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IN THE
COURT OF APPEALS OF INDIANA

No. 21A-PL-1268

ERIC HOLCOMB, in his official capacity as Governor, and FREDERICK PAYNE, in his official capacity as Commissioner of the Department of Workforce Development, *Appellant-Defendants*,	Interlocutory Appeal from the Marion Superior Court 11,
v.	No. 49D11-2106-PL-20140,
T.L., J.C., L.C., S.A.S., J.H.S., and CONCERNED CLERGY OF INDIANAPOLIS, *Appellee-Plaintiffs*.	The Honorable John Hanley, Judge.

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INTRODUCTION

The worldwide COVID-19 pandemic has been an unprecedented calamity that has cost millions of lives and wreaked havoc on societies and their economies. During the early days of the pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, 134 Stat. 281. Among many other things, the CARES Act created three temporary federal unemployment programs, participation in which Congress made voluntary to the States.[1] Those programs provide unemployment benefits above and beyond what Indiana's unemployment insurance (UI) program already provides by increasing benefits, extending the duration of benefits, and awarding benefits to those who otherwise would be ineligible. Those programs are fully funded from the federal treasury and set to expire on September 6, 2021, absent a congressional extension.

Indiana initially agreed to participate in the CARES Act programs and signed an agreement with the U.S. Department of Labor (USDOL) so that Hoosiers could obtain those federal benefits. But as the pandemic began to abate earlier this year and life began the long process of returning to normal, the Hoosier economy, like those of many other States, faced a significant labor shortage that was among the obstacles to Hoosier employers' recovery efforts. Governor Holcomb determined

[1] The CARES Act enacted a wide variety of federal programs, most of which are not relevant here. As explained below in further detail, this case only involves three of the unemployment benefit-related programs. When used throughout this brief unless otherwise noted, the terms "CARES Act programs" or "CARES Act benefits" mean only the three programs challenged by the Plaintiffs.

that continued participation in the CARES Act programs was now harming Indiana's recovery because those optional benefits were dissuading some people from returning to the workforce. So, in mid-May 2021, the Governor withdrew Indiana from those CARES Act programs effective June 19, 2021, in accordance with the required 30-day notice to USDOL.

Almost a month after Governor Holcomb announced Indiana's termination of its participation in the CARES Act programs, Plaintiffs—five individuals who had been receiving benefits under those programs and a group of clergy members—filed this lawsuit and requested an emergency preliminary injunction. Because they filed their complaint mere days before June 19, their injunction request effectively asked that the State be forced to rejoin the CARES Act programs while this case is litigated.

On June 25, after a June 23 hearing, the trial court granted Plaintiffs' request and ordered the State of Indiana to recommence participation in the CARES Act programs. In doing so, the trial court accepted at face value Plaintiffs' sole legal basis for relief, ruling that Indiana Code section 22-4-37-1—a declaration-of-purpose statute that Indiana's UI system should comply with federal requirements—imposed on the State a statutory duty to participate in any and all federal unemployment programs created by Congress.

STATEMENT OF THE ISSUE

Whether the trial court abused its discretion in issuing the preliminary injunction requiring Indiana to rejoin the CARES Act programs.

STATEMENT OF THE CASE

Nature of the Case

This is a case brought against Governor Eric Holcomb and Department of Workforce Development Commissioner Frederick Payne seeking relief under the Uniform Declaratory Judgment Act, Indiana Code chapter 34-14-1. The Defendants appeal a preliminary injunction order that enjoins them from withdrawing the State of Indiana from three types of unemployment benefits offered by the federal government through the CARES Act and orders them to immediately notify USDOL of Indiana's continued participation in the CARES Act unemployment programs (App. 17–18). This appeal is brought as an interlocutory appeal as of right under Appellate Rule 14(A)(5), which provides for nondiscretionary interlocutory appeals from orders "granting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction."

Course of Proceedings & Disposition Below

Plaintiffs are the Concerned Clergy of Indianapolis and five Indiana residents who received CARES Act benefits. They sued the Governor and DWD Commissioner to require the State of Indiana to continue its participation in the CARES Act programs (App. 19–30). Defendants had announced on May 17, 2021, that Indiana

had notified USDOL that the State was exercising its statutory right under the CARES Act to withdraw with at least 30 days' notice to that agency (App. 106). Plaintiffs filed suit on June 14 (App. 4, 19). Indiana's withdrawal from those CARES Act programs took effect on June 19 (App. 106).

The day they filed their complaint, Plaintiffs filed a motion for a preliminary injunction that sought to enjoin Defendants from withdrawing the State from the CARES Act programs pending final judgment (App. 5, 31–33). Two days later, Plaintiffs moved for a hearing on their preliminary injunction motion, which the trial court held on June 23 (App. 5, 71–75).

Over Defendants' objection, the trial court enjoined them from withdrawing from the CARES Act programs and directed them to notify USDOL (App. 17–18).

The State filed its notice of appeal on June 25, 2021, the same day as the trial court issued its preliminary injunction. *See* App. R. 14(A)(5).

STATEMENT OF FACTS

A. Legal Background

Properly resolving this case requires an understanding of Indiana's traditional unemployment insurance program, the federal laws that provide funding for the administration costs of conforming state UI programs, and how the CARES Act unemployment benefits are entirely different public welfare programs from traditional unemployment insurance. Indiana law provides for unemployment insurance benefits that are funded by state-mandated contributions from

businesses. Indiana's UI program is administered in compliance with federal requirements so that the federal government will pay the State's administrative costs for the UI program and provide Indiana employers a substantial credit against the federal unemployment tax they pay for each of their employees. The General Assembly enacted Indiana Code section 22-4-37-1 to provide a state policy that Indiana's UI program should comply with a list of specific federal laws so as to ensure an optimally functioning UI program.

