

<p>D.A., et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>LARRY HOGAN, in his official capacity as GOVERNOR of the State of Maryland, et al.,</p> <p>Defendants.</p>	<p>IN THE</p> <p>CIRCUIT COURT</p> <p>FOR BALTIMORE CITY</p> <p>Case No. 24-C-21-002988</p>
<p>LEONARD HARP, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>GOVERNOR LARRY HOGAN, et al.,</p> <p>Defendants.</p>	<p>Case No. 24-C-21-002999</p>

MEMORANDUM OPINION

These two actions are not consolidated. The Court heard the requests for a temporary restraining order by Plaintiffs in both actions together and issues this Memorandum Opinion and the accompanying Temporary Restraining Order jointly in both actions because of the similar issues raised and relief sought in both actions.

Plaintiffs in both actions include Maryland residents who currently receive one or more of several types of expanded or supplemental unemployment benefits made available to the states by the federal government under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act and/or the American Rescue Plan Act of 2021 (“ARPA”). There are six individual Plaintiffs in *D.A., et al. v. Hogan, et al.*, Case No. 24-C-21-002988. There are also six individual Plaintiffs in *Harp, et al. v. Hogan, et al.*, Case No. 24-C-21-002999. The *Harp*

Plaintiffs also seek to represent a class of allegedly similarly situated persons. The Defendants in both actions are Governor Larry Hogan and Maryland Secretary of Labor Tiffany P. Robinson.

Both actions are now before this Court. Defendants removed the *D.A.* action to the United States District Court for the District of Maryland on July 1, 2021. On the same day, however, Judge Richard D. Bennett granted Plaintiffs' Emergency Motion for Remand to State Court and remanded the action to this Court. Because of these rapid procedural events, Judge Bennett's Memorandum Order apparently has not yet been received by the Clerk of this Court. The Court has confirmed that the Memorandum Order has been docketed by the federal court and is having a copy of that Memorandum Order docketed in this Court to confirm this Court's jurisdiction. An earlier action filed in this Court by the *Harp* Plaintiffs also was removed to federal court by Defendants. The *Harp* Plaintiffs chose to dismiss that action, and they then filed this action.

The Court now addresses the Motion for Temporary Restraining Order and Preliminary Injunction (Paper No. 3) filed by the *D.A.* Plaintiffs in Case No. 24-C-21-002988 and the Motion for Temporary Restraining Order and Emergency Hearing (Paper No. 2) appended by the *Harp* Plaintiffs to their Verified Class Action Complaint (Paper No. 1) filed in Case No. 24-C-21-002999. Defendants have filed oppositions to both motions, and the *D.A.* Plaintiffs filed a reply memorandum. The Court conducted a joint hearing in both actions on July 2, 2021 by remote electronic means using Zoom for Government pursuant to Maryland Rule 2-802. All parties appeared by counsel. The Court thanks all counsel for their helpful submissions and arguments.

Allegations

As the health threats resulting from accelerating transmission of the novel coronavirus disrupted economic activity in the United States in March 2020, Congress passed and the President signed the CARES Act on March 27, 2020. At issue here are three types of enhanced

unemployment benefits established and funded by the United States government in the CARES Act. Pandemic Unemployment Assistance (“PUA”) provides benefits to people who otherwise would not be eligible for traditional unemployment insurance benefits, including self-employed individuals and workers who could not work because of a lack of childcare assistance. 15 U.S.C. § 9021. Pandemic Emergency Unemployment Compensation (“PEUC”) extended benefits to workers who exhausted the number of weeks of benefits for which they previously were eligible. 15 U.S.C. § 9025. Federal Pandemic Unemployment Compensation (“FPUC”) provided supplemental benefits of \$600 per week from March 27, 2020 to July 31, 2020. 15 U.S.C. § 9023. The ARPA, Pub. L. No. 117-2, then amended the CARES Act to revive this supplemental benefit at a level of \$300 per week from December 27, 2020 through September 6, 2021.

