IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-03390-RMR

JOSHUA ABRAMS

Plaintiff,

v.

DIVISION OF UNEMPLOYMENT INSURANCE
JOE BARELA
JEFF FITZGERALD
JOHN & JANE DOE(S)

Defendants.

STATE DEFENDANTS' RESPONSE TO MOTION FOR EMERGENCY INJUNCTION [ECF 8]

Defendants Division of Unemployment Insurance (the "Division") and Joe Barela (hereinafter jointly "State Defendants"),[1] through counsel, file this Response to Plaintiff's Motion for Emergency Injunction ("the Motion" or "Plaintiff's Motion").

FACTUAL BACKGROUND

The Division received a claim for unemployment insurance benefits from Plaintiff on February 2, 2025. Ex. C, ¶ 20 (Declaration of Guadalupe Diaz); Ex. E (MyUI+ Home Page for Plaintiff). Plaintiff also previously filed a claim for unemployment benefits in 2023. Ex. A, ¶ 6 (Declaration of Jeff Newcomb); Ex. B, ¶ 15 (Declaration of Brandon McClure); Ex. C, ¶ 10; *see* ECF No. 8, p. 1. Plaintiff's Motion concerns the 2025 claim, but a short discussion of the 2023 claim provides necessary context.

[1] A return of service was filed for Jeff Fitzgerald indicating the Summons and Amended Complaint was left with an administrative assistant at the Colorado Department of Labor and Employment ("CDLE"). ECF No. 20. However, because Mr. Fitzgerald is no longer employed by CDLE, this attempt at service was not effective.

Program Integrity Measures

During and after the COVID-19 pandemic, Colorado and other states experienced a significant increase in the volume of fraudulent claims for unemployment insurance benefits and extended pandemic benefits. Ex. C, ¶ 3. Since the pandemic began in early 2020, the Division has received millions of fraudulent claims. *Id.*

In March 15, 2020, the Division adopted "program integrity" measures to avoid payment of fraudulent claims. *Id.* at ¶ 4. The program integrity process reviews and compares available information from a variety of sources to flag discrepancies that could indicate a fraudulent claim. *Id.* at ¶ 5. Depending on the severity of the flagged issues, the claims system establishes a "program integrity hold," which prevents benefits payments on the flagged claim until further information can be assessed by the Division. *Id.* If a program integrity hold is placed, the system immediately and automatically sends a fact-finding request to the claimant, who receives an alert. *Id.* at ¶ 6. The claimant has seven days to respond to a list of questions and provide the required documentation. *Id.* If the Division receives the information within seven days, a deputy reviews the information and decides whether to release the hold, seek further information, or disqualify the claimant. *Id.* at ¶ 7. If the Division does not receive the requested information within seven days of sending the factfinding, the system sends a "reporting requirement disqualification" to the claimant, which informs the claimant that they have been disqualified for failing to provide information and provides notice of the right to appeal the decision. *Id.* at ¶ 8. If the deputy determines that a program integrity hold should be removed, the hold is removed and the claimant is notified of the decision. *Id.* at ¶ 9.

Customer Service Capabilities

An unemployment benefits claimant can contact the Division about their claim by phone, U.S. mail, online through the MyUI+ portal, or in person. Ex. D, ¶ 2 (Declaration of David Kimball). The Division's call center has 102 agents and 9 supervisors. Call center agents assist claimants with filing claims, adjudicating non-separation decisions, and providing guidance for claimants within the unemployment system. *Id.* at ¶ 3. The Division's call center agents are available to answer phone calls Monday through Friday, from 8 a.m. to 4 p.m. *Id.* at ¶ 4. The Division's phone system has a total of 150 phone lines divided into 12 active queues. *Id.* at ¶ 5. Each active queue can accommodate 10 people on hold, allowing up to 120 people to be on hold. *Id.* Once the system reaches 120 people on hold, it puts additional callers into a separate queue that can hold up to 150 calls at a time. *Id.* Once this separate queue reaches 150 callers, new callers are notified that the queue is full and will be invited to speak with a virtual assistant. *Id.* The virtual assistant can answer basic questions about claims, including how to file a claim and how to appeal a decision of the Division. *Id.* Claimants have several ways to contact the Division online. *Id.* at ¶ 8. The primary method is the online portal, MyUI+, where claimants utilize various tools and perform functions like updating their information and managing existing claims. *Id.* Documents and forms may also be uploaded through the online "document submission form." *Id.* at ¶ 9; Ex. B, ¶¶ 8-10. Claimants can also complete a Claimant Feedback Form, which can be used to provide several categories of feedback.