The CARES Act benefits are different. These special benefits are entirely federally funded payments to workers made independently of, and made more widely available than, traditional state-provided UI benefits. They are not created in the sections of the United States Code that create the federal law about traditional state UI programs, *see* Ind. Code § 22-4-37-1 (listing federal laws regarding traditional UI programs), and they evidence a congressional intent not to expand traditional UI programs but rather temporarily to provide additional economic stabilization in a time of unprecedented crisis. And unlike the federal laws regarding traditional UI, the Indiana legislature has not enacted any law regarding Indiana's participation in the separate CARES Act unemployment benefit programs. The one quality of the CARES Act benefits that is shared with the traditional UI program is that they are distributed through the same state-created administrative schemes set up to implement the UI programs.

The distinctions between the traditional UI programs and the CARES Act programs are critically important. Plaintiffs' entire argument turns on whether

Indiana Code section 22-4-37-1 is interpreted as a command by the General Assembly to the executive branch to fully participate in not only the longstanding state-federal unemployment insurance system, but also any other federal-only unemployment-related benefit programs that Congress creates. In other words, this Court must decide whether the General Assembly chose many years ago not only to secure federal administrative funding and tax credits for Indiana employers, but also to implicitly require the State's full participation in all kinds of future federal unemployment-benefits programs that did not exist then, such as today's CARES Act benefit programs.

1. Unemployment Insurance

Indiana established its UI program to address the "serious menace to the health, morale, and welfare of the people of [the] state and to the maintenance of public order" posed by "economic insecurity due to unemployment." I.C. § 22-4-1-1. Under the traditional UI program, Indiana employers pay contributions into the State's Unemployment Insurance Benefit Fund (Trust Fund) based upon their number of employees, the amount of wages paid to those employees, and the number of claims for UI benefits made by their employees in the past. I.C. §§ 22-4-10-1, 22-4-26-1. If workers lose their jobs through no fault of their own and meet other qualifying conditions, then they are eligible for income support. *Id.* An unemployed or partially employed applicant may then apply for unemployment insurance benefits, which are paid out from the Trust Fund—federal funds are *not* used to pay benefits to claimants. I.C. § 22-4-1-2(a).

Indiana, like other States, participates in the national UI system established by federal law. I.C. § 22-4-37-1. The States run their UI programs and pay the actual benefits, but if a state's UI program is compliant with federal standards then the federal government pays the States' administrative costs. Businesses with employees in compliant States also receive a substantial credit for federal unemployment taxes. Congress has tasked USDOL to oversee the States' administration. Although States are subject to a few federal requirements, they are generally able to set their own eligibility criteria and benefit levels. Indiana's program provides up to 26 weeks of benefits to unemployed workers, replacing about half of their previous wages, up to a maximum benefit amount of $390 per week. I.C. §§ 22-4-12-2(b), 22-4-12-4(a).

Plaintiffs build their entire argument upon Indiana's participation in the federal-state cooperative scheme—as directed by Indiana Code section 22-4-37-1. That section provides in pertinent part as follows:

> 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.

I.C. § 22-4-37-1. As explained below, each of those referenced federal statutes deal with UI, but not the separately created CARES Act programs.

42 U.S.C. §§ 501–504: The statutes found at 42 U.S.C. § 501 *et seq*. provide the structure for the grants available from the federal government to states that maintain compliant traditional UI programs. 42 U.S.C. § 501. Under section 502,

the Labor Secretary administers the process, certifies those States with "proper and efficient administration" of unemployment compensation laws, and causes payment of those sums from the federal treasury. 42 U.S.C. § 502. Section 503(a) establishes the requirements that States must meet to be certified by the Labor Secretary. 42 U.S.C. § 503(a). If a State fails to comply with those requirements, then the Secretary can stop payments to the State. 42 U.S.C. § 503(b); *see also* 42 U.S.C. § 504 (authorizing a State to seek judicial review of the Secretary's determination).

42 U.S.C. §§ 1101–1109: This chapter establishes an Unemployment Trust Fund in the United States Treasury and accounts for funds used to pay the administrative costs for compliant States (42 U.S.C. §§ 1101–1104); extended unemployment benefits in States with particularly high unemployment (42 U.S.C. § 1105); UI benefits for former federal employees (42 U.S.C. § 1109); and various programs for research, training, and advising (42 U.S.C. §§ 1106–1108).

26 U.S.C. §§ 3301–3311: This chapter, known as the Federal Unemployment Tax Act, creates and governs an excise tax on employers based upon a percentage of wages paid to employees. 26 U.S.C. §§ 3301, 3311. It also provides for employers to receive credits against their federal employment tax obligations if their State's UI program is certified by the Labor Secretary as being compliant with federal standards. 26 U.S.C. §§ 3302, 3303. The Labor Secretary approves State unemployment compensation laws that meet a number of statutory qualifications, and States may obtain judicial review in federal court whenever the Secretary withholds certification. 26 U.S.C. §§ 3304, 3310. Federal law also allows state law to

govern the collection of taxes and the application for benefits in a number of special circumstances. 26 U.S.C. § 3305. The other sections of this chapter include a definition section and provisions governing how the federal tax is administered in various circumstances. 26 U.S.C. §§ 3306–3309.

29 U.S.C. § 49 et seq.: This chapter creates the United States Employment Service within USDOL to coordinate and fund State public employment services offices. It establishes a variety of services and support that USDOL will provide to the States, including data exchanges and electronic tools. It also authorizes USDOL to transfer to the States property, including records and office equipment, used by the federal government to run the benefit program that preceded the current state-federal UI system. 29 U.S.C. §§ 49–49l-2.

