

**THE STATE OF NEW HAMPSHIRE SUPREME COURT**

**NO. 2021-0478**

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***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 from Trial Court Decision on the Merits  
Pursuant to New Hampshire Supreme Court Rule 7**

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**BRIEF OF CASSANDRA CARON, BRANDON DEANE, ALISON  
PETROWSKI, AND AARON SHELTON,**

**APPELLANTS**

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Respectfully submitted,

By Appellants' Attorney,

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### **Question Presented**

Whether the plain language of RSA 282-A:127, I requires New Hampshire Employment Security to secure the federal unemployment insurance benefits available under the provisions of the Social Security Act, as amended, including Pandemic Unemployment Assistance. *See* Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (“Plaintiffs’ Motion for Injunctive Relief”), *Caron, et al. v. NHES*, NH Sup. Ct., Hillsborough S., No. 226-2021-CV-00423 (August 27, 2021)(Appended to this Brief as Addendum).

### **Standard of Review**

Statutory interpretation is a question of law that this Court reviews de novo. *Appeal of Niadni, Inc.*, 166 N.H. 256, 260 (2014) (emphasis added) (quotation omitted); *see also Petition of Carrier*, 165 N.H. 719, 721 (2013).

### **Statement of the Case**

Appellants were recipients of Pandemic Unemployment Assistance, an unemployment insurance program intended to assist struggling workers during the COVID-19 pandemic who would not otherwise qualify for typical unemployment insurance. *See* 15 U.S.C. § 9021(a)(3). In the trial court, Appellants sought reinstatement of the Pandemic Unemployment Assistance program, after New Hampshire Employment Security and its Commissioner (collectively referred to as “NHES”) abandoned the program

on June 19, 2021, rather than let it expire on September 6, 2021. *See* Plaintiffs’ Motion Injunctive Relief (Appendix at 0347 - 0453).

Appellants are workers and business owners hit hard by the economic impact of the pandemic, including the government mandated shutdown of nonessential work. *Id.* at ¶¶ 1-8. Pandemic Unemployment Assistance provided bridge income while they looked for new jobs and rebuilt their businesses. *Id.* Without it, Appellants are exhausting meager savings and selling possessions to make ends meet. *Id.* So they sought relief from the trial court on the basis of NHES’ statutory duties:

In the administration of this chapter, the commissioner of the department of employment security shall cooperate to the fullest extent consistent with the provisions of this chapter, with the United States Department of Labor, and is authorized and directed to take such action, through the adoption of appropriate rules, the adoption of administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act, under the provisions of section 3302 of the Federal Unemployment Tax Act and under the provisions of the Wagner-Peyser Act approved June 6, 1933, as amended.

RSA 282-A:127, I.

The trial court adopted the State’s construction of RSA 282-A:127, I, that Pandemic Unemployment Assistance is not “available under” the Social Security Act. *See* Order on Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (“Trial Court Order”), Addendum at 10. The trial court found, as a matter of fact, that Plaintiffs Cassandra Caron, Brandon Deane, Alison Petrowski, and Aaron Shelton, “...despite being eligible for [Pandemic Unemployment Assistance]

benefits under the terms of the CARES Act ... have not received them since June 2021.” Trial Court Order at 3.

It also found that New Hampshire does not pay anything for Pandemic Unemployment Assistance. Trial Court Order at 2 (“The States incurred no financial burden for agreeing to distribute PUA benefits; rather, the federal government funded the benefits themselves and paid the States for any associated administrative costs.”). Indeed, the entirety of the Pandemic Unemployment Assistance program, including all administrative costs, are borne by the federal government, and the federal government is ready, willing, and able to turn Pandemic Unemployment Assistance back on, including retroactive benefits. *See* 15 U.S.C. § 9021(f)(2); *see also* U.S. Department of Labor, Unemployment Insurance Program Letter, No. 14-21 (“UI Program Letter”), dated July 12, 2021. Appendix 0454 – 0462.

The trial court, however, erred in its statutory construction, incorrectly concluding that Pandemic Unemployment Assistance is not within the scope of the Legislature’s mandate in RSA 282-A:127, I. Congress enacted Pandemic Unemployment Assistance in the CARES Act, which was signed into law on March 27, 2020. *See* Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, Title II, 134 Stat. 313 (2020), Appendix 0013 - 0347. The CARES Act provided for the flow of Pandemic Unemployment Assistance funds through the Unemployment Trust Fund created by the Social Security Act. *Id.* at Section 2101(g). In using the Unemployment Trust Fund, the CARES Act ensured Pandemic Unemployment Assistance funds would be handled in accordance with the provisions of the Social Security Act. *See* 42 U.S.C. § 1104; 42 U.S.C. § 1105; 42 U.S.C. § 1101; and 42 USC § 503.

Appellants' plain language interpretation of RSA 282-A:127, I would require the state to secure Pandemic Unemployment Assistance funds and to accept applications for benefits for weeks between June 19, 2021 and September 6, 2021. NHES would then have to make eligibility determinations. Appellants do not ask this Court or the trial court to grant benefits or otherwise make eligibility determinations.

### **Summary of Argument**

The plain and ordinary meaning of the words and phrases in RSA 282-A:127, I require NHES to secure all available Pandemic Unemployment Assistance for eligible New Hampshire citizens. The legislature has "directed" NHES to, on behalf of New Hampshire, take full advantage of the federally created and funded unemployment insurance programs. RSA 282-A:127, I. NHES shirked its statutory duty when it cut off Pandemic Unemployment Assistance before the program's completion.

The plain language of RSA 282-A:127, I establishes mandatory duties for NHES, the scope of which include securing Pandemic Unemployment Assistance. NHES is "authorized and directed to take action...to secure...all advantages available under the provisions of the Social Security Act...as amended." RSA 282-A:127, I (emphasis added). Pandemic Unemployment Assistance is among "all advantages available under the provisions of the Social Security Act...as amended." *See Id.* NHES is required to take such action as may be necessary to secure Pandemic Unemployment Assistance for eligible Granite Staters.

NHES misconstrued its duty under RSA 282-A:127, I based on inaccurate comparisons to statutes in Indiana and South Carolina, which



contain materially different language. *See* Ind. Code § 22-4-37-1; SC Code § 41-29-230(1). NHES’s erroneous construction of RSA 282-A:127, I would, furthermore, lead to absurd results that undermine the purpose of RSA 282-A:127, I and the larger statutory scheme. If Pandemic Unemployment Assistance were not within the scope of RSA 282-A:127, I, NHES would not have the authority to have secured it in the first place. *See* RSA 282-A:127, I (“authoriz[ing] and direct[ing]” NHES). The purpose of RSA 282-A:127, I and the Unemployment Insurance system is “to prevent the spread of unemployment and to lighten the burden which now so often falls with crushing force upon the unemployed worker and his family.” *Appeal of Gallant*, 125 N.H. 832, 836 (1984) (quotation omitted). NHES’s interpretation of the statute would have the opposite result, to prevent NHES from accepting any emergency unemployment assistance in the first place and potentially subject recipients to collection of overpayments through no fault of their own.

