THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0478

Cassandra Caron, Brandon Deane, Alison Petrowski, and Aaron Shelton

v.

The State of New Hampshire, New Hampshire Employment Security and George Copadis, Commissioner, New Hampshire Employment Security

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

BRIEF FOR THE DEFENDANTS

NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY

and

GEORGE COPADIS,
as Commissioner of New Hampshire Department of Employment Security

By their attorneys

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(*Fifteen-Minute Oral Argument Requested*)

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ISSUE PRESENTED

I. Whether the trial court correctly ruled that Pandemic Unemployment Assistance is not "available under the provisions of the Social Security Act" within the meaning of RSA 282-A:127, I.

STATEMENT OF THE CASE

I. Factual Background

a. The CARES Act & PUA

In March 2020, Congress created a number of temporary federal unemployment benefits under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. *See* CARES Act, Pub. L. No. 116-136, tit. II, subtit. A [Unemployment Insurance Provisions] §§ 2101–2116, 134 Stat. 281 (2020) (codified, as amended, at 15 U.S.C. §§ 9021–9034). Congress called one of those benefits "Pandemic Unemployment Assistance," or "PUA." *See id*. § 2102 (codified, as amended, at 15 U.S.C. § 9021).

PUA was a temporary federal benefit for "covered individuals," meaning those who were ineligible for both traditional state unemployment compensation benefits and other temporary federal benefits. *See* 15 U.S.C. § 9021(a)(3) (defining "covered individual"). The benefit was retroactively available from late January 2020 through early September 2021. *See* 15 U.S.C. § 9021(c).

Congress funded PUA with money from the United States Treasury's General Fund. *See* 15 U.S.C. § 9021(g). To the extent a state agreed to administer PUA payments for the federal government, Congress directed the United States Department of Labor ("DOL") to provide PUA "through agreements" with those states. *See* 15 U.S.C. 9021(f) [Agreements with States]; *see also* SA 32–34 (DOL's email to the states regarding their "option" to enter such agreements).[1] In the event of such an agreement, Congress further directed the Treasury to transfer the requisite

[1] Citations to the records are as follows:
"SA __" refers to the State's appendix and page number.
"PB __" refers to Plaintiffs' brief and page number.
"PA __" refers to Plaintiffs' appendix and page number.

funding to the administrating state by moving the moneys from the General Fund, to the unemployment compensation account of the Treasury's Unemployment Trust Fund, and then to the state for payment to the individual. *See* 15 U.S.C. 9021(g) [Funding].

b. The State's agreement with DOL

Soon after the CARES Act became law, the State of New Hampshire (acting through Governor Sununu) entered an agreement with DOL to administer PUA for the federal government. SA 61–71. The agreement gave both parties the right to terminate it upon thirty days written notice. SA 63.

The State administered PUA for the better part of the next fifteen months, until a workforce crisis emerged during the spring of 2021. SA 4–5. With businesses struggling to find ready and willing employees that spring, Governor Sununu notified DOL in May that the State was terminating the agreement. SA 75–76. In accordance with that notice, the State did not administer PUA for benefit weeks after June 19, 2021.

II. Procedural Background

More than two months after the State terminated the agreement, Plaintiffs filed the underlying action against the Department. SA 174–190 (complaint); PA 349–359 (motion for preliminary relief). Although Governor Sununu had terminated the State's agreement with DOL, Plaintiffs stated that the Department had done so and that this violated both state and federal law. SA 174; PA 349. With respect to their state law claim, Plaintiffs asserted that RSA 282-A:127, I, required the Department to "secure" PUA because it was "available under the provisions of the Social Security Act" within the meaning of that statute. SA 182–184; PA 352–356. As to their claim under federal law, Plaintiffs construed certain

mandatory language in 15 U.S.C. § 9021 to require the Department to administer PUA for the federal government. SA 183; PA 356.

Plaintiffs sought both declaratory and injunctive relief on their claims, and in a separately filed motion they asked the trial court to issue a temporary restraining order and preliminary injunction "enjoining the [Department] from refusing to reinstate PUA and instructing them to reinstate PUA before September 6, 2021." SA 184; PA 359.