Kiosks are available at the Division for claimants who lack computer access and staff are available to assist with questions. Ex. D, ¶ 13. A secure dropbox is located in the Division's lobby, which may be accessed during regular business hours, Monday to

Friday from 8 a.m. to 4 p.m. *Id.* at ¶ 14. Claimants may schedule in-person appointments through an online form. *Id.* at ¶ 15.

2023 Claim for Benefits

The Division received Plaintiff's first claim for unemployment benefits on March 5, 2023. Ex. C, ¶ 10. Plaintiff later attempted to withdraw the claim, but the request was denied by a deputy of the Division. *Id.* at ¶ 15. Plaintiff appealed to a hearing officer, and later, to a panel of the Industrial Claims Appeals Office, but the decision was affirmed. *Id.* at ¶¶ 15-17.

Plaintiff received benefit payments from April 2023 through mid-June 2023. *Id.* at ¶ 19; Ex. F (Abrams' Unemployment Benefits Payments) (reflecting payments from 4/3/2023 through 6/17/2023). In late June 2023, the Division's claims handling system flagged the claim for two program integrity holds*. Id*. at ¶ 11. The first program integrity hold was triggered on June 23, 2023, and the system automatically sent Plaintiff a fact-finding request. *Id.* at ¶ 12. The Division received the requested information from Plaintiff that same day, and the hold was released the next day. *Id.* The second hold was triggered on June 26, 2023, and the Division sent Plaintiff a fact-finding request on that date*. Id*. at ¶ 13. Because the Division did not receive the requested information from Plaintiff within seven days, the hold was not released. *Id.*

Within the next few months, Plaintiff began reporting employment income again, so the claim became inactive*. Id*. at ¶ 14; Ex. A, ¶ 6. Plaintiff continued to report income through the fourth quarter of 2024, until January 31, 2025. Ex. C, ¶ 14. The program integrity hold remained in place because the Division had not received any response to the fact-finding sent to Plaintiff on June 26, 2023. *See id*. at ¶¶ 20-22.

2025 Claim for Benefits

The Division received a second claim for benefits from Plaintiff on February 2, 2025. *Id.* at ¶ 10; Ex. E. At the time the 2025 claim was received, the Division still had not received the information requested from the program integrity fact-finding on June 26, 2023, so the hold was still in place. Ex. C, ¶¶ 20-22. On March 15, 2025, the Division received the requested information from Plaintiff. *Id.* at ¶ 22. The program integrity hold was cleared on March 17, 2025, and the Division adjudicated Plaintiff's separation the next day. *Id.* at ¶¶ 22-23. Plaintiff began receiving benefits on March 20, 2025. *Id.* at ¶ 24; *see* Ex. F [Payments] (Payment Date: 3/20/2025). As of this filing, Plaintiff has received unemployment benefits by direct deposit from February 8, 2025, through the week ending April 12, 2025. Ex. C, ¶ 25. Today, April 21, 2025, the Division received a request for payment from Plaintiff for the week ending April 19, 2025. *Id.* He has not appealed any decision about his 2025 claim to a hearing officer. *Id.* at ¶ 27.

Plaintiff contacted the Division by phone several times in 2023 and 2025. Ex. D, ¶ 19; Ex. G (Record of Inbound Calls from Plaintiff's Phone Number). On March 14, 2025, he spoke with call center agents twice for a total of approximately 90 minutes. Ex. D, ¶ 20. The calls concerned the program integrity hold on his claim. *Id.* The hold was lifted after the Division received documentation from Plaintiff. *Id.*

Plaintiff has successfully used the MyUI+ platform to manage his claims in 2023 and 2025. Ex. B, ¶¶ 16-17. For example, Plaintiff uploaded documentation to MyUI+ on March 15, 2025, to clear his program integrity hold, which was lifted two days later. *Id.* at ¶ 17. Plaintiff used the portal to update his contact information as recently as April 11, 2025. *Id.* To date, the Division has not received any request to accommodate a disability from Plaintiff. Ex. A, ¶ 10.

PROCEDURAL BACKGROUND

Plaintiff initiated this action on December 6, 2024. ECF No. 1. On December 9, 2024, the Court ordered Plaintiff to file an amended complaint. ECF No. 4. Plaintiff complied with that order. ECF No. 7. On February 26, 2025, Plaintiff filed the Motion. ECF No. 8. On March 4, 2025, the Court ordered Plaintiff to serve the Complaint and Motion for Emergency Injunction on defendants. ECF No. 11. The Court later vacated that order and directed the Clerk of Court to issues summonses to be served by the U.S. Marshals Service. ECF No. 13. The Marshals Service served the Amended Complaint upon State Defendants on March 24, 2025. ECF Nos. 19, 21. The Motion for Preliminary Injunction was not served on State Defendants. The Court ordered State Defendants to respond to the Motion by April 21, 2025. ECF No. 28.