### **Argument**

#### **I. The Plain Language of RSA 282-A:127, I Requires NHES to Secure All Pandemic Unemployment Assistance for New Hampshire Citizens.**

The plain language of RSA 282-A:127, I is, in pertinent part:

In the administration of this chapter, the commissioner of the department of employment security shall cooperate to the fullest extent consistent with the provisions of this chapter, with the United States Department of Labor, and is authorized and directed to take such action, through the adoption of

appropriate rules, the adoption of administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act, under the provisions of section 3302 of the Federal Unemployment Tax Act and under the provisions of the Wagner-Peyser Act approved June 6, 1933, as amended...

(Emphasis added). “In matters of statutory interpretation, [the Court] [is] the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole.” *Carrier*, 165 N.H. at 719. The Court “first look[s] to the language of the statute itself, and, if possible, construe[s] the language according to its plain and ordinary meaning. *Id.* In matters of statutory construction, this Court examines the common definition of key terms. *State v. Flodin*, 159 N.H. 358, 363 (2012); *see also State v. Kelley*, 158 N.H. 481, 483 (2006)( consulting dictionary when considering plain meaning of statutory terms).

A. The Legislature Mandated Action by NHES in RSA 282-A:127, I

When the Legislature “directed” NHES in RSA 282-A:127, I, it gave mandatory instructions, more than “authoriz[ation].” “All the words of a statute must be given effect.” *Merrill v. Great Bay Disposal Serv.*, 125 N.H. 540, 543 (1984). “[T]he legislature is presumed not to have used superfluous or redundant words.” *Id.* The Legislature “authorized and directed” NHES to “...take such action...to secure” benefits in RSA 282-A:127, I. Having already “authorized” NHES to take such action, “direct[ing]” it to do so was a mandate from the Legislature.

In this context, the word “authorized” is defined as “having authority : marked by authority : recognized as having authority” or “sanctioned by authority”. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (“Webster’s Third”), def. 1 & 2, 147 (unabridged ed. 1993).<sup>1</sup> The Legislature included “and directed” following the word “authorized.” So the word “directed” must be construed to have a different and additional meaning to the word “authorized.” *Merrill*, 125 N.H. at 542. A definition of the word “directed” that is different from the definition of the word “authorized” would be: “subject to the regulation by a guiding and supervising agency”. Webster’s Third, def. 2, 640. Under the plain language of RSA 282-A:127, I, NHES is subject to the Legislature’s direction “to take such action...to secure to this state and its citizens all advantages available under the provisions of the Social Security Act...as amended.” RSA 282-A:127, I. If NHES was “authorized” to secure Pandemic Unemployment Assistance, by the principles of statutory construction, NHES was also “directed” to secure them.<sup>2</sup>

The definition of “action” at the end of the phrase “authorized and directed to take such action” reinforces the mandatory nature of the

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<sup>1</sup> This Court has long used WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY as the source for dictionary definitions for statutory interpretation. *See, e.g., State v. Flodin*, 159 N.H. 358, (2012).

<sup>2</sup> The Legislature intentionally added “authorized and directed to take such action...as may be necessary to secure...all advantages available...” to the statute through amendments in 1981. N.H. Laws 1981, 408:3, at 345. Prior, the statute only mandated cooperation with the federal government, particularly with regard to reporting and expenditures. *See* N.H. Laws 1937, 178:1, at 391; N.H. Laws 1939, 138:21, at 150; N.H. Laws 1947, 59:20.

legislature's direction. "Action" means "the process of doing : exertion of energy : performance : manner of doing" and "initiative : enterprise." Webster's Third, def. 3 & 5c, 21. In the phrase "authorized and directed to take such action," the Legislature not only delegates authority to NHES. It regulates the conduct of NHES, requiring it to exert energy, initiative, and enterprise "to secure to this state and its citizens all advantages available under the provisions of the Social Security Act...as amended." See RSA 282-A:127, I.

The plain language of the phrase "authorized and directed to take such action" must also be read together with the definition of the word "secure" in RSA 282-A:127, I, which means "to put beyond hazard of losing or of not receiving : GUARANTEE" or "to come into secure possession of; especially to acquire as the result of effort : PROCURE". Webster's Third, def. 3b & 6a, 2053.

Had the Legislature chosen to just grant *the discretion* to secure federal unemployment insurance it would have only used the word "authorized" in RSA 282-A:127, I. But it used the mandatory word "directed." *Id.* Together with the order to "take such action" to "secure," NHES is required to secure "all advantages available under the provisions of the Social Security Act...as amended."<sup>3</sup> RSA 282-A:127, I.

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<sup>3</sup> Moreover, courts traditionally construe statutes as mandatory, not directory or discretionary, unless it clearly appears otherwise. See 1A SUTHERLAND STATUTORY CONSTRUCTION, 25:4 (7th ed. 2015).<sup>3</sup> There is nothing in RSA 282-A:127, I that clearly undermines the mandatory nature and operation of the plain language of the phrase "authorized and directed to take such action".

B. Pandemic Unemployment Assistance is Within the Scope of the Legislature’s Mandate to Secure “All Advantages Available Under the Provisions of the Social Security Act.”

The Legislature’s mandate in RSA 282-A:127, I includes a direction to NHES to “take such action as may be necessary to secure all advantages available under the provisions of the Social Security Act...as amended.”

RSA 282-A:127, I (emphasis added). Pandemic Unemployment Assistance funds are, by statute, available under the provisions of the Social Security Act. *See* 15 U.S.C. § 9021(g); 42 U.S.C. § 1104; 42 U.S.C. § 1105. Based on the meaning of the plain language – “available under the provisions of the Social Security Act...as amended” – Pandemic Unemployment Assistance is within the scope of the Legislature’s mandate for NHES in RSA 282-A:127, I. NHES’s reading of the statute glosses over the specific word choices of the Legislature and what they mean as a whole.