The Department filed a written objection to Plaintiffs' motion on September 2, 2021. SA 3–173. Among other things, the Department argued that Plaintiffs' claim that PUA was "available under the provisions of the Social Security Act" was based on an erroneous interpretation of RSA 282-A:127, I. SA 13–19.

The trial court (*Colburn*, J.) heard oral argument on Plaintiffs' motion during a preliminary hearing on September 3, 2021, following which the trial court took the motion under advisement. SA 191. While the motion remained under advisement, Plaintiffs filed a reply to the Department's objection, and the Department filed a corresponding surreply. SA 197–202 (reply), 203–204 (surreply).

On September 27, 2021, the trial court issued a narrative order rejecting Plaintiffs' construction of both RSA 282-A:127, I, and 15 U.S.C. § 9021. PB 31–40.

With respect to RSA 282-A:127, I, the trial court explained that where "the PUA program was created by the CARES Act and is not found in the same section of the federal code as the Social Security Act, it is difficult to envision how PUA benefits could be considered 'available under the provisions of the Social Security Act.'" PB 36. It then explained why PUA was not "available under" the Social Security Act simply because the funding passes through a trust fund created by the Social Security Act on its way from the Treasury's General Fund to the individual:

> The benefits provided under the CARES Act are new benefits, never previously available to unemployed workers, and are provided by legislation separate and apart from the Social Security Act. Although the federal government chose to use the funding mechanisms available through the Social Security Administration, that does not mean these new benefits fall under the Social Security Act. It simply shows Congress used an existing mechanism to put PUA . . . into place quickly.

PB 37 (quotation omitted).

Having ruled as a matter of law that neither RSA 282-A:127, I, nor 15 U.S.C. § 9021 required the Department to secure or administer PUA, the trial court denied Plaintiffs' motion for preliminary relief and dismissed their action *sua sponte* on the grounds that Plaintiffs had failed to state claims upon which relief could be granted. PB 40.

On October 14, 2021, Plaintiffs filed a timely notice of appeal limited to the dismissal of their claim under RSA 282-A:127, I. SA 205–221.

SUMMARY OF THE ARGUMENT

As Plaintiffs acknowledged below, PUA was "set up" by the CARES Act, PA 352, "established by the [CARES] Act," id., and "a part of the CARES Act," SA 174. Meanwhile, RSA 282-A:127, I, says absolutely nothing about the CARES Act. Instead, it directs the Department to adopt administrative rules, methods, and standards as necessary to "secure to this state and its citizens all advantages available under the provisions of" three other federal laws: (1) the Social Security Act, (2) Section 3302 of the Federal Unemployment Tax Act ("FUTA"); and (3) the Wagner-Peyser Act approved June 6, 1933, as amended. RSA 282-A:127, I, is thus clear on its face: it does not direct the Department to do anything with respect to PUA made available by the CARES Act.

An examination of the statutory scheme within which RSA 282-A:127, I, exists confirms this conclusion, as the advantages that the Social Security Act, FUTA, and the Wagner-Peyser Act provide are very different from temporary individual unemployment benefits like PUA. Under the Social Security Act and FUTA, so long as the State meets certain federal benchmarks, the federal government pays most of the State's costs of administering its unemployment compensation system and gives employers in the State a substantial federal tax credit. Likewise, so long as the State meets certain federal benchmarks under the Wagner-Peyser Act, the federal government provides funding for the State to invest in labor exchange services for employers and the unemployed. These federal laws thus provide critical system-sustaining advantages, but only so long as the State administers those systems in accordance with federal requirements.

PUA—again, a product of the CARES Act—was not a system-sustaining advantage like the advantages that the Social Security, FUTA, and the Wagner-Peyser Act make available. Instead, it was a temporary federal benefit for individuals. This context confirms what is already

unambiguous from the plain text of RSA 282-A:127, I, itself: PUA was not an advantage within the scope of that statute and therefore was not an advantage "available under the provisions of the Social Security Act" as Plaintiffs argue.