STANDARD OF REVIEW

Whether to grant a preliminary injunction is left to the sound discretion of the Court. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). Because Plaintiff is pro se, the Court must liberally construe his pleadings. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court must not advocate on his behalf. *Id.*; *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) ("[T]he court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record.").

ARGUMENT

"A preliminary injunction is considered 'an extraordinary and drastic remedy.'" *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015). A plaintiff seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits, (2) they will suffer irreparable injury if the preliminary injunction is denied, (3) the threatened injury outweighs the injury caused by the injunction, and (4) an injunction is not adverse to the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The plaintiff bears the burden of proof to demonstrate that each factor tips in their favor. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003).

In addition, the preliminary injunction Plaintiff seeks here is a "disfavored" injunction—he requests a "mandatory" injunction that would upset the existing status quo. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005). Plaintiff therefore bears a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors: [they] must make a strong showing these tilt in [their] favor." *Free the Nipple v. City of Ft. Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (quotations omitted). "[B]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Stephens v. Jones*, 494 Fed. Appx. 906, 910 (10th Cir. 2012).

I. Plaintiff is not substantially likely to succeed on the merits.

The first preliminary injunction factor asks whether Plaintiff has established a substantial likelihood of success on the merits. *Winter*, 555 U.S. at 20. "A 'substantial likelihood' is defined as 'a prima facie case showing a reasonable probability that [the movant] will ultimately be entitled to the relief sought.'" *Peterson v. Kunkel*, 492 F. Supp. 3d. 1183, 1194 (D.N.M. 2020) (quoting *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781 (10th Cir. 1964)). As Plaintiff seeks a disfavored preliminary injunction, he faces a heavier burden to show this factor is satisfied. *Free the Nipple*, 916 F.3d at 797.

Plaintiff raises his Title II ADA, First Amendment, and Fourteenth Amendment claims as the basis for his request for emergency injunction. ECF No. 8, p. 1. For the reasons stated below, Plaintiff cannot meet this heavy burden.

A. The Eleventh Amendment forecloses relief against the Division and the Executive Director in his official capacity under § 1983.

Plaintiff asserts two § 1983 claims as the basis for his request for emergency injunctive relief. ECF No. 8, p. 1. The Eleventh Amendment to the United States Constitution bars federal jurisdiction over private claims for money damages against a state, its instrumentalities, and state officials acting in their official capacity. *Tennessee v. Lane*, 541 U.S. 509, 517-18 (2004). Eleventh Amendment immunity presents an issue of subject matter jurisdiction. *Fent v. Okla. Water Resources Bd.*, 235 F.3d 553, 559 (10th Cir. 2000). Unless a state has waived its Eleventh Amendment immunity, or Congress has abrogated it, such absolute immunity applies regardless of the relief sought. *See Higganbotham v. Okla. Transp. Comm'n*, 328 F.3d 638, 644 (10th Cir. 2003); *Ramirez v. Okla. Dep't of Mental Health*, 41 F.3d 584, 588 (10th Cir. 1994), *overruled on other grounds by Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998). Colorado has not waived its immunity. *See Griess v. Colorado*, 841 F.2d 1042, 1044 (10th Cir. 1988) (holding that Colorado had not abandoned Eleventh Amendment immunity for § 1983 claims). And Congress did not abrogate such immunity in enacting § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989).

The Division is part of the Colorado Department of Labor and Employment, an arm of the state. § 8-71-101, C.R.S. (2024); § 24-1-121(1), C.R.S. (2024). Thus, it is entitled to immunity. Likewise, the Executive Director is entitled to such immunity in his official capacity. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Therefore, the § 1983 claims are barred, making Plaintiff unlikely to succeed on the merits.

B. Plaintiff is not substantially likely to succeed on his ADA claim.

The Motion appears to assert that injunctive relief is needed due to a failure to accommodate his disability.[2] To state a claim for Title II ADA discrimination under a failure to accommodate theory,[3] Plaintiff must establish (1) he is otherwise entitled to a public benefit, service, or program also available to similarly situated persons without disabilities; (2) he requires a reasonable accommodation to access that benefit, service, or program; and (3) the public entity refused to provide such accommodation, thereby denying access. *Grider v. City & Cnty. of Denver*, No. 10-CV-00722-MSK-MJW, 2011 WL 721279, at *5 (D. Colo. Feb. 23, 2011) (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-76 (2d Cir. 2003)).