2. CARES Act Unemployment Benefits

On March 27, 2020, Congress passed the CARES Act, creating several federally funded unemployment benefit programs separate and distinct from the traditional state UI programs. Importantly, the CARES Act allows the governors of each State to decide whether to participate and to withdraw at their discretion with at least 30 days' advance notice to USDOL. *See* 15 U.S.C. §§ 9021, 9023, 9025. Unlike traditional state UI programs, the federal government provides the funds for paying benefits to claimants under the CARES Act programs. *See* 15 U.S.C. § 9023(d)(3).

The programs were envisioned as temporary measures from their inception. Congress has twice extended the expiration dates for these federal programs, with

the current expiration date set for September 6, 2021. American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 9011, 9013, 9016, 135 Stat. 4; Consolidated Appropriations Act of 2021 (Continued Assistance for Unemployed Workers Act of 2020), Pub. L. No. 116-260, §§ 201, 203, 206, 134 Stat. 1182.

The three CARES Act programs at issue in this case, and the federal statutes that established them, are:

- Pandemic Unemployment Assistance (PUA), which provides benefits to those who do not qualify for traditional unemployment benefits (e.g., independent contractors, the self-employed, and gig workers), 15 U.S.C. § 9021;
- Federal Pandemic Unemployment Compensation (FPUC), which provides $300 of weekly unemployment compensation in addition to any other benefits, 15 U.S.C. § 9023; and
- Pandemic Emergency Unemployment Compensation (PEUC), which provides additional federally funded compensation for 53 weeks after a person exhausts the regular 26 weeks of state-provided UI benefits, 15 U.S.C. § 9025.

B. Indiana's Participation in the CARES Act Benefit Programs

In March 2020, as the coronavirus pandemic caused the sudden shutdown of large portions of the economy across the United States, Indiana entered into an agreement with USDOL to implement the new federal CARES Act benefits (App. 94–105). The agreement was required before the State could participate in the temporary and voluntary programs. In pertinent part, paragraph XI of the

agreement provides, "this agreement with respect to any of provisions identified in paragraph XIV may be terminated by either party on thirty days' written notice" (App. 96). *See* 15 U.S.C. § 9023(a). Paragraph XIV indicates which of the federal CARES Act programs the State agrees to implement and administer. *Id.*

On May 17, 2021, Governor Holcomb announced that these additional temporary federal benefits had now become detrimental to the recovery of the Hoosier economy because they were disincentivizing some workers from returning to the labor force. Press Release, Governor Eric J. Holcomb, Indiana Will End Federal Pandemic Unemployment Benefits (May 17, 2021), https://events.in.gov/event/indiana_will_end_federal_pandemic_unemployment_benefits. That same day, the DWD Commissioner provided written notice to USDOL terminating the State's participation in the CARES Act benefits (App. 106). USDOL subsequently worked with Indiana on winding down the programs. On June 19, 2021, the agreement between the United States and Indiana terminated pursuant to the State's written notice of May 17, 2021 (*see* App. 106).

On June 14, 2021, 28 days after the State provided its termination notice, Plaintiffs filed this lawsuit seeking to prevent the State from terminating the CARES Act benefits (App. 4, 19–30). On the afternoon of Friday, June 25—six days *after* Indiana properly terminated the agreement to participate in the CARES Act programs—the trial court issued a preliminary injunction barring the State "from withdrawing … from unemployment benefits offered through the [CARES Act] until this Court renders a final judgment" (App. 17–18). It also commanded the

Defendants to "notify [USDOL] immediately of its continued participation in the CARES Act programs pending further action by this Court" (*id.*). The trial court issued this injunction despite knowing that the State's agreement with USDOL had already terminated and that the CARES Act programs had already ended.

In reaching its conclusion, the trial court determined that Indiana Code section 22-4-37-1 imposed a statutory duty on Defendants to obtain all rights and benefits available under federal law related to any kind of unemployment benefits, and Defendants ostensibly violated this mandatory duty by withdrawing the State from these voluntary federal programs (App. 15–16). And even though Indiana was no longer a participant in the CARES Act programs, the trial court nevertheless determined that an injunction was required to preserve the status quo, which the court viewed as continued participation in the federal programs that Indiana had already ended (App. 17).

To comply with the injunction, on Monday, June 28, DWD notified USDOL of the trial court's order and began the process of determining how to reinstate the relevant CARES Act benefits. It took several weeks of interaction with USDOL, but it allowed Indiana to resume its participation and restart federal benefit payments on July 14. *See* Indiana Unemployment FAQ for Claimants, https://www.in.gov/dwd/files/Indiana_Unemployment_FAQ.pdf at 28 (Section K, Q1).

Unless Congress enacts a third extension of the CARES Act benefits, they will expire for the entire nation on September 6, 2021. 15 U.S.C. §§ 9021(c), 9023(e), 9025(g).

SUMMARY OF THE ARGUMENT

This Court should vacate the preliminary injunction. The Governor made a quintessential policy determination that continued participation in federal CARES Act programs was now harming Indiana's economy more than those programs were benefitting it. Yet a single trial judge determined that the Governor's policy determination was unlawful exclusively on the basis of an Indiana statute that does not create any substantive or enforceable rights to unemployment benefits but instead asserts a declaration of purpose for Indiana to take advantage of the traditional state-federal cooperative unemployment insurance system. The trial court abused its discretion in issuing the injunction because Plaintiffs wholly failed to establish any of the four requirements for the granting of injunctive relief.

