons other than matters included in the initial determination, the claimant shall be promptly notified of the denial and the reasons therefor, and may appeal therefrom in accordance with the procedure herein described for appeals from initial determinations.").

Third, the District violated the D.C. statutory and regulatory rights of Plaintiffs Hailu and Werede, whose benefits were seized through offset based on an alleged overpayment. *See supra* pp. 10-12. The D.C. Code specifies that the first step in the offset process—the determination that

there has been an overpayment—is subject to the same notice and appeal rights described above with respect to premature benefit terminations. *Id.* § 51-119(d)(2) ("The determination of whether a person has received any sum as benefits to which he is not entitled and the review to such a determination shall be made in accordance with §§ 51-111, 51-112, and this section."); *see also* 7 D.C. Mun. Regs. §§ 305.6, 306. The D.C. Code does not expressly address notice and appeal rights regarding the second step in the offset process—the determination that the overpayment qualifies for offset—but the same notice and appeal rights are implicit in the statutory structure. The statute plainly prohibits offsetting some overpayments (*see supra* section I.A.2.b.), and for the prohibitions to have any meaning, a claimant must be able to appeal an offset that the statute does not permit. Furthermore, the D.C. Municipal Regulations interpret the statute to establish notice and appeal rights for any determination regarding unemployment benefits. 7 D.C. Mun. Regs. §§ 305.6, 306. The District violated these provisions of D.C. law by failing to provide notice of either decision. *See supra* section I.A.2.b.

II. PLAINTIFFS WILL CONTINUE TO SUFFER IRREPARABLE HARM UNLESS THE COURT ISSUES A PRELIMINARY INJUNCTION

This Court should issue a preliminary injunction because the harm Plaintiffs face is "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm . . . [that is] beyond remediation." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (citations and internal quotation marks omitted, alterations adopted). Plaintiffs already have suffered irreparable harm, and the harm will continue unless the Court intervenes.

First, Defendants' violation of Plaintiffs' Fifth Amendment Due Process rights constitutes irreparable harm in and of itself. In this Circuit, "'[s]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury

other than the threatened constitutional deprivation itself.'" *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (quoting *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)). Accordingly, "'[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes.'" *Id*.

Second, denying, terminating or reducing Plaintiffs' benefits has irreparably harmed them, because they cannot provide for many of their essential needs. "Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java*, 402 U.S. at 131-132. Loss of subsistence benefits for even a limited period of time "results in injury that cannot be rectified through the payment of benefits at a later date." *Islam v. Cuomo*, 475 F. Supp. 3d 144, 153 (E.D.N.Y. 2020). Thus, "when the outright denial or undue delay in the provision of subsistence benefits is at issue, courts have not hesitated to utilize the extraordinary remedy of preliminary injunctive relief." *Id*. Irreparable harm arises whether benefits are terminated wholesale or reduced in part through offset, because "[t]he particular amounts represented by [a percentage reduction] . . . are crucial" to recipients reliant upon such benefits to meet subsistence needs. *Westenfelder v. Ferguson*, 998 F. Supp. 146, 157 (D.R.I. 1998) (holding that Plaintiffs had shown irreparable harm when their welfare benefits were reduced by 30%, noting that "the deprivation of these amounts works immediate hardships which cannot be remedied by a later judgment in their favor").

For example, Plaintiff Hailu's loss of $4,311 in benefits from a termination, and another $958 in benefits from an offset, has deprived him of the ability to "afford rent, fuel for [his] car, food for [himself], or support for [his] children." Hailu Decl. ¶ 22. To survive, he has been forced

to use up his savings and borrow money from friends, some of whom expect him to pay the money back. *Id*. ¶¶ 23-24. He has suffered significant physical deprivation (the inability to cover his own housing expenses and food) as well as mental and emotional distress resulting from housing insecurity and being forced to live on the charity of friends. *See id*. ¶¶ 24-25. This deprivation is ongoing, as Mr. Hailu's lack of benefits has resulted in continuing housing insecurity, depletion of his savings and remaining debt to his friends, contributing to his existing significant mental and emotional distress. *Id*.

Similarly, Plaintiff Werede's loss of $2,964 in benefits fundamentally threatens her financial, mental and emotional well-being. Before she initially received benefits, Ms. Werede had trouble paying for necessary living expenses, including food, car insurance, utility bills, and telephone bills. Werede Decl. ¶ 5. The benefits alleviated these challenges, but the subsequent offset without notice further exacerbated her tenuous financial position. As a result of the improper offsets, Ms. Werede suffered significant stress from being unable to pay for food, phone bills, car insurance, and other bills, and interacting with a system that offset her benefits without notice or an opportunity to appeal. *Id*. ¶¶ 24, 26.

Plaintiff William Perry's inability to obtain benefits for more than 77 weeks has caused substantial stress and mental distress arising from almost a year and a half of financial instability and uncertainty. He is unable to afford rent or to pay his utility bills and has had to borrow money from family and friends to survive. *Id*. ¶ 17. He fears that he will lose his housing and will be unable to get back on his feet, causing him significant continued stress. *Id*. ¶ 20.