Up against both the language and context of RSA 282-A:127, I, Plaintiffs have resorted to a hypertechnical interpretation of the statute that is built on their preferred dictionary definitions of isolated words. Along the way, they ignore context and inaccurately describe both federal and state law. Their results-oriented interpretive approach is inconsistent with this Court's well-settled principles of statutory interpretation, and their proposed interpretation is wrong as a matter of a law.

This Court should accordingly affirm the trial court's ruling that PUA is not an advantage "available under the provisions of the Social Security Act," within the meaning of RSA 282-A:127, I.

STANDARD OF REVIEW

The Court reviews questions of statutory interpretation *de novo*. *Petition of New Hampshire Division for Children, Youth and Families*, 170 N.H. 633, 639 (2018).

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT PUA IS NOT "AVAILABLE UNDER THE PROVISIONS OF THE SOCIAL SECURITY ACT."

Whether PUA was "available under the provisions of the Social Security Act" within the meaning of RSA 282-A:127, I, requires this Court to interpret the statute to discern what the Legislature intended these words to mean.

This exercise starts by examining the plain and ordinary meaning of the words as informed by the overall statutory context in which they exist. *See Petition of Carrier*, 165 N.H. 719, 721 (2013) ("[W]e do not consider words and phrases in isolation, but rather within the context of the statute as a whole."); *Forsberg v. Kearsarge Reg'l Sch. Dist.*, 160 N.H. 264, 266 (2010) ("We also interpret a statute in the context of the overall statutory scheme and not in isolation."). This approach "enables [one] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Petition of Carrier*, 165 N.H. at 721. Indeed, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish." *Clare v. Town of Hudson*, 160 N.H. 378, 384 (2010). In this sense, it is important to remember that "[s]tatutory interpretation is not a game of blind man's bluff" where one can say what a statute means by simply grasping at its individuals words while ignoring the context in which they appear. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (*Breyer*, J., concurring in part and dissenting in part).

A. RSA 282-A:127, I, does not direct the Department to secure PUA.

1. RSA 282-A:127, I, says nothing about the CARES Act.

RSA 282-A:127, I, says nothing about the CARES Act, which Plaintiffs acknowledge "set up" and "established" PUA. PA 352. Instead, the statute only directs the Department to take certain administrative actions as necessary to secure advantages that the Social Security Act, FUTA, and the Wagner-Peyser Act make available.

As the trial court correctly observed, RSA 282-A:127, I's complete silence with respect to the CARES Act seems to foreclose Plaintiffs' argument that it directs the Department to secure a benefit created by the CARES Act. See PB 36 (explaining that "because the PUA program was created by the CARES Act and is not found in the same section of the federal code as the Social Security Act, it is difficult to envision how PUA benefits could be considered 'available under the provisions of the Social Security Act'" for purposes of RSA 282-A:127, I); c*f. In re Carmody*, 164 N.H. 677, 678 (2013) (explaining how this Court will not add words to a statute that the Legislature did not see fit to include).

Of course, a mature interpretation of RSA 282-A:127, I, also requires a developed understanding of the overall statutory scheme within which the statute exists. *See Clare*, 160 N.H. at 384. As discussed below, that scheme confirms what the plain text of RSA 282-A:127, I, already makes clear: the statute does not direct the Department to secure PUA.

2. The three federal laws that RSA 282-A:127, I, refers to provide system-sustaining advantages, not temporary individual unemployment benefits like PUA.

Congress designed the Social Security Act, FUTA, and the Wagner-Peyser Act to induce the states to adopt and maintain two separate social welfare systems: (1) employer-funded unemployment compensation systems; and (2) labor exchange services systems. To achieve these

purposes, Congress offers some advantages to the states that maintain such systems in accordance with federal benchmarks.

THE SOCIAL SECURITY ACT & FUTA

The Social Security Act and FUTA are the backbone of a federal scheme Congress designed in the 1930s in response to the widespread rejection of unemployment compensation legislation amongst the states. *See Charles C. Steward Mach. Co. v. Davis* ("*Steward Mach.*"), 301 U.S. 548, 587–588 (1937) (recounting the early failures of unemployment compensation legislation in the states); *accord* Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L. J. 21, 25–28 (1945) (describing how "hope for the establishment of unemployment in this country through unaided state action seemed remote" by the end of 1933).