Plaintiffs cannot succeed on the merits of their legal claim because Indiana Code section 22-4-37-1—the statute on which they rely—neither confers a private right of action nor is amenable to a judicial mandate. In fact, the statute does not create any substantive rights whatsoever. Rather, it merely declares the General Assembly's intent that the State of Indiana participate in the traditional state-federal UI program, under which States receive federal funds to cover the costs of administering their traditional state UI programs. Just as the statute does not

create any substantive rights, it also does not impose on any particular state official a specific ministerial duty to act in any particular manner.

What is more, even if Plaintiffs could overcome those threshold issues (which they cannot), their claim still cannot succeed on the merits because the statute does not do what they say it does. The trial court adopted Plaintiffs' erroneous view that Indiana law requires our state government to participate fully in every kind of unemployment benefit created by federal law. It does not. Plaintiffs' view eschews the proper reading of section 22-4-37-1, which is that the statute is solely about ensuring conformity of Indiana's UI program with federal requirements, not establishing rights to additional federal programs that are created by entirely different federal statutes. The trial court's view also erroneously requires Indiana's participation —without regard to the harm such participation might cause the Hoosier economy, workers, and employers. In other words, Plaintiffs urge the courts to view Indiana's unemployment system as an entirely federal program to which the General Assembly has ceded full control to Congress. This is incorrect, and remarkably so. It is important that this Court should understand the CARES Act benefits properly: as a new voluntary federal benefit, created by entirely different federal statutes, that is merely distributed through the already existing state UI system for ease of administration and rapid payment to beneficiaries.

The trial court also abused its discretion in determining that Plaintiffs satisfied the other three prerequisites for preliminary injunctive relief. With respect to irreparable harm, Plaintiffs alleged only individual economic injury stemming

from the termination of CARES Act benefits, but it is well-established that economic injury is not irreparable harm as a matter of law. Nor do Plaintiffs' individualized harms outweigh the harm to the economy and the public from forcing the State to continue participation in the CARES Act programs amidst a significant labor shortage. Lastly, the trial court's issuance of the injunction disserves the public interest by elevating Plaintiffs' private economic interests above the public's interest in recovering from the pandemic, as determined and implemented by the executive branch.

ARGUMENT

The trial court abused its discretion by commanding Indiana to resume participation in the federal CARES Act benefits programs.

The Court should vacate the preliminary injunction because Plaintiffs failed to show any of the four criteria required for injunctive relief, let alone all of them as they must. A preliminary injunction's purpose "is to preserve the status quo pending an adjudication of a case on the merits," *Lake County v. House*, 168 N.E.3d 278, 287 (Ind. Ct. App. 2021), not to restore an earlier status quo while a case is litigated. To obtain a preliminary injunction, the requesting party "must demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success at trial, (2) the remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action, (3) the threatened injury to the movant outweighs the potential harm to the nonmovant from the granting of an

injunction, and (4) the public interest would not be disserved by granting the requested injunction." *Leone v. Comm'r, Indiana Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1248 (Ind. 2010). The movant's "[f]ailure to prove any one of these requires denying the injunction." *Id.* The Court reviews the trial court's grant of a preliminary injunction for an abuse of discretion, but it reviews legal questions de novo. *Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 152 (Ind. 2019).

The trial court abused its discretion by enjoining the Governor's decision to withdraw Indiana from the CARES Act programs. Remarkably, rather than issue an injunction to preserve the status quo—which, at the time of the June 25 injunction was that Indiana had withdrawn from the CARES Act programs effective June 19—the trial court instead ordered these already terminated programs to be restarted. Moreover, none of the criteria for obtaining an injunction were properly established. Most importantly, Plaintiffs have no likelihood of success on the merits of their suit because Indiana Code section 22-4-37-1 does not create a private right of action, does not impose on any state official any specific duties enforceable through a judicial mandate, and does not require or even contemplate the State's participation in these CARES Act programs.

A. Plaintiffs cannot succeed on the merits because Indiana law has not given them a privately enforceable right to force the State to participate in the CARES Act programs.

Plaintiffs have no lawful basis to enjoin Indiana's discontinuation of the CARES Act programs. Plaintiffs' legal theory underlying the injunction fails three times over: First, they have sued to enforce a statute that does not create a private

right of action. Second, the statute on which their entire claim relies does not impose any specific duty on Defendants, so it is not amenable to a judicial mandate. And third, even if Plaintiffs could overcome those two hurdles, Indiana law does not require participation in the CARES Act benefits programs.

1. Plaintiffs do not have a private right of action to enforce a declaration of purpose.

Plaintiffs cannot sue to enforce Indiana Code section 22-4-37-1 because that statute—which is merely a declaration of purpose—does not create a private right of action. Absent an express right of action, courts look to whether the legislature intended to imply a private right of action, *Blanck v. Ind. Dep't of Correction*, 829 N.E.2d 505, 509 (Ind. 2005), and that question "is purely a question of legislative intent, not judicial preference," *Doe # 1 v. Ind. Dep't of Child Servs.*, 81 N.E.3d 199, 202 (Ind. 2017). Indeed, this Court has "long been reluctant to infer this unwritten intent, since the legislature often creates rights of action using clear language." *Id.* (cleaned up). Critically, "[w]hen a statute is designed mainly for public benefit, it implies no right of action; incidental benefits to a private party make no difference." *Id.* That is the case here.

Section 22-4-37-1 simply does not contain an express right of action for people to sue the State. This is unsurprising because the provision merely declares "the purpose" of Indiana Code article 22-4—Indiana's UI program. The statute provides that "the purpose of this article is to secure to the state of Indiana and to employers and employees in Indiana all the rights and benefits which are conferred under"

specific provisions of federal law. I.C. §22-4-37-1. The statute does not create or convey *any* substantive rights on anyone, so the legislature undoubtedly saw no need to provide an enforcement mechanism.