To implement these and other unemployment benefit programs, Maryland entered into an “Agreement Implementing the Relief for Workers Affected by Coronavirus Act” with the United States Secretary of Labor. Defs.’ Oppos., Exh. A. On June 1, 2021, Governor Hogan wrote to U.S. Secretary of Labor Martin J. Walsh to give notice that “the State of Maryland will end its participation in the unemployment insurance programs listed below, effective at 11:59 p.m. on July 3, 2021.” *Id.*, Exh. B. Governor Hogan listed for termination the PUA, PEUC, and FPUC programs, as well as the Mixed Earners Unemployment Compensation (“MEUP”) program. Plaintiffs do not include claims about the MEUP program. Governor Hogan offered the following explanation:

Thanks to Marylanders’ resilience and tenacity, our state has seen a dramatic drop in COVID-19 cases, and we have reached the milestone set by President Biden of vaccinating 70% of adults. Businesses large and small across our state are reopening and hiring workers, but many are facing severe worker shortages. While we have experienced 12 straight months of job growth in

our state, we will not truly recover until our workforce is fully participating in the economy.

Our administration, in partnership with your agency, will continue working with Marylanders who need reskilling and retraining to reach the next stages of their careers. The comprehensive resources available to our customers through a great variety of training and apprenticeship programs will continue to serve the needs of both Maryland businesses and jobseekers.

Id., Exh. B at 2.

Plaintiffs allege that approximately 300,000 Maryland residents currently receive PUA, PEUC, or FPUC benefits. But for the State's early termination of its participation in those programs, those benefits would continue until September 6, 2021. At stake is nine weeks or just over two months of additional benefits. Plaintiffs allege, and Defendants do not dispute, that these benefits are funded entirely by the federal government. Although not emphasized by any party, the Court assumes that the State bears the costs of administering these benefits, at least once the federal funds are transferred to the State Unemployment Insurance Fund.

The Court will not recite here each individual Plaintiffs' allegations of her or his employment struggles during the pandemic or the importance that each Plaintiff attaches to continuation of these particular programs and the benefits paid through them. All six Plaintiffs in the *D.A.* action have provided affidavits to this effect. Some of the Plaintiffs in the *Harp* action are in different situations. Several of them complain about their frustrations with attempting to qualify for unemployment benefits in Maryland during this period. At the hearing, their counsel stated that on this motion the *Harp* Plaintiffs are seeking relief only with respect to the early termination of these enhanced benefit programs.

Discussion¹

Plaintiffs bear the significant burden of establishing the appropriateness of granting immediate and preliminary injunctive relief in the form of a temporary restraining order. Just this week, amendments to Maryland Rule 15-504 took effect that confirm and clarify that an applicant for a temporary restraining order must show not only the risk of immediate harm before a full adversary hearing can be held, but also must satisfy consideration of the four common considerations for any form of preliminary injunctive relief:

(a) **Standard for Granting.** A temporary restraining order may be granted only if (1) it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the party seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction, and (2) the court examines and makes appropriate findings regarding:

(A) the likelihood that the moving party will succeed on the merits;

(B) the balance of harm to each party if relief is or is not granted;

(C) whether the moving party will suffer irreparable injury unless the order is granted; and

(D) a determination that granting the order is not contrary to the public interest.

Md. Rule 15-504. The Court will discuss the “immediate, substantial, and irreparable harm” element that is specific to the procedural moment of a request for temporary restraining order within the more general discussion of harm and irreparable harm under the second and third preliminary injunction factors.

¹ Because of the time constraints for preparation of this Memorandum Opinion, the Court omits citations to most case authorities supporting the Discussion. Those citations may be found in the parties’ helpful memoranda.

1. Likelihood of Success on the Merits

Perhaps hoping to fit within the pattern of *Ehrlich v. Perez*, 394 Md. 691 (2006), Plaintiffs claim that the State's early termination of unemployment benefits for them draws impermissible distinctions that result in a violation of their equal protection rights recognized under Article 24 of the Maryland Declaration of Rights. Plaintiffs do not place themselves in any demographic category that would establish or even allege a suspect classification leading to strict or elevated constitutional scrutiny. Indeed, Plaintiffs strain to articulate any categories of differentiation at all. They advance allegations that about 85% of the approximately 300,000 Marylanders who are receiving unemployment benefits under one of the enhanced programs at issue are receiving unemployment benefits *only* under those programs. They suggest that this creates an irrational distinction. If early termination of the enhanced programs is carried out, this means that 85% of those affected will then receive no unemployment benefits at all, while 15% will continue to receive some benefits because they have some residual eligibility for unemployment benefits under the State's existing standard program of benefits. According to Plaintiffs, this is not a rational way to carry out the Governor's stated goal of encouraging workers to return to work. Some allegedly will be more encouraged than others.