*1) “Under,” as used in RSA 282-A:127, I to refer to the Social Security Act, includes Pandemic Unemployment Assistance, which is transmitted through and according to the provisions of the Social Security Act.*

The following definitions of “under” could apply when referring to provisions of a law: “within the grouping or designation of” or “required by : in accordance with : bound by.” *See* Webster’s Third, def. 2 under, 2487 (unabridged ed. 1993). Pandemic Unemployment Assistance is available “under” the provisions of the Social Security Act in that it is within the grouping or designation of, processed in accordance with, and bound by the Social Security Act. *See* 15 U.S.C. § 9021(g); 42 U.S.C. § 1104; 42 U.S.C.

§ 1105; 42 USC § 503; USDOL Unemployment Insurance Program Letter (UIPL) 16-20 (Change 6; Sept. 3, 2021), ¶ 7 Appendix 0555- 0598.

Pandemic Unemployment Assistance is “within the grouping or designation of” the Social Security Act in that the Pandemic Unemployment Assistance statute incorporates provisions of the Social Security Act. 15 U.S.C. § 9021(g) (incorporating 42 U.S.C. §§ 1101, 1104, and 1005). Pandemic Unemployment Assistance funds, furthermore, come from and are processed through the provisions of the Social Security Act, specifically the Unemployment Trust Fund. *See* 15 U.S.C. § 9021(g); 42 U.S.C. § 1104; 42 U.S.C. § 1105. The CARES Act also amended the Social Security Act to ensure that workers could access assistance remotely during the pandemic, including Pandemic Unemployment Assistance. CARES Act, Section 3603 Pub. L. 116-136, 134 Stat. 410 (2020); *see* 42 U.S.C. § 1103(h)(2)(B).<sup>4</sup> Had the CARES Act provided food assistance instead of Pandemic Unemployment Assistance, it would not be “within the grouping or designation of” the provisions of the Social Security Act but those of The Food Stamp Act of 1964 (7 U.S.C. Chapter 51). Having referenced, incorporated, and relied on amendments to the provisions of the Social Security Act, Pandemic Unemployment Assistance is within that grouping or designation.

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<sup>4</sup> Viewed broadly, the federal and state unemployment laws are “a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other.” *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 526 (1937).

Pandemic Unemployment Assistance is also processed *according to* and is *bound by* the Social Security Act. *See* 15 U.S.C. § 9021(g) (incorporating the Social Security Act by reference to provide for funds from the Unemployment Trust Fund and the state’s extended unemployment compensation account); 42 U.S.C. § 1104 (establishing in the Social Security Act the “Unemployment Trust Fund”); 42 U.S.C. § 1105 (establishing as part of the Social Security Act each state’s “extended unemployment compensation account”); 42 U.S.C. § 1101 (establishing in the Social Security Act each state’s employment security administration account” from which administrative costs for Pandemic Unemployment Assistance are paid); 42 USC § 503 (providing no funds be paid to any state’s account unless the U.S. Secretary’s certifies the state’s laws as compliant); *see also* USDOL Unemployment Insurance Program Letter (UIPL) 16-20 (Change 6; Sept. 3, 2021), ¶ 7 (Appendix 0555- 0598). Pandemic Unemployment Assistance is funded through the federal Unemployment Trust Fund, as are normal unemployment insurance benefits.<sup>5</sup> 15 U.S.C. § 9021(g). The funds for Pandemic Unemployment Assistance are transferred from the extended unemployment account within the Unemployment Trust Fund to each state’s book account. 15 U.S.C. § 9021 (g)(1)(A) (incorporating 42 U.S.C. §§ 1101(a), 1104(a), and 1105(a)). The benefits, including administration costs, are funded by 42 USC § 1104(a) and 1105(a). *See* 15 USC § 9021(g) (“Funds in the extended unemployment compensation account (as established by section 1105(a) of

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<sup>5</sup> The only difference being that the federal government pays 100% of the cost of Pandemic Unemployment Assistance and the full costs of administering these benefits. *See* 15 U.S.C. § 9021(f)(2).

title 42) of the Unemployment Trust Fund (as established by section 1104(a) of title 42) shall be used to make payments to States pursuant to subsection (f)(2)(A) [for PUA]). Pandemic Unemployment Assistance must also be administered in accordance with the “when due” and the “due process” provisions of the Social Security Act. *See* 42 USC § 503; *see also* USDOL Unemployment Insurance Program Letter (UIPL) 16-20 (Change 6; Sept. 3, 2021), ¶ 7 Appendix 0555- 0598.

While Pandemic Unemployment Assistance is not strictly “required by” the Social Security Act proper, that definition of “under” (“required by”) does not make sense considering the rest of the plain language of RSA 282-A:127, I. If “under” has the narrow definition of “required by,” the Legislature could have simply “authorized” NHES to secure all advantages “under” (“required by”) the Social Security Act. But in RSA 282-A:127, I, the Legislature also “directed” NHES to “take such action” to secure all advantages under the Social Security Act. The words “directed” and “under” cannot mean the same thing, as “[a]ll of the words of a statute must be given effect and [ ]the legislature is presumed not to have used superfluous or redundant words.” *Merrill*, 125 N.H. at 543. If “directed” is to have any meaning in RSA 282-A:127, I, then the word “under” cannot mean just mean “required by.” That would render either the word “directed” or “under” superfluous. *Cf. Merrill*, 125 N.H. at 543. The meaning of “under” in RSA 282-A:127, I must include some or allof the other plausible definitions: “within the grouping or designation of,” “in accordance with,” or “bound by.” *See* Webster’s Third, def. 2 under, 2487.

“Under” must also be construed within the context of the statute as a whole. *White v. Auger*, 171 N.H. 171 N.H. 660, 666 (2019). The phrase “all



advantages available” preceding “under” reinforces that the Legislature did not intend “under” to be construed as narrowly as it was by NHES. *See* RSA 282-A:127, I. The word “all” in the phrase “all advantages available” means “EVERY – used chiefly in the phrases *all manner of, all kind of.*” Webster’s Third, def. 4 of 1all, 54. The plain and ordinary definition of “all” includes “all manner of, all kind of.” The scope of RSA 282-A:127, I, therefore, is not limited to benefits required by the Social Security Act. Next, the word “advantage” means “benefit, profit, or gain of any kind”. Webster’s Third, def. 1advantage 2a, 30. Pandemic Unemployment Assistance fits well within the plain and ordinary definition of a “benefit, profit, or gain of any kind” to New Hampshire citizens. Finally, the word “available” means something “that is accessible or may be obtained : personally obtainable”. Webster’s Third, def. 4, 150.. The plain and ordinary meaning of the phrase “all advantages available” as well as the Legislature’s directive for NHES to proactively secure them contradicts a narrow construction of the word “under.”