Nor does anything in the statute suggest an intent to confer a private right of action. Again, the statute is a declaration of purpose, not a rights-creating statute. *See, e.g.*, *Besozzi v. Indiana Emp't Security Bd.*, 237 Ind. 341, 146 N.E.2d 100 (1957) (explaining—in a case about an unemployment statute, no less—"[t]he well established rule … that a declaration of public policy, stated as the preamble of an act, is not controlling of the operation of the act itself, unless there is ambiguity in the act which makes it susceptible to construction."); *Nextel West Corp. v. Indiana Utility Regulatory Comm'n*, 831 N.E.2d 134, 142 (Ind. Ct. App. 2005) ("A preamble may be considered in ascertaining legislative intent in construing an ambiguous statute, but it is not controlling."), *trans. denied*; *Hobbs v. State*, 451 N.E.2d 356, 359 (Ind. Ct. App. 1983) (explaining that a "preamble is no part of the act, and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous" (citation omitted)). It explains the purpose of article 22-4 as it pertains to participation in the national UI program. Critically, under the traditional UI system envisioned by the Indiana legislature, federal funds are not used to pay benefits to claimants—they are used only to pay the Department's costs of administering the state program. I.C. § 22-4-1-2(a). Because the traditional UI system referenced in section 22-4-37-1 has never included federal benefits payable directly to claimants, the legislature has never had any reason to contemplate

creating a private right of action—whether explicitly or through unmistakable implication—for individuals to force the State to obtain benefits from the federal government. Indeed, nothing in section 22-4-37-1 gives a right of action to individuals to require the State to obtain benefits from the federal government.

Moreover, the statement of purpose is about the traditional UI program as a whole, and the legislature created the UI program to address the "serious menace to the health, morale, and welfare of the people of [the] state and to the maintenance of public order" posed by "economic insecurity due to unemployment." I.C. §22-4-1-1. It necessarily follows that the declaration-of-purpose statute "is designed mainly for the benefit of the public"—by using federal funds to cover administrative costs—and not for the benefit of any particular claimant or group of claimants (who may disagree with particular public policy decisions), so "it implies no right of action." *Doe #1*, 81 N.E.3d at 202.

2. Plaintiffs cannot bring a mandate action because Indiana Code section 22-4-37-1 does not impose a mandatory duty on Defendants.

Because Plaintiffs do not have a private right of action to enforce Indiana Code section 22-4-37-1, they have no "right" to pursue a claim under the Declaratory Judgment Act. Despite the labeling of their complaint as one for a declaratory judgment, Plaintiffs really seek—and the trial court effectively, and erroneously, issued—a mandate, which is impermissible because section 22-4-37-1 does not impose any specific duty on Defendants.

A judicial mandate is "an extraordinary remedy, viewed with extreme disfavor." *State ex rel. Civil City of South Bend v. Ct. of Appeals of Ind.–Third Dist.*, 406 N.E.2d 244, 245 (Ind. 1980). Mandate is appropriate only when "(1) the defendant bears an imperative legal duty to perform the ministerial act or function demanded and (2) the plaintiff has a clear right to compel the performance of [that] specific duty." *Price v. Ind. Dep't of Child Servs.*, 80 N.E.3d 170, 175 (Ind. 2017) (cleaned up). "These strictures mean that judicial mandate should never be granted in doubtful cases." *Id.* (cleaned up).

A judicial mandate is not available if the statute does not require a specific, ministerial (i.e., nondiscretionary) act, even if the statute uses mandatory terms. Indeed, even a statute that requires "a specific outcome" is not "susceptible to a judicial mandate" unless it also "compel[s] the performance of a specific act." *Id.* at 177. In *Price*, for instance, the Court held that a DCS family case manager could not bring an action for a mandate to enforce caseload limits contained in a statute because, although that statute spoke in mandatory terms about the desired outcome, it did "not spell out *how* the Department is to comply with the caseload caps." *Id.* at 177 (emphasis added).

The declaration-of-purpose statute on which Plaintiffs' claim hinges is even further removed from judicial mandate than the statute in *Price*. Section 22-4-37-1 does not even use mandatory language to require a particular outcome. Rather, it says only that "the purpose of this article is to secure to the state of Indiana and to employers and employees in Indiana all the rights and benefits which are conferred

under" specific provisions of federal law. I.C. §22-4-37-1. The statute does *not* say that the State shall secure all benefits available under federal law. And it certainly does not impose on the Governor or the DWD Commissioner (or any other state official) a specific duty to undertake any action or perform any specific task. Instead, the most that can be inferred from the statute is that the purpose of the article is conformity with federal law to access federal administrative funding. *Cf. Price*, 80 N.E.3d at 176 ("Courts do not have license to define or prescribe a duty to act. The requirement of a specific, ministerial act leaves no room for judicial improvisation regarding the underlying legal duty.").

3. Indiana law does not require participation in the CARES Act programs.

Even if Plaintiffs could overcome the first two hurdles (which they cannot), their claims still fail because section 22-4-37-1 does not require the State of Indiana's participation in the CARES Act programs, as they are independent of the traditional federal-state UI program.

Plaintiffs build their entire argument on Indiana's participation in the federal-state cooperative scheme, as conveyed by section 22-4-37-1. They argue that because Indiana law provides for Indiana's participation in the federal-state cooperative UI program, then Indiana must fully participate in all kinds of programs created by the federal government now or in the future. But while the CARES Act programs and the traditional state-federal UI programs are both types of unemployment benefits, the State of Indiana has only committed to participating

fully in the state-federal UI program. Perhaps the best evidence for that policy is that the Indiana Code nowhere references the federal statutes that establish the CARES Act benefits. *See* 15 U.S.C. §§ 9021, 9023, 9025.