The states' early reticence to enact unemployment compensation laws "was not owing, for the most part, to the lack of sympathetic interest" though. *Steward Mach.*, 301 U.S. at 588. Rather, it was rooted in concerns about the economic burdens such a law would place on employers and the downstream effect those burdens would have on the overall economic health of the state:

> Many [states] held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national program was paralyzed by fear. The other was that in so far as there was a failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the government of the nation.

Id.; *accord* David N. Price, *Unemployment Insurance Then and Now, 1935–85*, SOCIAL SECURITY BULLETIN, Vol. 48, No. 10 (Oct. 1985) (explaining how "each State hesitated to impose on employers the higher

costs entailed in establishing an unemployment insurance program" because "[i]t was believed that such extra costs might drive employers out of the State or make it less likely for new businesses to enter that State"); *Development of Unemployment Compensation*, *supra* at 28 (describing how "a far more important obstacle to attaining unemployment insurance through state action was the argument that any state which enacted an unemployment compensation law thereby handicapped its employers in interstate markets by burdening them with costs their competitors in other states were not required to meet").

Faced with near total inaction by the states on a matter of growing national concern, Congress created a federal statutory scheme designed to induce the states to adopt unemployment compensation laws. This scheme was originally set forth in the Social Security Act of 1935. *See* Social Security Act, Pub. L. No. 74-271, tit. III [Grants to States for Unemployment Compensation Administration], tit. IX [Tax on Employers of Eight or More] (Aug. 1, 1935).

The scheme offered two advantages to any state that enacted an unemployment compensation system meeting certain federal benchmarks. First, the federal government would pay the state for the substantial cost of administering its unemployment compensation system, thus relieving the state and its taxpayers from a significant financial burden. *See id*. §§ 301–303. Second, employers in the state would be permitted to apply any amount they contributed to the state's system as a credit against up to 90%

of a new federal excise tax imposed on employer payrolls.[2] *See id*. §§ 901–902.

With Congress making these two advantages available, it took less than two years before every state in the nation had adopted a federally certified unemployment compensation system. *See Development of Unemployment Compensation*, *supra* at 34 ("So it came to pass that in less than two years after the [Social Security] Act was enacted unemployment compensation was securely established everywhere in the United States, and contributions for unemployment compensation purposes were being collected in all states. In accordance with their terms, benefits under these laws were not payable until two years after collection began, but by January 1939 unemployment compensation benefits were being paid in all states.").

The same federal scheme is still in place today, albeit with a slight rearrangement in the United States Code as the employer tax credit advantage has been moved from the Social Security Act into FUTA. *See* 42 U.S.C. ch. 7, subch. III, §§ 501–506 [Grants to States for Unemployment Compensation Administration]; 26 U.S.C. § 3302 [Credits against tax]; *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 (1981) (explaining how "FUTA appeared originally as Title IX of the Social Security Act of 1935").

As already mentioned, a state's unemployment compensation system must meet federal benchmarks for the state and its citizens to receive the

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[2] This tax credit mechanism alleviated the concern that by adopting an unemployment compensation law funded by employer contributions, a state would disadvantage its businesses against their competitors in states without such a law. *See* U.S. Social Security Administration, Pub. No. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2012 at 64 (released Feb. 2013) (explaining how the tax offset incentive "ensured that employers in states without an unemployment insurance law would not have an advantage competing with similar businesses in states with such a law because they would still be subject to the federal payroll tax, and their employees would not be eligible for benefits").

advantages that the Social Security Act and FUTA make available to them. *See* 42 U.S.C. § 503 [State laws] (setting forth benchmarks state must meet to receive payment for the substantial costs of administering its unemployment compensation system); 26 U.S.C. § 3304 [Approval of State laws] (setting forth benchmarks that the state's system must meet for employer tax credit to apply). Thus, harsh economic consequences stand to follow from a state's failure to meet those benchmarks, as (a) the state could be left to pay its administrative costs itself, and (b) employers in the state could face a substantially higher federal tax burden.