*2) The “provisions” means what is provided through the Social Security Act, not just what is required by it.*

“[P]rovisions” of the Social Security Act does not limit the mandate in RSA 282-A:127, I. The definition of “provision” is “the act or process of providing”. Webster’s Third def. 2a, 1827. Pandemic Unemployment Assistance is provided to New Hampshire’s citizens under the provisions of the Social Security Act. 15 U.S.C. § 9021(g); 42 U.S.C. § 1104; 42 U.S.C. § 1105.

When the Legislature intends to refer simply to the text in a law it uses words such as “this section,” as in “available under this section.” *See e.g.* RSA 141-C:19 (requiring the commissioner of the department of health and human services to adopt rules regarding laboratory testing for early detection of communicable disease); RSA 167:64 (requiring the DHHS commissioner to use funds “available under this section” for Medicaid payments). The Legislature may also use the words “this paragraph” to refer to text. *See e.g.* RSA 186-C:18 (requiring the state board of education, through its commissioner, to distribute funds for special education “available under this paragraph”); RSA 260:14 (regulating the transfer of motor vehicle records “available under this paragraph”). The Legislature may also refer to “the subdivision” of a law. *See e.g.* RSA 237:17 (requiring the costs of the state’s turnpike system to be charged against the funds made “available under the subdivision”).

The Legislature also could have modified “provisions” by referring to “any specific provision” as it did in RSA 420-N:5, where the legislature granted the insurance commissioner some authority to apply for waivers under “any specific provision” of the Patient Protection and Affordable Care Act. RSA 420-N:5, III. “Any specific provision” is a narrow and exact reference to a particular law, as opposed to the general concept of “provisions” available under the Social Security Act.

In RSA 282-A:127, I, the Legislature did not refer to sections, subdivisions, paragraphs, or any specific requirements of the Social Security Act. It referred broadly to its all advantages available under its provisions. Pandemic Unemployment Assistance explicitly relies on the provisions of the Social Security Act. *See* 15 U.S.C. § 9021(g); 42 U.S.C. §

1104; 42 U.S.C. § 1105. Within the plain and ordinary definition of the word “provision”, “the act and the process of providing” Pandemic Unemployment Assistance is clearly through and within the structure of the Social Security Act.

*3) Securing “all advantages” means securing complete, not partial advantages.*

The Legislature requires NHES secure “all advantages available” under the provisions of the Social Security Act. RSA 282-A:127, I. “All” means “every.” Webster’s Third, def. 4 of 1all, 54. The word “advantage” means “benefit, profit, or gain *of any kind*”. Webster’s Third, def. 1advantage 2a, 30) (emphasis added). Pandemic Unemployment Assistance – temporary unemployment support for those suffering economically during the pandemic – is a “benefit, profit, or gain of any kind” to eligible New Hampshire citizens. *See* 15 U.S.C. § 9021(b) and (d) (describing the “benefit assistance” provided and the amount).

The word “available” means something “that is accessible or may be obtained : personally obtainable”. Webster’s Third, def. 4, 150. Pandemic Unemployment Assistance is accessible, i.e. available, for all weeks of unemployment through September 6, 2021. *See* 15 U.S.C. § 9021(c)(1)(A)(ii)). Thus, within the plain language of RSA 282-A:127 I, Pandemic Unemployment Assistance, through September 6, 2021, must be “accessible or may be obtained” by New Hampshire citizens.

Moreover, the Legislature created NHES to take advantage of employment programs offered by the U.S. government. *See generally* N.H. Laws 1937, ch. 178. Now, the plain language of RSA 282-A:127, I requires

NHES to affirmatively secure and make Pandemic Unemployment Assistance available to New Hampshire citizens for weeks of unemployment through September 6, 2021.

## **II. The Trial Court’s Reliance on Statutes in Indiana and South Carolina was Misplaced.**

In construing RSA 282-A:127, I the trial court relied on decisions from Indiana and South Carolina and their statutes regarding state-federal cooperation in administering unemployment insurance. *See* Trial Court Order at 7; *see also Holcomb v. T.L.*, No. 21A-PL-1268, 2021 WL 3627270 (Ind. Ct. App. Aug. 17, 2021), Appendix 599; *Brannon v. McMaster*, 864 S.E.2d 548 (S.C. 2021), Appendix at 615. The statutes from Indiana and from South Carolina, however, are materially different than RSA 282-A:127, I. The New Hampshire “legislature must be presumed to know the meaning of words, and to have used the words of a statute advisedly.” *Caswell v. BCI Geonetics, Inc.*, 121 N.H. 1048, 1050 (1981). “[T]he legislature is presumed not to have used superfluous or redundant words. *See Merrill*, 125 N.H. at 543. So, interpretation of the statutes relies once again on the plain and ordinary language used, including dictionary definitions of key terms. *See, generally, Flodin*, 159 N.H. at 363. The plain language of New Hampshire’s statute is distinct and more potent. *See* RSA 282-A:127, I; Ind. Code § 22-4-37-1; SC Code § 41-29-230(1).

A. Indiana’s Statute is Materially Different in that it is not a Mandate and has a Narrower Scope than RSA 282-A:127, I.

Indiana’s statute only declares a general purpose, instead of directing the applicable state agency to take certain action, like New Hampshire’s legislature did in RSA 282-A:127, I. Indiana Code reads, in pertinent part:

It is **declared to be the purpose** of this article to secure to the state of Indiana and to employers and employees in Indiana all of the **rights and benefits which are conferred under the provisions** of 42 U.S.C. 501 through 504, 42 U.S.C. 1101 through 1109, 26 U.S.C. 3301 through 3311, and 29 U.S.C. 49 et seq., and the amendments to those statutes.

Ind. Code § 22-4-37-1 (Emphasis added). Further, the words “rights and benefits” in Indiana’s statute are narrower than “all advantages” in New Hampshire’s RSA 282-A:127, I. Again, the word “advantage” in New Hampshire’s statute means “benefit, profit, or gain of any kind”. Webster’s Third, def. 2a of 1advantage, 30. “Advantage” in New Hampshire’s statute means not only “benefit” – used by Indiana – but also “profit, or gain of any kind.” *Id.*

Additionally, the phrase “which are conferred” in Indiana’s statute, referring to rights and benefits in the Social Security Act, is entirely absent from New Hampshire’s statute. Ind. Code § 22-4-37-1; RSA 282-A:127, I. The word “conferred” means “to give or yield”. Webster’s Third, def. 3b, 475. The phrase “which are conferred under” limits the breadth and scope of Indiana’s statute to those rights and benefits enumerated within the Social Security Act. *See* Ind. Code § 22-4-37-1; *see also Holcomb*, 2021 WL 3627270, at \*15 (construing “conferred” as synonymous with enumerated by). RSA 282-A:127, I, on the other hand, refers to “all

advantages” that are “available under” the provisions of the Social Security Act. What is available to the public under the provisions of the Social Security Act is broader than the rights and benefits “conferred” by the Social Security Act itself. The New Hampshire legislature could have modified “under the Social Security Act” with the preceding phrase “which are conferred”, but it chose not to. RSA 282-A:127, I. This Court “...will not consider what the legislature might have said or add words to a statute that the legislature did not see fit to include.” *Grand China, Inc. v. United Nat'l Ins. Co.*, 156 N.H. 429, 433 (2007).