Plaintiffs (and the trial court) misapprehend the federal-state cooperative UI program, a mistake that confuses the distinction that Congress intended. Under that traditional system, all benefits paid to claimants come from the state trust fund into which employers pay—federal funds are *not* used to pay benefits. I.C. § 22-4-1-2(a). Federal funds, rather, are used to cover the Department's administrative costs. Indeed, the federal statutes cross-referenced by section 22-4-37-1—"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."—establish that traditional system and makes federal funds available for administrative costs. In particular, 42 U.S.C. §§ 1101–1109 establish the unemployment trust fund in the United States Treasury. That fund is used to assist States in administering their UI programs, establishing and maintaining public employment offices, and for veterans' employment and training. 42 U.S.C. §§ 1101–1104. To pay for the costs of the CARES Act benefits, Congress wrote into 42 U.S.C. § 1103 (the federal trust fund statute) a blank check whereby the Treasury Department shall transfer from the federal Treasury's general fund to the unemployment fund any sums that are necessary to provide the CARES Act benefits through the existing UI system. 42 U.S.C. § 1103(i)(1)(D), (i)(2)(A).

It is this distribution link between the CARES Act benefits and the traditional UI programs that the trial court saw as silently incorporating the CARES Act benefits statutes into section 22-4-37-1:

> Unemployment benefits under the CARES Act are funded by and through the federal unemployment programs established under 42 U.S.C. §§ 1101(a), 1104(a), and 1105(a). See 15 U.S.C. §§ 9021(g), 15 U.S.C. § 9025(d) and 15 U.S.C. § 9023(d). These are the same statutes enumerated in Ind. Code 22-4-37-1.

(App. 15). But sections 1101(a), 1104(a), and 1105(a) do not "establish" any "unemployment programs" themselves; rather, they establish accounts within the federal treasury to hold and account for funds for eventual transfer to the States for use in the unemployment programs that are actually established by the other federal statutes listed in section 22-4-37-1. In other words, the statutes found at 42 U.S.C. §§ 1101–05 are accounting statutes: they describe how funds are to flow from the federal treasury to the federal trust fund accounts, and then to the state unemployment trust funds.

Because the federal government already had a longstanding and efficient accounting system to channel federal funds to the States for use in the unemployment arena, it is unsurprising that Congress chose that same system as the means to distribute CARES Act funds. But specifying the way money should be moved around is entirely different from creating the contours of a wholly new federal benefit program. Had it properly understood that distinction, the trial court would have determined that Indiana's traditional UI program is created by state (not federal) law at Indiana Code article 22-4; the federal statutes governing how

and under what circumstances the federal government will certify state UI programs for federal assistance are found in the federal statutes cited in section 22-4-37-1; and the three CARES Act programs at issue here are created by 15 U.S.C. §§ 9021, 9023, and 9025. It would have also concluded that nothing in the Indiana Code requires (or even announces a policy about) participation in the CARES Act programs. *See generally* I.C. art. 22-4, *and specifically* I.C. § 22-4-37-1 (which omits any reference to 15 U.S.C. §§ 9021–9034, the subchapter establishing and defining the unemployment-related programs created by the CARES Act).

So to the extent that the trial court correctly observed that Congress chose the federal government's UI financial distribution backbone, that fact does not identify the meaning of section 22-4-37-1 or the intent of the General Assembly when enacting it. Indeed, in *Jug's Catering, Inc. v. Ind. Dep't of Workforce Development*, another case interpreting section 22-4-37-1, this Court rejected the same sort of faulty reasoning used by the trial court below. 717 N.E.2d 207 (Ind. Ct. App. 1999), *trans. denied*. In that case, a business underpaid unemployment taxes into the state Trust Fund after it misclassified certain employees as independent contractors. *Id.* at 208. After the IRS uncovered the misclassification during an audit, it provided the business with a "prior audit safe haven status" under 26 U.S.C. § 3401, which granted the business some relief from paying back federal unemployment taxes and penalties because the error was not identified in an earlier audit. *Id.* at 209. That statute is not part of the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301–3311, a federal act explicitly referenced in section 22-4-37-1.

Id. at 212. But the business argued that the safe haven law effectively amended 26 U.S.C. § 3301. *Id.* at 211–12. So to avoid paying the State the unpaid UI contributions, the business reasoned that by virtue of the citation in section 22-4-37-1 to federal statutes that include 26 U.S.C. § 3301, state law prevented DWD from collecting state unemployment insurance contributions once the IRS granted the business the safe haven status. *Id.* This Court rejected that serpentine reasoning. It held that neither Indiana law nor the Federal Unemployment Tax Act was amended by how various other federal statutes dealing with matters outside the traditional UI statutory schemes interplay with the UI statutes. *Id.*

The same is true here. The CARES Act funds are distributed by piggybacking onto the same administrative systems used to fund the operations of the state UI programs (but not the state benefits themselves), yet they are established and defined by entirely different statutes that are not named in section 22-4-37-1. Congress needed an efficient mechanism to distribute the CARES Act benefits, and that mechanism exists in the state-administered UI systems. But that convenience is not evidence that Congress intended to change the traditional UI scheme through the CARES Act—indeed, the CARES Act is intended to be temporary and provide different benefits to more types of people and for different amounts of time as a supplement to traditional UI benefits during an unprecedented pandemic.