These potential consequences provide the states a strong financial incentive to meet those federal benchmarks, many of which require the states' administrating agencies to remain adaptable and cooperative with federal regulators. *See*, *e.g.*, 42 U.S.C. § 503(a)(1) (requiring "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment unemployment compensation when due"); 42 U.S.C. § 503(a)(6) (requiring states to "mak[e] such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports"); 26 U.S.C. § 3304(a)(9)(B) (mandating that states "shall participate in any arrangement for the payment of compensation on the basis of combining an individual's wages and employment covered under the State law with his wages and employment covered under the unemployment compensation law of other States which are approved by the Secretary of Labor in consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations").

It is in this context that the Legislature directed the Department to adopt rules, methods, and standards as necessary for securing the

advantages that the Social Security Act and FUTA make available. In this context, it is clear that the Legislature intended to direct the Department to take actions needed to meet the federal benchmarks that make it financially possible for the State to maintain its traditional employer-funded unemployment compensation system.[3]

THE WAGNER-PEYSER ACT

The Wagner-Peyser Act sets forth a federal scheme designed to "promote the establishment and maintenance of a national system of public employment service offices[.]" Wagner-Peyser Act, Pub. L. No. 73-30, § 1 (June 6, 1933) (codified, as amended, at 29 U.S.C. § 49).

In general, the scheme works by providing funding to the states for investment in the development of labor exchange services (including, for example, "job search and placement services" for job seekers, and "recruitment services and special technical services" for employers) and related information. *See* 29 U.S.C. § 49f [Percentage disposition of allotted funds]; *see also* 29 U.S.C. § 49c-1 [Transfer to States of property used by United States Employment Service].

Just like the Social Security Act and FUTA, states must meet a variety of federal benchmarks to receive the funding available under the Wagner-Peyser Act. *See* 29 U.S.C. §§ 49c [Acceptance by States; creation of State agencies], 49g [State plans]. In this context, it is thus similarly clear that the Legislature has directed the Department to do no more than what is administratively necessary to meet the federal benchmarks that the

[3] RSA 282-A:173, II, which states that the collection of employer contributions and payment of unemployment compensations benefits "shall be suspended" if the federal tax credit advantage is ever held unconstitutional or repealed, illustrates how critical it is for the State to meet the benchmarks necessary for securing that advantage. Without that advantage in place, the Legislature has effectively instructed that the State's unemployment compensation will cease.

State must meet to secure the funding that supports its labor exchange services system.

* * * * * * *

The foregoing context reveals that PUA is wholly unrelated to the system-sustaining advantages that the Social Security Act, FUTA, and the Wagner-Peyser Act make available to the State and its citizens. These three federal laws provide advantages the State needs to maintain its employer-funded unemployment compensation and labor exchange services systems. PUA, on the other hand, was a temporary federal benefit for individuals, and the State did not need to administer that federal benefit to continue receiving the federal advantages that sustain those two systems. As such, by not administering PUA, the State did not risk losing any of the critical system advantages that RSA 282-A:127, I, is intended to secure for the State and its citizens.

It is in this overall statutory context that the Legislature's directive to the Department must be interpreted, *see Petition of Carrier*, 165 N.H. at 721; *Forsberg*, 160 N.H. at 266, and in this context, there is no reasonable basis to believe that PUA is an advantage "available under the provisions of the Social Security Act." The meaning of RSA 282-A:127, I, is thus unambiguous: it does not direct the Department to do anything with respect to PUA. The trial court so ruled, and its decision should be affirmed.

B. Plaintiffs' interpretation of RSA 282-A:127, I, lacks merit.

In asking the Court to vacate the trial court's ruling, Plaintiffs play a game of blind man's bluff by ignoring statutory context in favor of a heavy dose of Webster's dictionary. Their argument thus quickly falls apart when placed under even slight scrutiny.

According to Plaintiffs, PUA was "available under the provisions of the Social Security Act" because (a) PUA funding flowed through the

Unemployment Trust Fund on its way from the General Fund to the individual beneficiary, and (b) the Unemployment Trust Fund is a product of the Social Security Act. PB 13–19. This argument lacks merit for many reasons.