B. South Carolina’s Statute Contains a Materially Weaker Mandate and Narrower Scope Than RSA 282-A:127, I.

The thorough mandate of RSA 282-A:127, I is also missing from South Carolina’s statute, which provides, in pertinent part:

In the administration of Chapters 27 through 41 of this title, the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act, through the promulgation of appropriate rules, regulations, administrative methods and standards, as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

SC Code § 41-29-230(1). The key differences in South Carolina’s statute are in the word “act,” used instead of “take such action,” and the lack of “as

amended.” RSA 282-A:127, I is thorough and forward looking. South Carolina’s statute is not. *Cf. Brannon*, at 548.

The words “must...act,” used by South Carolina, are limited compared to “take such action,” used in RSA 282-A:127, I. The word “act” means “to move to action”. Webster’s Third, def. 1, 21. “Act” is preliminary to or part of “action.” Whereas “action,” used by the New Hampshire legislature, is ongoing, comprehensive, and impliedly plural. The word “action” means “the process of doing : exertion of energy : performance : manner of doing.” Webster’s Third, def. 3 & 5c, 21 (unabridged ed. 1993) (emphasis added). It may be that an agency taking one step is enough to satisfy the South Carolina statute’s requirement to “act,” but it is not enough to satisfy New Hampshire’s requirement to “take such action” to secure all available advantages. Again, as a basic canon of statutory construction, “[t]he legislature must be presumed to know the meaning of words, and to have used the words of a statute advisedly.” *See Caswell*, 121 N.H. at 1050.

Moreover, New Hampshire’s statute includes the phrase “as amended” after the reference to “under Social Security Act.” RSA 282-A:127, I. South Carolina’s statute does not. SC Code § 41-29-230(1). The Legislature sought, explicitly, by virtue of the words “as amended,” to capture the ongoing advantages made available under the provisions of the Social Security Act. RSA 282-A: 127, I.<sup>6</sup> The South Carolina Supreme Court found that the CARES Act programs are not within the scope of

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<sup>6</sup> RSA 282-A:127, I also requires such action as “may be necessary,” leaving the door open for change in the future. Whereas South Carolina’s just requires the agency to act “as necessary.” SC Code § 41-29-230(1).

Section 41-29-230(1) because the benefits were “provided by legislation separate and apart from the [Social Security Act].” *Brannon*, at 548 (quotation omitted). By including the plain language “as amended” in RSA 282-A:127, I, the scope of the mandate includes “legislation separate and apart from the [Social Security Act].” *Cf. Id.* Read together with the phrase “authorized and directed to take such action,” the plain language of RSA 282-A:127 expresses the New Hampshire Legislature’s intent to secure unemployment benefits beyond those specifically established by the Social Security Act.

The mandate expressed by the Legislature in the plain language of RSA 282-A:127, I is both stronger and broader than South Carolina and Indiana’s statutes. NHES’s interpretation of RSA 282-A:127, I would negate the plain language chosen by the Legislature.

### **III. NHES’s Statutory Construction of RSA 282-A:127, I Would Lead to Absurd or Unjust Results.**

NHES’s interpretation of its duties under RSA 282-A:127, I would lead to an absurd and unjust negation of NHES’s own authority under RSA 282-A:127, I. “[This Court’s] canons of statutory construction do not permit or countenance an interpretation of a statute that would lead to [] absurd results.” *Rogers v. Rogers*, 171 N.H. 738, 748 (N.H. 2019) (citing *State v. Brawley*, 171 N.H. 333, 336-37 (2018)). “The Court construes all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” *Id.*; *see also Carrier*, 165 N.H. at 721. NHES’s construction of RSA 282-A:127, I would prevent New Hampshire from ever receiving federal relief during this pandemic, during the great



recession, and during times of disaster, let alone terminating the programs early.

RSA 282-A:127, I both “authoriz[es] and direct[s]” NHES to secure federal unemployment assistance for New Hampshire citizens. NHES disputes that Pandemic Unemployment Assistance is within the scope of its mandate. If Pandemic Unemployment Assistance is not within the scope of RSA 282-A:127, I, NHES did not have the authority to have secured it in the first place, for the limited time that it did. *See* RSA 282-A:127, I. NHES’s reasoning about the scope of RSA 282-A:127, I would require the Legislature to add the name of each new federal program or act that provides unemployment assistance funds, even if those funds pass through and are governed by the apparatus established by the Social Security Act.

This would also negate NHES’s authority to have secured extended federal unemployment insurance and modernization monies during the Great Recession through the American Recovery and Reinvestment Act (“ARRA”), which does not specifically appear in RSA 282-A:127, I. Just as the CARES Act did for Pandemic Unemployment Assistance, the American Recovery and Reinvestment Act (otherwise known as “ARRA”) (Pub. L. 111-5; Feb. 17, 2009) created special unemployment compensation benefits to address a crisis. *See* ARRA, Pub. L. 111-5, Title II §§ 2001-02, 123 Stat. 436 (2009). It also provided for the transfer of funds through provisions of the Social Security Act. *See* ARRA, Pub. L. 111-5, Title II Section 2003, 123 Stat. 439 (2009).