To be sure, the General Assembly has never adopted in any way the CARES Act benefit programs—not even during the 2021 legislative session when it could have easily done so. Yet despite knowing that both the CARES Act itself and the

agreement made between Indiana and USDOL allowed the Governor to withdraw Indiana from the CARES Act benefits at any time, the legislature did not act. The trial court erred in granting a preliminary injunction on Plaintiffs' novel theory; the CARES Act provides new federal unemployment benefits, but it does not amend the state-federal insurance program at issue in section 22-4-37-1.

B. Plaintiffs failed to establish that not reinstating federal CARES Act benefits would cause them irreparable harm.

Plaintiffs failed to establish irreparable harm because the only injury they have ever identified is an economic injury from no longer receiving the government benefits conferred by the CARES Act. But it is well-established that economic injuries do not support preliminary injunctive relief; rather, those may be remedied only at final judgment. A party requesting a preliminary injunction must establish that "the remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action." *Leone*, 933 N.E.2d at 1248. Indeed, the Supreme Court has explained that "[i]f an adequate remedy at law exists, injunctive relief should not be granted." *Indiana Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002). Critically, "[a] party suffering mere economic injury *is not entitled to injunctive relief* because damages are sufficient to make the party whole." *Id.* (emphasis added).

The lone injury Plaintiffs can claim from Defendants' termination of the CARES Act programs is the loss of income. That figure, however, could be calculated post-trial and awarded as a legal remedy should Plaintiffs ultimately

prevail in their lawsuit.[2] That the loss of income may make Plaintiffs' lives more difficult is both speculative and beside the point.

In fact, classifying mere economic injury as "irreparable harm" with no adequate legal remedy simply because the lost income would be used to pay expenses eviscerates the rule against allowing injunctions to prevent economic injuries. For this reason, the Supreme Court in *Walgreen Co.* held that Walgreens failed to establish this component of the preliminary injunction standard even though the evidence showed that the loss of revenue occasioned by the challenged rates would cause a handful of its pharmacies to close. 769 N.E.2d at 162–63. Despite those obviously dire consequences, the Court held that "Walgreens failed to identify any injury beyond purely economic injury, which is not enough to justify injunctive relief." *Id.* at 163.

The trial court here abused its discretion when it concluded that Plaintiffs established irreparable harm, because the only harm resulting from termination of the CARES Act programs is the loss of income from those benefits. As a matter of law, that purely economic harm does not support or justify injunctive relief.

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[2] Of course, to obtain that relief, Plaintiffs would need to also name the United States or USDOL as a party to this suit because the CARES Act benefits are entirely federal and paid from the federal treasury. State courts have no jurisdiction over the United States or USDOL, but the failure of Plaintiffs to properly plead their case in the proper court is not a reason why the State of Indiana would be liable for federally-provided benefits ultimately withdrawn by USDOL. While Defendants explained this shortcoming to the trial court, *see* App. 88–90; Tr. 8–10, the trial court did not address it and instead improperly chose to award preliminary injunctive relief anyway.

C. Forced participation in the CARES Act programs harms the public more than the harm to Plaintiffs caused by Indiana's withdrawal.

The trial court also abused its discretion in determining that the harm to Plaintiffs caused by Indiana's termination of the CARES Act programs outweighs the harm to the State caused by forcing it to restart the CARES Act benefits. Injunctive relief is appropriate "only when the threatened injury to the moving party … outweighs the potential harm to the nonmoving party … resulting from the granting of an injunction." *Cent. Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 733 (Ind. 2008).

The balance of harms tips in the State's favor. Plaintiffs' individualized economic harms do not outweigh the harms to the State and to the public of forced continuation in the CARES Act programs, and the trial court abused its discretion in focusing solely on the fact that CARES Act funds are federal funds and concluding that the State is not harmed by continuing to distribute them. The State is harmed in two respects: First, the State is irreparably harmed by the trial court's injunction because it is effectively a judicial veto of the Governor's policy decision. Second, the State is also harmed because of the administrative tasks it has had to undertake to comply with the injunction.

The injunction is causing irreparable harm to the State's economic and social recovery efforts, which impacts all Hoosiers, and that statewide harm outweighs the harm to individuals receiving CARES Act benefits. No one questions that there is a significant labor shortage and that employers are struggling to fill open positions.

The Governor reasonably determined that generous federal benefits available under the CARES Act are now dissuading some workers from returning to the labor force. Not only is that intuitive, but it is also supported by the experiences of other States as well as the experience of business owners in Indiana. *See, e.g.*, Eric Morath & Joe Barrett, *Americans Are Leaving Unemployment Rolls More Quickly in States Cutting Off Benefits*, Wall Street Journal (June 27, 2021), https://www.wsj.com/articles/americans-are-leaving-unemployment-rolls-more-quickly-in-states-cutting-off-benefits-11624786202; Nat'l Fed'n Indep. Business, *Indiana Small Business Thanks Governor For Ending Federal Unemployment Benefit Extension* (May 17, 2021) (reporting that "nearly 40%" of "Hoosier small business owners … said that enhanced unemployment benefits are discouraging people in Indiana from returning to work"), https://www.nfib.com/content/news/coronavirus-state/indiana-small-business-thanks-governor-for-ending-federal-unemployment-benefit-extension/. After studying the labor shortage problem and unemployment data, the Governor reasonably determined that CARES Act benefits, while at one time useful, were stunting Indiana's recovery from the pandemic by incentivizing some people not to reenter the workforce.

The trial court's injunction cancels the economic benefits expected from addressing the labor shortage now. It interferes with the State's recovery efforts by delaying the termination of CARES Act benefits for several months until this lawsuit is resolved or the CARES Act programs expire. In the meantime, Indiana's economy is hindered as it awaits the return of many to its workforce. These harms

also counsel this Court to resolve this appeal within days rather than weeks or months.