The Court has difficulty even following the logic of the argument. The classifications that have been made have been made at a program level. For example, benefits have been extended to individuals who are or were self-employed even though they previously were not qualified for unemployment benefits. Or an amount – currently \$300 per week – has been added to whatever benefits a class of eligible or once-eligible workers receive. The Governor's action would end benefits for whole classes of recipients at the program level, with no discrimination within each separate program. If the result is that one person is left with no benefits at all while another person retains some benefits under a remaining program, the reason is not because the

early termination treats similarly situated people differently but because some people have some remaining residual eligibility under the standard unemployment benefit program. Put another way, any discrimination or differentiation would result from the eligibility criteria of the programs themselves. Those distinctions were created when the individual programs were created and are not the result of the early termination of certain programs. The Court is not convinced that Plaintiffs have any likelihood of success on the merits of their Article 24 claims.

Plaintiffs also advance a statutory claim centered in Title 8 of the Labor and Employment Article of the Maryland Code. They start with the very broad legislative findings and purpose provisions behind the State’s unemployment insurance system. Those provisions identify “economic insecurity due to unemployment” as a “serious menace” and establish the unemployment insurance system as a necessary exercise of the State’s police power for “the public good and the general welfare of the citizens of the State.” Md. Code, Lab. & Empl. § 8-102(b)(1), (c). These broad statements serve as “a guide to the interpretation and application” of Title 8. Plaintiffs find their most specific support in § 8-310, which provides:

In the administration of this title, the [Maryland] Secretary [of Labor] shall cooperate with the United States Secretary of Labor to the fullest extent that this title allows.

Id. § 8-310(a)(1). Plaintiffs also cite the recognition that federal contributions, including payment for the enhanced benefits at issue, flow into the State’s Unemployment Insurance Fund.

Id. § 8-403(a)(6). Finally they cite 2021 Md. Laws ch. 49, an emergency enactment during the pandemic that requires that “the Maryland Department of Labor shall identify all changes in federal regulations and guidance that would expand access to unemployment benefits or reduce bureaucratic hurdles to prompt approval of unemployment benefits.” *Id.* § 3(a).

In the Court’s opinion, Plaintiffs’ likelihood of success depends on Plaintiffs’ ability to establish a construction of the Maryland statutes that creates a mandate that executive officials

seek and obtain all federally funded benefits that are available to the State. In the absence of a mandate that controls executive discretion, Plaintiffs are left to debate the wisdom of the Governor's strategy as a matter of policy. Plaintiffs engage in that debate, suggesting data or studies to indicate that enhanced unemployment benefits are not in fact a disincentive to workers leaving the unemployment benefit rolls and returning to work, but it is not the Court's function to adjudicate that policy debate. The Governor and the Secretary of Labor are entitled to very substantial deference in framing public policy and strategy for the State if the statutory framework leaves them that scope of discretion.

The Court concludes that Plaintiffs have shown a likelihood of success in demonstrating that the "fullest extent" language of § 8-310(a)(1) should be interpreted in this context to constrain administrative discretion and require the Maryland Labor Secretary to maximize use of any available federal unemployment benefits. By plain language, the General Assembly meant cooperation "to the fullest extent that this title allows" to be extensive and comprehensive. In the same section, the command that the Maryland Secretary "*shall* cooperate" with the federal Secretary "to the *fullest* extent" contrasts with the discretion accorded that she "*may* afford *reasonable* cooperation" with other federal units. *Id.* § 8-310(b)(1) (emphasis added). Moreover, mandating cooperation "to the fullest extent *that this title allows*" carries the implication that the Maryland Secretary must act whenever an opportunity for cooperation exists within the bounds of Maryland law. This is not just "the Secretary should be very cooperative with federal officials." It requires action as far as Maryland law in this arena will permit.

Defendants argue that the section deals only with administrative cooperation and is limited by the specific reporting and expenditure requirements in § 8-310(a)(2). But the structure of the statute belies such a limitation. Sub-subsection 8-310(a)(1), containing the "fullest extent" command, stands alone as a sentence with a broad and generalized requirement.