The Legislature would also have had to add “The Robert T. Stafford Disaster Relief and Emergency Assistance Act” to RSA 282-A:127, I for NHES to have had the authority to secure Disaster Unemployment

Assistance (DUA). *See* Disaster Relief and Emergency Assistance Act, Pub. L. 100-707, 102 Stat. 4689 (1988) (codified at 42 U.S.C. § 5121). DUA is not mentioned in RSA 282-A:127, I. Nevertheless, NHES has secured and distributed DUA after various disasters for many years. *See e.g.* “Belknap County workers have been approved for Disaster Unemployment Assistance” LACONIA DAILY SUN, Dec. 8 2005.<sup>7</sup>; “Disaster Unemployment Assistance has been approved for Carroll and Grafton Counties in New Hampshire”<sup>8</sup> “FEMA Announces Lost Wages Grant for New Hampshire,”<sup>9</sup> Ethan Dewitt, “UPDATE: N.H. expands unemployment benefits to those affected by COVID-19, effective immediately” CONCORD MONITOR, Mar. 17 2020<sup>10</sup> “Disaster Unemployment Assistance: What You Need to Know If You Become Unemployed Due to A Disaster.”<sup>11</sup> Notably, Pandemic Unemployment

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<sup>7</sup> [https://www.laconiadailysun.com/community/announcements/belknap-county-workers-have-been-approved-for-disaster-unemployment-assistance/article\\_06cb8f40-327e-58d1-9db7-4500dacfc80f.html](https://www.laconiadailysun.com/community/announcements/belknap-county-workers-have-been-approved-for-disaster-unemployment-assistance/article_06cb8f40-327e-58d1-9db7-4500dacfc80f.html) (last checked December 26, 2021)

<sup>8</sup> <https://www.nhes.nh.gov/media/press/2011/20110908.htm> (last checked December 26, 2021)

<sup>9</sup> <https://www.fema.gov/press-release/20200824/fema-anuncia-subsencion-de-salarios-perdidos-para-new-hampshire> (last checked December 26, 2021)

<sup>10</sup> <https://www.concordmonitor.com/New-Hampshire-unveils-paid-time-off-program-for-families-facing-COVID-19-33351959> (last checked December 26, 2021)

<sup>11</sup> <https://www.nhes.nh.gov/forms/documents/dua-pamphlet.pdf> (last checked December 26, 2021)

Assistance is governed by the same Department of Labor regulations as DUA, where, for example, the term “pandemic” can be substituted for “disaster” in the regulations. 15 U.S.C. § 9021(h); 20 C.F.R. Part 625.

The Legislature never formally added DUA, ARRA, or Pandemic Unemployment Assistance to RSA 282-A:127, I. To have done so was not necessary under the plain language of the statute. *See* RSA 282-A:127, I. And to require it would be contrary to the purpose of RSA 282-A:127, I, as expressed in the plain language, and the remedial purpose of Chapter, RSA 282-A more broadly. *See Appeal of Gallant*, 125 N.H. 832, 836 (1984) (“The purpose of the unemployment compensation law is to prevent the spread of unemployment and to lighten the burden which no so often falls with crushing force upon the unemployed worker and his family”) (internal quotations omitted). That absurd and unjust result must be avoided in construing the language of the statute. *See Rogers*, 171 N.H. at 748

Moreover, NHES’s construction of RSA 282-A:127, I, could put thousands of Granite Staters at risk of having to pay back the benefits NHES granted them, through no fault of their own. *See* 25 C.F.R. § 625.14(a) (requiring repayment for benefits to which an individual was not entitled “whether or not the payment was due to the individual’s fault...”); *see* 15 U.S.C. § 9021(h) (applying 25 C.F.R. § 625 to Pandemic Unemployment Benefits). NHES would become a *de facto* collection agency for the federal government, going after thousands of Granite Staters who received this assistance during the pandemic. That would be an absurd and unjust result that should be avoided. *See Appeal of Gallant*, 125 N.H. at

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836 (stating the purpose of the unemployment system to be to ease the burden on unemployed workers); *see also Rogers*, 171 N.H. at 748 (avoiding absurd and unjust results in statutory interpretation).

### **Conclusion**

The plain language of RSA 282-A:127, I requires NHES to secure the full extent of Pandemic Unemployment Assistance for New Hampshire. The Trial Court Order to the contrary was in error. Appellants respectfully request that this Court vacate the Trial Court Order and remand for further proceedings as this Court deems necessary.

Respectfully Submitted,

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Brandon Deane,

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Aaron Shelton,

**APELLANTS**

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**CERTIFICATE OF SERVICE**

I, Michael Perez, hereby certify that a copy of the foregoing brief was served upon all counsel of record via this Court’s electronic filing system, contemporaneously with this brief’s filing.

Dated: December 27, 2021

/s/Michael Perez  
Michael Perez, Esquire

**CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)**

I, Michael Perez, hereby certify that the appealed decision is in writing and is appended to this brief.

Dated: December 27, 2021

/s/Michael Perez  
Michael Perez, Esquire

**STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

I, Michael Perez, hereby certify that this brief contains a total of 6,222 words and meets the requirement of 9,500 words or less for Appellant’s Opening Brief.

Dated: December 27, 2021

/s/Michael Perez  
Michael Perez, Esquire

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS  
SOUTHERN DISTRICT

SUPERIOR COURT  
No. 2021-CV-00423

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

**ORDER ON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

The plaintiffs have brought this action against the defendants, the State of New Hampshire Department of Employment Security (“DES”), and its Commissioner, George Copadis (the “Commissioner”), seeking a writ of mandamus, declaratory relief, and injunctive relief. Contemporaneous with the filing of the complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction. (See Court Doc. 3.) The defendants object. (See Court Doc. 6.) The Court held a hearing on the plaintiffs’ motion on September 3, 2021. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Background

In response to the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (the “CARES” Act), effective March 27, 2020. Among other things, the CARES Act established several new unemployment benefit programs to aid workers affected by the pandemic. Relevant here, one of the new programs was entitled “Pandemic Unemployment Assistance” (“PUA”). PUA provided<sup>1</sup> benefits to workers who were “self-employed, [were] seeking part-time employment,

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<sup>1</sup> Eligibility for PUA benefits ended on September 6, 2021. See 15 USC § 9021(c)(1)(A)(ii).

[did] not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or [other provisions of the CARES Act].” 15 U.S.C. § 9021(a)(3)(A)(ii)(II). Although the CARES Act directed that the United States Secretary of Labor “shall” provide PUA benefits “to any covered individual,” 15 U.S.C. § 9021(b), it envisioned that the Secretary of Labor would carry out that obligation by entering into agreements with the States and then the States would administer PUA benefits to their citizens through their existing State-run unemployment insurance systems. See 15 U.S.C. § 9021(f)(1) (“The Secretary shall provide [PUA] . . . through agreements with States which, in the judgment of the Secretary, have an adequate system for administering such assistance through existing State agencies.”).<sup>2</sup> The States incurred no financial burden for agreeing to distribute PUA benefits; rather, the federal government funded the benefits themselves and paid the States for any associated administrative costs.