For starters, Plaintiffs ignore what the Unemployment Trust Fund is and the wholly passive role it plays under the CARES Act's PUA provision. Congress created the Unemployment Trust Fund to hold moneys raised under the traditional federal-state unemployment compensation system for investment as a single fund when that money is not in use. *See* 42 U.S.C. § 1104(a) [Establishment]; 42 U.S.C. § 1104(b) [Investment]; *see also* 76 Am. Jur. 2d *Unemployment Compensation* § 7 *Funding provisions for unemployment compensation, generally* (Westlaw, database updated Jan. 2022). Each state has a separate book account in the Unemployment Trust Fund into which the state must deposit moneys from its own unemployment fund and from which it can make withdrawals. *See* 42 U.S.C. § 1104(f) [Payment to State agencies and Railroad Retirement Board]; *see also* 42 U.S.C. § 503(a)(4) (requiring state unemployment compensation laws to provide for "[t]he payment of all money received in the unemployment fund of such State . . . immediately upon such receipt, to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 1104 of this title").

Because states can withdraw funds directly from their book accounts, Congress uses those accounts as the mechanism for transferring federal funding available under the Federal-State Extended Unemployment Compensation Act of 1970 from the Unemployment Trust Fund to the states. *See* 42 U.S.C. § 1105(c) [Transfers to State Accounts]. This established accounting mechanism gave Congress a way to efficiently move PUA from the General Fund to the administrating states as well, and as the trial court observed, Congress simply took advantage of that existing

accounting infrastructure instead of starting from scratch in trying to quickly respond to the then-emerging coronavirus pandemic:

> 'Congress chose to use the existing accounting system, that was already in place to direct federal funds to the States for use in the area of unemployment, to efficiently distribute funds for the CARES Act benefits.' *Holcomb v. T.L.*, No. 21A-PL-1268, 2021 WL 3627270, at *5 (Ind. Ct. App. Aug. 17, 2021). However, simply because PUA 'benefits are distributed by utilizing the same accounting systems used to fund the administrative costs of the state unemployment insurance programs' under the Social Security Act, *id*. at *6, it does not follow that the PUA benefits themselves are 'advantages available under the Social Security Act,' RSA 282-A:127, I. Rather . . . 'the CARES Act benefits including PUA are established and conferred by entirely different statutes than' the Social Security Act. *Holcomb*, 2020 WL 3627270, at *6. As succinctly put by one court in interpreting a South Carolina statute nearly identical to RSA 282-A:127, I: '. . . The benefits provided under the CARES Act are new benefits, never previously available to unemployed workers, and are provided by legislation separate and apart from the Social Security Act. Although the federal government chose to use the funding mechanisms available through the Social Security Administration, that does not mean these new benefits fall under the Social Security Act. It simply shows Congress used an existing mechanism to put PUA . . . into place quickly. . . .' *S.B. v. McMaster*, No. 2021-CP-40-03774, 2021 WL 3699098, at *3–4 (S.C. Com. Pl. Aug. 13, 2021).

PB 37 (internal brackets omitted).

In addition to not acknowledging this context to the Court, Plaintiffs also repeatedly mischaracterize the Social Security Act as actively funding PUA. In one place, they state PUA funds "come from" the Social Security Act, PB 14; in another, they assert PUA was "funded by" the Social Security Act, PB 15. Whether these statements are products of misunderstanding, analytical imprecision, or something else, they are

wrong.[4] The CARES Act funded PUA with moneys in the Treasury's General Fund. *See* 15 U.S.C. § 9021(g)(1)(B) (directing the Treasury to transfer the sums payable "from the general fund of the Treasury," and "appropriat[ing] from the general fund of the Treasury . . . the sums referred to in the preceding sentence"). The Social Security Act says absolutely nothing about PUA.

Plaintiffs' choice to ignore statutory language and context in favor of inaccurate statements reflects a results-oriented approach to statutory interpretation. Although Plaintiffs try to camouflage that approach by pulling out the dictionary, the manner in which they use it underscores why this Court cautions against "mak[ing] a fortress out of the dictionary," *Clare*, 160 N.H. at 384, and "construing certain words in isolation, instead of in context," *Doe v. Comm'r of New Hampshire Department of Health & Hum Servs.*, 174 N.H. 239, __ (2021) (slip opinion at 11).