Moreover, the trial court's injunction harms the State of Indiana itself, not just its recovery efforts. Because CARES Act benefits are federal funds, reacquisition of those funds has required the State to work with USDOL on getting an agreement in place to restart federal benefits. And because terminating an agreement requires 30 days' notice (App. 96), the injunction has seriously impaired—if not effectively prevented—Indiana from exercising its federally given right under the CARES Act to end the CARES Act benefits before September when they are scheduled to expire. This only perpetuates the labor shortage and irrevocably delays the State's economic and social recovery for several more months.

What is more, in the balance of harms, there is a thumb on the scale against Plaintiffs by virtue of their inexcusable litigation delay. Plaintiffs waited until mere days before the CARES Act benefits were to end to file suit and seek an emergency injunction. Yet nearly a month earlier, Governor Holcomb announced on May 17 that Indiana would be withdrawing from the CARES Act programs on June 19. Plaintiffs could have easily filed their lawsuit any time after May 17. Instead, they waited until the last minute and rushed through a preliminary injunction about a week after the State withdrew from the programs. *Cf. Republican Nat'l Committee v. Democratic Nat'l Committee*, 140 S. Ct. 1205, 1207 (2020) (discussing problems with last-minute injunctions in election cases); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (explaining that even in capital cases "the last-minute nature of an

application that could have been brought earlier" may itself be grounds for denial of relief (cleaned up)). Plaintiffs' abusive litigation tactic should not have been rewarded with an injunction.

D. The preliminary injunction disserves the public interest.

Lastly, the trial court abused its discretion in concluding that the public interest favors Plaintiffs. Absent a constitutional problem, it is nearly impossible for a private plaintiff to prevail on the public-interest prong of the preliminary injunction standard when the plaintiff seeks to enjoin legislative or executive action. *See, e.g.*, *Leone*, 933 N.E.2d at 1258. And for good reason: a private plaintiff has only his private interests at stake, whereas the legislative and executive branches have been vested by the people of Indiana to make statewide policy in the public interest. In *Walgreen Co.*, for example, the Supreme Court easily rejected Walgreens' argument that the public interest favored an injunction because the rate limits it was challenging had been enacted to counteract a massive Medicaid funding deficit, an "action [that] clearly invoked the public interest." 769 N.E.2d at 169. Walgreens, on the other hand, asserted only "that a reduction in reimbursement rates will cause a handful of store closures and potential discontinuation of some special services." *Id.* But the Court rejected Walgreens' attempt to identify "its private interest and extrapolate[] that harm to the general public interest," concluding instead "that the public interest weighs against injunctive relief in favor of Walgreens." *Id.*

The Governor terminated Indiana's participation in the CARES Act programs to serve the public interest by removing a barrier to the State's economic and social recovery from the pandemic. Like the Medicaid regulations in *Walgreen Co.*, the Governor's action "clearly invoked the public interest." *Id.* But the trial court's injunction supplanted the Governor's policy choice and resurrected that barrier to economic recovery solely on the basis of Plaintiffs' private interests. To be sure, the trial court extrapolated Plaintiffs' private situations to the broader public policy in favor of tackling the societal problem of unemployment writ large. Yet that is the same as Walgreens saying that closing a few stores may have an effect on the public's ability to obtain particular services. Here, this is not a class-action suit and so the only interests Plaintiffs have at stake are their own private interests.

Moreover, the judiciary disserves the public interest when a court sets aside a governor's statewide economic policy and imposes its own. The people of Indiana have vested their elected officeholders in the executive and legislative branches with the authority to make economic, social, and political policy choices. *See Berry v. Crawford*, 990 N.E.2d 410, 415 (Ind. 2013). Neither the courts, Plaintiffs, nor other third parties get to make those policy determinations. The decision to terminate the agreement with USDOL as to the CARES Act programs is a political, social, and economic decision regarding how to best handle the reintegration of Indiana's workforce after an unprecedented pandemic that resulted in the temporary shutdown of some places of employment. This decision is for governmental policymakers, not the courts, and the trial court's injunction disserves the public

interest by stripping the policymakers of their authority to do what they have been elected to do.

* * *

The upshot is that in issuing the preliminary injunction the trial court abused its discretion at every turn. Indeed, to affirm the trial court's injunction, this Court has to make no less than six conclusions. First, it has to conclude that Indiana Code section 22-4-37-1 confers an implied private right of action. Second, it has to conclude that the statute imposes specific duties on the Governor and the DWD Commissioner such that the statute is amenable to a judicial mandate. Third, the Court has to conclude that the statute—which is one declaring the purpose of Indiana's involvement in the traditional UI state-federal program—requires Defendants to participate in all unemployment benefits programs created by Congress now or in the future. Fourth, it has to conclude that Plaintiffs' purely economic harm—the loss of CARES Act benefits—constitutes "irreparable harm" despite black-letter Indiana law to the contrary. Fifth, it has to conclude that the private harms suffered by Plaintiffs outweigh the harms to the public writ large of recommencing participation in the CARES Act programs. And sixth, it has to conclude that a trial court order enjoining the Governor's economic policy, in order to protect the private interests of several private plaintiffs, is justifiably in the public interest.

Respectfully, none of these conclusions can be reached here, let alone all six. Therefore, it should immediately vacate the preliminary injunction without undue delay.

CONCLUSION

For the foregoing reasons, the Court should vacate the trial court's preliminary injunction with all due haste.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this appellants' brief contains no more than 14,000 words, not including those portions excluded by Indiana Appellate Rule 44(C).

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CERTIFICATE OF SERVICE

I certify that on July 19, 2021, the foregoing document was electronically filed using the Indiana E-filing System (IEFS). I also certify that on July 19, 2021, the following persons were served electronically with the foregoing document through the IEFS:

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