On March 28, 2020, Governor Sununu signed an agreement with the Department of Labor. As contemplated by 15 U.S.C. § 9021, the governor agreed that New Hampshire would administer PUA benefits to New Hampshire citizens through DES. DES thereafter administered and distributed PUA benefits to eligible New Hampshire citizens, including the plaintiffs. Beginning in 2021, several governors began terminating their agreements with the Department of Labor to administer PUA benefits. In May 2021, Governor Sununu announced that he too would be terminating his agreement with the Department of Labor. In compliance with a thirty-day cancellation

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<sup>2</sup> The Act did not provide any other explicit mechanism for the Secretary of Labor to distribute PUA benefits in the event that a State refused to enter into an agreement, or, similarly, if the Secretary determined that the State did not have an adequate system for PUA benefit administration.



notice provision in the agreement,<sup>3</sup> Governor Sununu sent a letter to the Secretary of Labor on May 18, 2021 declaring his intent to terminate the agreement to distribute PUA benefits through DES effective June 19, 2021. The governor cited New Hampshire's labor shortage and the improving pandemic conditions as the bases for his decision. As the Act provided no other mechanism to distribute PUA benefits to eligible recipients, see supra n.1, Governor Sununu's decision to terminate the agreement essentially ended the availability of PUA benefits for New Hampshire citizens, including the plaintiffs. Thus, despite being eligible for PUA benefits under the terms of the CARES Act, the plaintiffs have not received them since June 2021.

As a result, the plaintiffs brought this action on August 27, 2021. The plaintiffs seek: (1) a writ of mandamus directing the defendants "to reinstate PUA benefits to covered individuals in New Hampshire, including back benefits"; (2) a declaratory judgment that the defendants are in violation of state and federal law; and (3) an injunction "enjoining the [d]efendants from abandoning PUA before it expires . . . and requiring [the] [d]efendants to reinstate PUA benefits to covered individuals in New Hampshire, including back benefits[.]" (Compl. Prs. for Relief ¶¶ A–D.) Citing their dire financial situations and the lack of any harm to the defendants should they resume administration of PUA benefits, the plaintiffs now move for a preliminary injunction requiring the defendants "to reinstate PUA" immediately. (Pls.' Mot. at 2.) For their part, the defendants maintain that preliminary injunctive relief is unwarranted primarily "because [the plaintiffs'] claims fail on the merits as a matter of law." (Defs.' Obj. at 11.)

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<sup>3</sup> Specifically, the agreement stated that: "This Agreement with respect to [the PUA program] may be terminated by either party on thirty days' written notice." (Defs.' Obj. Ex. A-3-1 ¶ XI.)

## Analysis

“The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” Murphy v. McQuade, 122 N.H. 314, 316 (1982). A preliminary injunction generally should not issue unless the moving party demonstrates: (1) a likelihood of success on the merits; (2) that “there is an immediate danger of irreparable harm to the party seeking injunctive relief”; and (3) that “there is no adequate remedy at law.” N.H. Dep’t of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). As a practical matter, the first factor—the likelihood of success on the merits—is the “touchstone of the preliminary injunction inquiry.” Maine Educ. Ass’n Benefits Trust v. Cioppa, 695 F.3d 145, 152 (1st Cir. 2012); see also Weaver v. Henderson, 984 F.2d 11, 12 (1st Cir. 1993) (“The sine qua non [of the preliminary injunction factors] . . . is whether the plaintiffs are likely to succeed on the merits.”). That is, “[i]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” Cioppa, 695 F.3d at 152. “The logic behind this emphasis is obvious. If the moving party cannot show that it is likely to prevail at the end of the case, it makes little to sense to change the status quo on the assumption that the moving party will win.” Ronzio v. Tannariello, No. 226-2019-CV-671, 2020 N.H. Super. LEXIS 24, at \*13 (Dec. 11, 2020). Thus, “[i]n the ordinary course, plaintiffs who are unable to convince the trial court that they will probably succeed on the merits will not obtain interim injunctive relief.” Weaver, 984 F.2d at 12.

Because of the importance of the likelihood-of-success-on-the-merits factor, the Court begins its analysis there. In support of that factor, the plaintiffs first argue that injunctive relief is warranted because “the plain language of RSA 282-A:127, I. . . do[es]

not give [DES] the discretion to cut off PUA early.” (Pls.’ Mot. at 6 (cleaned up).) That statute, entitled “State-Federal Cooperation,” provides in pertinent part:

In the administration of [RSA chapter 282-A], the commissioner of the department of employment security shall cooperate to the fullest extent consistent with the provisions of this chapter, with the United States Department of Labor, and is authorized and directed to take such action, through the adoption of appropriate rules, the adoption of administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act.]

RSA 282-A:127, I (emphasis added). The plaintiffs contend that “PUA is one of the many [unemployment insurance] programs provided ‘under’ the Social Security Act,” (Pls.’ Mot. at 7), and therefore Commissioner Copadis is obligated to administer PUA benefits in order to fulfill the statutory directive “to secure to this state and its citizens all advantages” under the Social Security Act. In response, the defendants maintain that PUA is not part of the Social Security Act, but rather the CARES Act, and therefore Commissioner Copadis is under no statutory obligation to “secure” PUA benefits from the Department of Labor on behalf of New Hampshire citizens.

The resolution of this issue requires the Court to engage in statutory interpretation. In matters of statutory interpretation, the Court’s goal is to discern “the intent of the legislature as expressed in the words of the statute considered as a whole.” State v. Beattie, 173 N.H. 716, 720 (2020). The Court first looks “to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning.” Id. The Court interprets “legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” Id. “The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute

should be given effect.” Id. The Court construes “all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” Id. Moreover, the Court does “not consider words and phrases in isolation, but rather within the context of the statute as a whole.” Id. “This enables [the Court] 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.” Id.

Here, the plaintiffs’ entire argument hinges on whether PUA benefits are “advantages available under the provisions of the Social Security Act.” RSA 282-A:127, I. As an initial matter, the Court notes that it is undisputed that the PUA program was created by the CARES Act and is codified at 15 U.S.C. §§ 9021, whereas the Social Security Act is codified at 42 U.S.C. §§ 301–1397mm. Indeed, the plaintiffs admit that “PUA is part of the CARES Act,” (compl. at 1), and they cannot point to any specific provision of the Social Security Act related to PUA benefits. These undisputed facts seem to foreclose the plaintiffs’ argument. That is, 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.” RSA 282-A:127, I

To overcome this relatively straightforward interpretation, the plaintiffs posit that PUA benefits are provided “under” the Social Security Act because the Social Security Act “created an Unemployment Trust Fund through which [PUA] funds flow to the states[.]” (Pls.’ Mot. at 7.) It is true that Congress directed that “[f]unds in the extended unemployment compensation account (as established by section 905(a) of the Social Security Act (42 U.S.C. 1105(a)) of the Unemployment Trust Fund (as established by

section 904(a) of such Act (42 U.S.C. 1104(a)) shall be used to make [PUA] payments to States[.]” 15 U.S.C. § 9021(g). By doing so, “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, as noted above, “the CARES Act benefits [including PUA] are established and conferred by entirely different statutes than” the Social Security Act. Holcomb., 2021 WL 3627270, at \*6. As succinctly put by one court in interpreting a South Carolina statute nearly identical to RSA 282-A:127, I:

Plaintiffs, however, claim that benefits under the CARES Act—PUA, PEUC, and FPUC— are advantages under the provisions of the Social Security Act that relate to unemployment compensation. The Court disagrees. 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, PEUC, and FPCU into place quickly. . . . Because PUA, PEUC, and FPUC are not provisions of the Social Security Act, section 41-29-230(1) does not require Defendants to do anything related to those three programs

S.B. v. McMaster, No. 2021-CP-40-03774, 2021 WL 3699098, at \*3–4 (S.C. Com. Pl. Aug. 13, 2021).