Plaintiffs start by picking out their preferred Webster's definition of the word "under" and arguing that, so defined in isolation, PUA is "under" the Social Security Act. *See* PB 13–17. It is in making this argument that Plaintiffs mischaracterize PUA as "com[ing] from" and being "funded by" the Social Security Act. PB 14–15.

Plaintiffs then turn to the word "provisions" and repeat the same process. *See* PB 17–19. In doing so, they again ignore context and accuracy. Specifically, although the word "provisions" refers to "provisions of the Social Security Act" and therefore plainly means "[a] clause in a statute" in this context, *see provision*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Westlaw), Plaintiffs take the liberty of picking a definition to fit their argument and define the term to mean "the

[4] Likewise, Plaintiffs assert in Footnote 2 of their brief that the Legislature "intentionally added" the language at issue "to the statute through amendments in 1981." PB 11. It was actually added in 1947. *See* Laws 1947, 59:20.

act or process of providing," PB 17. From this acontextual definition, Plaintiffs proclaim that PUA is "clearly through and within the structure of the Social Security Act." PB 19. The logic of this argument is hard to follow at best, but Plaintiffs' conclusion regarding the meaning of "provisions" seems no different from their conclusion regarding the meaning of "under." Whatever Plaintiffs mean though, their argument is a perfect illustration of why mature statutory interpretation does not simply involve stringing together isolated dictionary definitions of individual words.

Plaintiffs finally turn to the phrase "all advantages available" and define each of those three words in the abstract as well. PB 19–20. Based on those isolated definitions, Plaintiffs state that PUA is an "advantage" within the isolated meaning of that word, and that PUA is "available," within that word's isolated meaning. *Id*.

In taking their word-by-word approach, Plaintiffs have avoided confronting the ordinary meaning of the phrase "available under" by simply breaking those words up and analyzing them separately, pages apart in their brief. But they have to avoid that phrase to argue for the result they want because statutory references to a benefit being "available under" under a law ordinarily mean that the law referred to is the law that created the benefit—*i.e.*, makes that benefit available by defining what it is and who qualifies for it. *See*, *e.g.*, RSA 31:94-cc (referring to "any exemption or tax credit *available under* RSA 72:28, 29-a, 30, 31, 32, 35, 36-a, 37, 37-a, 39-b, 62, 66, and 70," each of which creates an exemption or credit). As already discussed, the CARES Act created PUA, *see* 15 U.S.C. § 9021 (authorizing funding for PUA from the General Fund, and defining the individual eligibility qualifications), not the Social Security Act. Thus, even entirely divorced from its statute-specific context, PUA was not

"available under" any provision of the Social Security Act within the ordinary meaning of that phrase in the law.

If the Legislature had wanted the same thing Plaintiffs do, it could have said so. But instead of either broadly directing the Department to secure any federal benefit related to unemployment compensation or amending RSA 282-A:127, I, to include the CARES Act, the Legislature chose to limit its directive to three federal laws that provide system-sustaining advantages to the State and its citizens, not temporary individual benefits like PUA. *Cf. I.D. v. Parson*, Mo. Cir. Ct. No. 21AC-CC00309, *order denying plaintiffs' request for preliminary injunction and granting defendants' motion to dismiss in a substantially similar case*, at pp. 2–3 (Aug. 31, 2021) (provided at SA 122) ("Plaintiffs believe that a legislature from seventy years ago intended to confer a civil remedy on a class that only came into existence in the last year—and will only be around until next week—for benefits wholly unrelated to the law that legislature enacted. The Court is unpersuaded. . . . To be sure, [the state law closely analogous to RSA 282-A:127] commands that the State "cooperate" with the federal government. But that is in the context of administering the traditional unemployment program under the existing infrastructure, not the temporary, enhanced benefits under the CARES Act."); *Cuccaro v. Desantis*, Fl. Cir. Ct. No. 2021 CA 1413, *order denying temporary injunction in a substantially similar case*, at p. 11 ¶ 35 (Aug. 30, 2021) (provided at SA 127) ("[I]f the Florida legislature wanted the state to participate in every federal unemployment program offered it could have accomplished that result in one clear[ ] sentence. . . . When the Florida legislature met during its 2021 session, it did not amend chapter 443 to mandate Florida's participation in CARES or any other voluntary federal unemployment programs. Nor did it call a special session to amend chapter

443 after the Defendants gave notice that the State would opt-out of FPUC. Nor has it called a special session to address the issue at any time since.").