Finally, Plaintiff Woube's loss of $14,660 in benefits has caused him substantial irreparable harm. Unable to afford housing, he was forced to leave Washington D.C. to move in with family members in Seattle, Washington. Woube Decl. ¶ 20. He has experienced bouts of

hunger and starvation while he has waited in vain for DOES to make a determination on his claim. *Id*. ¶ 22. He owes his former landlord approximately $5,000 in back rent, and he has had to borrow money from friends—who expect to be repaid—for basic living needs. *Id*. And the harm to Mr. Woube does not stop there—previously he had financially supported his family overseas, but he can no longer do so, causing him to suffer significant emotional distress. *Id*. ¶ 21. He suffers from depression as a result of Defendants' mishandling and effective denial of his benefits (*id*. ¶ 23), and the mental and emotional distress he is suffering will continue unless the Court intervenes.

In the context of COVID-19 and the resulting high rates of "unemployment, economic hardship, and shuttered businesses . . . there is no question that individuals like the plaintiffs will contain to be irreparably harmed" by the District's failure to issue adequate notice of denial, termination or reduction of benefits. *See Marrero, Jefrie et al. v. Jeffers*, No. 2085CV00937 (Mass. Sup. Ct. Mar. 2, 2021) (attached hereto as **Ex. B**).

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST SUPPORT ISSUING THE PRELIMINARY INJUNCTION

The balance of equities and the public interest also support issuing the preliminary injunction. The balance-of-equities factor "directs the Court to 'balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.'" *Richardson v. Trump*, 496 F. Supp. 3d 165, 188 (D.D.C. 2020) (quoting *Winter*, 555 U.S. at 24). When the government is the non-movant, this preliminary injunction factor merges into the public interest factor, and the Court weighs "'the benefits to the private party from obtaining an injunction against the harms to the government and the public from being enjoined.'" *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 386 (D.D.C. 2020) (quoting *Doe v. Mattis*, 928 F.3d 1, 23 (D.C. Cir. 2019)). These factors favor the injunction.

Preventing further violations of Plaintiffs' constitutional Due Process and statutory notice rights would substantially benefit Plaintiffs and the public interest. "'[T]he Constitution is the ultimate expression of the public interest,'" and government actions that violate the Constitution are "'always contrary to the public interest.'" *Turner*, 502 F. Supp. 3d at 386 (quoting *Gordon*, 721 F.3d at 653); *Richardson*, 496 F. Supp. 3d at 188. And there is "generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of the United States*, 838 F.3d at 12.

Furthermore, a preliminary injunction would strongly support the public interest by assuring that all claimants for unemployment benefits receive the notice and an opportunity to be heard guaranteed by the Fifth Amendment, the Social Security Act and D.C. law. The problems addressed by this motion have persisted for more than a year and now are systemically embedded in the practices of DOES and OAH concerning denials, terminations, and offset-seizures of benefits. *See* Mezey Decl. ¶¶ 10, 15, 17, 23 (addressing pervasive issues regarding denials and terminations); *id*. ¶¶ 11, 15, 17, 23 (addressing pervasive issues regarding offsets); Gutman Decl. ¶¶ 3, 7 (addressing pervasive issues regarding OAH's failure to hear appeals). Just during the last nine months, the number appeals that OAH has refused to hear (based on lack of a written decision) is astonishing, ranging from 80% of its docket (400-500 per month) in April 2021 to 20% of its docket (92 times per month) in August 2021. Mezey Decl. ¶ 20.

The consequences are grave. Defendants' practices have prevented numerous claimants throughout the District from being able to timely pay for their housing, utilities, food, medication, transportation, and other basic needs. Without the benefits to which they are entitled, claimants face high-interest debt, eviction or foreclosure, utility terminations, or other collateral consequences of unemployment. Mezey Decl. ¶¶ 22-23. Defendants have no legitimate

justification for failing to issue written notices when denying, terminating, or reducing benefits through offset. Therefore, Defendants have no legitimate harm to claim from an injunction preventing those practices. If Defendants are unwilling or unable to provide written notice and an opportunity to be heard, they should not deprive claimants of these critical, life-sustaining benefits.

CONCLUSION

The Court should grant Plaintiffs' motion and issue a preliminary injunction that (a) prohibits Defendants from denying, terminating or reducing (through offset) unemployment beneficiaries' benefits in the future without first providing a written rationale in a form acceptable to OAH to initiate an appeal of those actions; (b) requires OAH to hear administrative appeals of decisions denying, terminating or reducing unemployment benefits regardless of whether DOES has issued such decisions in writing; (c) orders payment of back benefits to Plaintiffs whose benefits were denied or terminated without notice; and (d) orders refunds of offsets to Plaintiffs whose benefits were offset without notice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2022, the foregoing Plaintiffs' Motion for Preliminary Injunction, Memorandum in Support of Motion for Preliminary Injunction; Exhibits; Declarations of Mulugeta Hailu, Mizan Werede, William Perry, Yohannes Woube, Jeffrey Gutman, and Jennifer Mezey; and Proposed Order, and a courtesy copy of Plaintiffs' Complaint will be served by hand on:

Fernando Amarillas,
Acting Chief - Equity Section
Office of the Attorney General for the District of Columbia,
400 6th Street NW,
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/s/ *Daniel G. Jarcho*
Daniel G. Jarcho