The plaintiffs’ reliance on RSA 282-A:127, I may have had more force had Congress established PUA by amending the Social Security Act. However, that is not

what happened—Congress instead “adopted [the PUA] program[ ] in the CARES Act[ ] without amending the Social Security Act.” *Id.* at \*3. “In contrast with Congress’s decision not to amend the Social Security Act for PUA, . . . Congress expressly amended the Social Security Act [through the CARES Act] to make changes regarding unemployment benefits for employees of governmental entities and nonprofits.” *Id.* at \*4 (citation omitted). This “shows Congress knew how to and very well could have amended the Social Security Act to provide that PUA . . . was part of the Social Security Act. But Congress decided not to do so.” *Id.* (cleaned up). This suggests that Congress never intended for PUA to be part of the Social Security Act and supports the conclusion that PUA benefits are not “advantages” under the Social Security Act.

For these reasons, the Court rejects the plaintiffs’ argument that PUA benefits are “advantages available under the provisions of the Social Security Act.” RSA 282-A:127, I. Because RSA 282-A:127, I has no application to PUA benefits, the Court concludes that neither Commissioner Copadis nor DES has a legal obligation to secure those benefits from the Secretary of Labor or administer them on his behalf. It follows that the plaintiffs cannot show a likelihood of success on the merits of obtaining their requested relief based on that statute.

The plaintiffs alternatively argue that they are entitled to injunctive relief because the defendants have “defied the plain language of 15 U.S.C. § 9021(c).” (Pls.’ Mot. at 8.) That statute provides, in pertinent part, that

[T]he assistance authorized under subsection (b) shall be available to a covered individual . . . for weeks of unemployment, partial unemployment, or inability to work caused by COVID-19 . . . beginning on or after January 27, 2020 [and ending on or before September 6, 2021] as long as the covered individual’s unemployment, partial unemployment, or inability to work caused by COVID-19 continues.

15 U.S.C. § 9021(c)(1) (emphasis added). Seizing on the phrase “shall be available,” the plaintiffs contend that the defendants “do not have the discretion to end the [PUA] program early.” (Pls.’ Mot. at 8.) However, in making this argument, the plaintiffs overlook the preceding phrase in 15 U.S.C. § 9021(c)(1), which clarifies that only “the assistance authorized under subsection (b) shall be available . . . .” 15 U.S.C. § 9021(c)(1). Subsection (b), in turn, states that, “the Secretary shall provide to any covered individual unemployment benefit assistance while such individual is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation . . . or waiting period credit.” 15 U.S.C. § 9021(b) (emphasis added). Reading subsections (b) and (c) together, it is clear that the Secretary of Labor is the party responsible for making PUA assistance “available” to eligible individuals. Thus, if anyone has “defied the plain language of 15 U.S.C. 9021(c)” by not making PUA benefits available, (Pls.’ Mot. at 8), it is the Secretary of Labor, not the defendants. Simply put, there is nothing in 15 U.S.C. § 9021 requiring either defendant to do anything regarding PUA benefits.<sup>4</sup> The Court therefore cannot find that the plaintiffs have shown a likelihood of success on the merits based on the provisions of that federal statute.

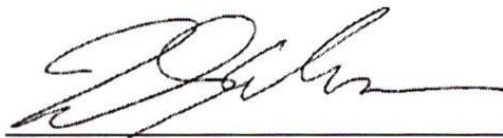
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<sup>4</sup> Indeed, as the defendants point out in their objection, it seems that any such mandates would run afoul of the Tenth Amendment. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012) (“Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer.” (cleaned up).)

Based on the foregoing analysis, the Court concludes that the plaintiffs have not demonstrated a likelihood of success on the merits of their claims because neither of the statutes on which they rely require the defendants to act. Having failed to make this vital showing, see Mottolo, 155 N.H. at 63, the plaintiffs' motion for a temporary restraining order and preliminary injunction is DENIED.<sup>5</sup> Moreover, because all of the plaintiffs' claims for relief are premised on flawed interpretations of RSA 282-A:127, I and 15 U.S.C. § 9021(c), the Court further finds that the plaintiffs cannot succeed on the merits of their claims as a matter of law. In other words, the plaintiffs have failed to state claims for which relief may be granted. The plaintiffs' complaint is therefore DISMISSED sua sponte. See Kennedy v. Titcomb, 131 N.H. 399, 402 (1989) (trial court may "dismiss an action sua sponte where the allegations contained in a writ do not state a claim upon which relief can be granted").<sup>6</sup>

So ordered.

Date: September 27, 2021



Hon. Jacalyn A. Colburn,  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 09/27/2021

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<sup>5</sup> Because the plaintiffs have failed to demonstrate a likelihood of success on the merits, the Court need not address the remaining preliminary injunction factors. See Cioppa, 695 F.3d at 152; Weaver, 984 F.2d at 12. In addition, the plaintiffs' motion to supplement the record, (see Court Doc. 11), is MOOT because the additional evidence the plaintiffs sought to submit with that motion has no bearing on the Court's interpretation of the two statutes at issue.

<sup>6</sup> It is not the Court's usual practice to dismiss an action sua sponte, particularly at this stage of the litigation. Here, however, there is no need to belabor this matter. The Court's decision to deny preliminary injunctive relief is premised entirely on the interpretation of the two statutes on which the plaintiffs stake their claims for relief. Because the interpretation of a statute is a question of law, the same analysis would apply if the Court were to consider whether the plaintiffs had stated claims for which relief may be granted under the typical motion to dismiss standard of review. Moreover, to the extent the plaintiffs disagree with the Court's statutory interpretation, they can now pursue an immediate appeal to the New Hampshire Supreme Court.