Plaintiffs' argument also runs headlong into the fact that RSA 282-A:127, I, does not authorize the Department to agree on behalf of the State to administer PUA for the federal government. *See* 15 U.S.C. § 9021(f) [Agreement with States]. When the Legislature has intended to authorize the Department to enter similar types of agreements with DOL, it has expressly said so. *See* RSA 282-A:178 [Agreements Authorized] (authorizing the Department to enter agreements with DOL to carry out the provisions of Chapter 2 of Title of the Trade Act of 1973 and the Trade Adjustment Assistance Reform Act of 2002). But RSA 282-A:127, I, merely authorizes and directs the Department to secure advantages "through the adoption of appropriate rules" or "the adoption of administrative methods and standards." *See* RSA 282-A:127, I. This is another feature of RSA 282-A:127, I, that Plaintiffs do not acknowledge.

But this still is not where their oversights end, as evidenced by the irony of their argument about the absurdity of interpreting RSA 282-A:127, I, in any way other than they do. *See* PB 24–28. According to Plaintiffs, if PUA "is not within the scope of RSA 282-A:127, I," then the Department "did not have authority to have secured it in the first place, for the limited time that it did." PB 25. Standing on this premise, Plaintiffs warn that "thousands of Granite Staters" could be "at risk of having to pay back the benefits NHES granted them, through no fault of their own" if the Court does not agree with what they say RSA 282-A:127, I, means. PB 27.

As Plaintiffs have ignored since day one of this case though, *see* SA 5, the Department did not "secure" PUA. Governor Sununu, acting under executive emergency powers, entered the State into its agreement with DOL to administer PUA on behalf of the federal government. SA 4, 61–71. In accordance with that duly executed agreement, the Department

administered PUA on behalf of the federal government until Governor Sununu terminated the agreement effective in June 2021. In this regard, Plaintiffs' argument rests on an entirely incorrect premise that they have been aware of since this case began.[5]

Plaintiffs' interpretation of RSA 282-A:127, I, lacks merit for all of these reasons.

[5] And continuing this trend, Plaintiffs likewise ignore: (1) that the Governor secures Disaster Unemployment Assistance by requesting a disaster declaration from the President, *see* 42 U.S.C. § 5191(a) ("All requests for a declaration by the President that an emergency exists shall be made by the Governor. . . . The Governor . . . will define the type and extent of Federal aid required."); and (2) that just like with PUA, the Department merely administered federal benefits under the American Recovery and Investment Act of 2009 pursuant to an agreement otherwise entered into by the State, *see* Pub. L. 111-5, Title II, § 2002(a) [Federal-State Agreements] (Feb. 17, 2009).

CONCLUSION

For the foregoing reasons, the trial court correctly ruled that PUA is not an advantage "available under the provisions of the Social Security Act," within the meaning of RSA 282-A:127, I. This Court should affirm that ruling.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

NEW HAMPSHIRE DEPARMTNET
OF EMPLOYMENT SECURITY

and

GEORGE M. COPADIS, as
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February 14, 2022

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CERTIFICATE OF COMPLIANCE

I, Nathan W. Kenison-Marvin, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6998 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

February 14, 2022 /s/ *Nathan W. Kenison-Marvin*
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CERTIFICATE OF SERVICE

I, Nathan W. Kenison-Marvin, hereby certify that a copy of the State's brief shall be served on Michael Perez, Esquire, counsel for Plaintiffs, through the New Hampshire Supreme Court's electronic-filing system.

February 14, 2022 /s/ *Nathan W. Kenison-Marvin*
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