Sub-section 8-310(a)(2) has its own separate command – “The Secretary shall . . .” – preceding the three specific administrative actions. But even there, those three actions show breadth of application. The first two involve reporting to the federal Labor Secretary, but the third item involves compliance with federal regulations that “govern the expenditure of any money that may be allotted and paid to the State” for administration. *Id.* § 8-310(a)(2)(iii). Thus, while all the items are administrative, they include the administration of federal funding.

In interpreting the specific statute, the Court must consider the clear remedial purpose of Title 8 more broadly and the strength of the General Assembly’s expression of the importance of addressing the “serious menace” of “economic insecurity due to unemployment.” *Id.* § 8-102(b)(1). The Court also considers the General Assembly’s pandemic-specific interest in requiring that the Maryland Labor Secretary review federal regulations and guidance to identify ways to “expand access to unemployment benefits.” 2021 Md. Laws ch. 49 § 3(a).² That provision appears aimed at facilitating access through improved administration, but it reinforces the desirability, expressed by the General Assembly, of seeking all forms of federal assistance.

At this preliminary stage, the Court concludes that Plaintiffs have shown a likelihood that they will succeed in establishing that the “fullest extent” provision requires the Secretary of Labor, without discretion, to draw available benefits from the federal government if providing them to Maryland residents is consistent with the Maryland unemployment benefit system. Defendants have not argued that there is anything about the enhanced benefit programs that violates Maryland law. Plaintiffs therefore have satisfied this element of the temporary restraining order standard.

² The Court appreciates the Senate President providing his insights by affidavit about the General Assembly’s work during the pandemic, but the Court does not regard his affidavit, prepared for use in litigation, as a source of legislative history for Chapter 49 enacted during the 2021 Session.

2. Balance of Harms

The Court must examine the harm that would be experienced by each party with or without issuance of a temporary restraining order and then compare those relative harms.

The Court will add more below in the discussion of the irreparable nature of the harm faced by the individual Plaintiffs, but Plaintiffs have shown by very particularized affidavits that they face significant hardship if their remaining unemployment benefits terminate tomorrow. Plaintiffs have been strained economically and emotionally by the pandemic. In its global scope and in the anxiety that almost all people experience over the threat of disease, the impact of the pandemic has been universal, but the brief stories of these Plaintiffs reminds the Court that the impact of the pandemic has been cruelly uneven. Some have suffered death or debilitating illness themselves, in their families, or among their friends. Others have experienced severe economic hardship from involuntary unemployment or the inability to work because of the need to take on childcare and elder care responsibilities. As one who has enjoyed the privilege of continuous, secure employment, the Court is particularly struck by the plight of those who have had to struggle with irregular or no employment. To their credit, Defendants, along with officials at every level of government, have devoted themselves to the effort to ameliorate these problems. The Court has no doubt that Defendants have made and are continuing to make very difficult decisions in all good faith.

Defendants, as representatives of the State government, stand to experience some harm from the issuance of a temporary restraining order. As stated, the Court assumes that although the cost of the enhanced benefits themselves are a federal responsibility, the State will bear additional costs of administration by continuing the enhanced benefits for a longer period. Those are the regular costs of government administration, however, and it is notable that there is no

contention that any person will get benefits improperly that she or he would not get if these programs simply are extended to the full time provided under federal law.

Balancing these harms, the balance tips decidedly in favor of issuing a temporary restraining order. The personal magnitude of the harm associated with losing benefits particularly for Plaintiffs and other individuals currently receiving them is far greater than any additional cost that must be borne by the State.

3. Irreparable Harm

The Court considers under this factor two separate aspects of irreparable harm. One aspect is the more general issue of whether the nature of the harm Plaintiffs will experience without a temporary restraining order is irreparable in nature such that injunctive relief is appropriate. The second aspect is more specific to consideration of a temporary restraining order. Is it necessary to act immediately, without having given Defendants a full opportunity to respond to the claims and issues, because of the risk of imminent consequences?

More generally, Plaintiffs face the threat of irreparable harm. Although “only” money is at stake, the potential consequences are irreparable because it is very unlikely that any Plaintiff would gain payment of lost benefits at some time in the future. If this were a situation in which Plaintiffs claimed that Defendants had made or were making legally or factually incorrect eligibility determinations, it might be possible that the errors ultimately could be addressed by a lump sum award of benefits that were due. Here, however, there is no dispute about Plaintiffs’ eligibility. They allege instead that they will lose benefits because Defendants choose to terminate access to a federal source of benefits that will continue and which they would receive absent that early termination decision. If the Court denied injunctive relief and then later determined that Defendants should not have terminated the programs early, it is extremely

unlikely that access to the federal funds that the State abandoned could be restored. This alone amounts to irreparable harm.

In addition, Plaintiffs have shown in their affidavits with varying degrees of severity that the immediate loss of benefits, when some of them already are in vulnerable financial condition, likely will lead to loss of housing, short-term diversion of effort to less valuable employment, and/or significant emotional consequences. These non-monetary effects would never be compensated and therefore add to the threat of irreparable harm.

The Court also must consider whether a temporary restraining order is necessary at this moment. This inquiry focuses on the very short term from today to the point at which the Court can conduct a full adversary hearing to consider a preliminary injunction. Here, without any question, immediate relief is appropriate because of the midnight deadline arising from the timing of the Governor's termination notice. It may be possible that if the Court waited seven to ten days and then issued a preliminary injunction following a hearing, the federal government would allow Maryland to re-enter the enhanced benefit programs, perhaps even with retroactive funding to eliminate a lapse in benefits. But there is an opportunity now to prevent any lapse and to avoid the risk that re-entry would not be possible by acting before termination of participation in the programs actually occurs. This is exactly the type of "immediate, substantial, and irreparable harm" that Maryland Rule 15-504(a)(1) is designed to prevent.

In this respect, Defendants mistake the assessment of the *status quo* that is to be preserved. Defendants argue that Governor Hogan has already acted to terminate Maryland's participation in the enhance benefit programs, so the *status quo* is termination and that termination should be preserved. In the Court's view, the proper perspective is to look at the situation that existed before the challenged action was taken. The *status quo* today for each individual Plaintiff is she or he is receiving benefits. The action that Plaintiffs challenge has

been announced and put in motion, but the change in the *status quo* has not yet occurred because their benefits have not yet ended. Most important, in this particular situation, there is still an opportunity to preserve that status during a period of further examination of the issues.

Defendants argue that the U.S. Department of Labor has already acknowledged the impending termination, but Plaintiffs have rebutted that by submission of an email from the same federal official indicating that there is still time for Maryland to rescind its termination and to remain in the enhanced benefit programs.

Plaintiffs have satisfied both the general element of irreparable harm and the specific requirement of immediate harm needed to support issuance of a temporary restraining order.

4. The Public Interest

As stated above, the Court does not doubt Defendants' good faith in adopting a course of action that they believe to be in the public interest considered as a whole. Even accepting their good faith, however, it must also be recognized that continued State participation in the enhanced benefit programs would both continue to support a very large number of individual Marylanders and continue to contribute large amounts of money to the State's recovering economy.

Defendants properly consider Maryland businesses that face a labor shortage, the effects of that factor on those businesses, and the rippling effects their activity has in the economy. But the effects on Plaintiffs also ripple throughout the economy. Any random panel of economists charged with determining which strategy would net a greater benefit to the public at large likely would produce divergent opinions. The Court concludes at the very least that the benefits of continuing the enhanced benefit programs for Plaintiffs and thousands of Marylanders like them are not limited to the private, personal effect on those people. There is a significant public interest in continuing those benefits, perhaps even a predominant public interest. Because

Maryland Rule 15-504(a)(2)(D) requires only that granting a temporary restraining order be “not contrary to the public interest,” Plaintiffs have clearly satisfied this factor.

Conclusion

For these reasons, the Court finds that Plaintiffs have satisfied all four of the preliminary injunctive relief factors and have also shown a threat of “immediate, substantial, irreparable harm.” Md. Rule 15-504(a)(1). The motions of Plaintiffs in both actions therefore will be granted, and the Court will issue a separate Temporary Restraining Order.

The judge’s signature appears on the original document in the court file.

July 3, 2021
10:00 a.m.

Judge Lawrence P. Fletcher-Hill
Circuit Court for Baltimore City