Here, because Plaintiff has been able to access his unemployment benefits, Ex. F; Ex. B, ¶ 15; Ex. C, ¶¶ 24-25, he cannot show a substantial likelihood of success on the third element of a failure to accommodate claim. Moreover, Plaintiff does not allege he requested any accommodation. ECF No. 8. And, in fact, he has not requested an accommodation from the Division. Ex. A, ¶ 10; *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197-98 (10th Cir. 2014) (public entity has no obligation to provide accommodation absent notice through a request or obvious need for accommodation); *Young v. City of Claremore, Okla*., 411 F. Supp. 2d 1295, 1308 (N.D. Okla. 2005). For these reasons, Plaintiff is not substantially likely to succeed on his ADA claim.

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[2] For the purposes of this Response only, the Division and Executive Director do not dispute Plaintiff is an individual with a disability.

[3] To the extent Plaintiff argues he was discriminated against or excluded based on a disability, he wholly fails to allege facts that could support intentional discrimination. *Meyers v. Colorado Dep't of Human Servs*., 62 F. App'x 831, 833 (10th Cir. 2003); *Tenorio v. Pitzer*, No. CV 12-01295 MCA/KBM, 2014 WL 12650972, at *1 (D.N.M. Mar. 31, 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)) ("Discriminatory intent is an extremely demanding state of mind requirement.").

C. Plaintiff is not substantially likely to succeed on his First Amendment claim.

The First Amendment guarantees “the right of the people . . . to petition the government for a redress of grievances.” U.S. Const. amend. I. The Motion alleges Plaintiff filed a claim for unemployment benefits on January 31, 2025. Plaintiff alleges his claim for benefits was approved, but he has been prevented from accessing the funds “due to an unexplained ‘integrity hold.’” ECF No. 8, p. 2. Plaintiff alleges the Division “has not provided a mechanism for claimants to contest or inquire about these holds,” leaving Plaintiff with “no viable path to redress.” *Id.* at 2-3. Plaintiff moved for an injunction just twenty-six days after submitting the claim for benefits to the Division.

As discussed above, Plaintiff cannot show a substantial likelihood of success on the merits because both his § 1983 claims are barred by the Eleventh Amendment.

Plaintiff also cannot establish that the Division impaired his right to petition for redress. Though the right to petition and the right to free speech are separate guarantees, they are related and “generally subject to the same constitutional analysis.” *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (citing *NAACP v. Claiborne Hardware Co.*, 458 US. 886, 911-15 (1982)). “[T]here is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.” *McDonald v. Smith*, 472 U.S. 479, 485 (1985). The purpose of the right to petition is to guarantee that “people ‘may communicate their will’ through direct petitions to the legislature and government officials.” *Id.* at 482 (quoting 1 Annals of Cong. 738 (1789)).

Although the Motion alleges a “Systemic Denial of Benefits without Due Process,” it admits the claim for benefits was approved. ECF No. 8, p. 2. Plaintiff does not allege approval has been revoked or rescinded, or that the claim has been denied. Plaintiff used the MyUI+ portal to manage his claim. *See* Ex. B, ¶ 17 (noting that

Abrams successfully used the MyUI+ portal). He received written notice the claim was approved. ECF No. 8, p. 2. He has received weekly benefit payments from February 8 through April 12, 2025. Ex. C, ¶¶ 24-25. The benefit payment for the week ending on April 19, 2025, has not yet been released because Plaintiff just requested that payment today (April 21, 2025). Ex. C, ¶ 25. Plaintiff has spoken with multiple call center agents of the Division in 2025. Ex. A, ¶ 9; Ex. D, ¶¶ 18-20. He also used the MyUI+ online portal to post notes to the Division and provide new contact information. Ex. B, ¶ 17.

The Motion does not allege the Division failed to consider information it received from Plaintiff; on the contrary, it admits his claim for benefits was approved. The "right to petition government afforded by the First Amendment does not include the right to speak in person to government officials. Where written communications are considered by government officials, denial of a hearing does not infringe upon the right to petition." *Scroggins v. City of Topeka, Kan.*, 2 F. Supp. 2d 1362, 1375 (D. Kan. 1998).

Finally, even if Plaintiff had received an adverse decision, by statute, he could seek several layers of appellate review of that decision. Under § 8-74-102(1), C.R.S. (2024), the initial determination is made by a deputy designated by the Executive Director. Plaintiff could then appeal any decision of the deputy and obtain a hearing before a hearing officer. § 8-74-103(1), C.R.S. (2024). If still dissatisfied, Plaintiff could appeal to the Industrial Claims Appeals Office and then the Colorado Court of Appeals. §§ 8-74-104(1), 8-74-107(2), C.R.S. (2024). In fact, Plaintiff used these procedures to appeal a decision about his 2023 claim. Ex. C, ¶¶ 15-17.

Plaintiff cannot establish that the Division deprived him of his right to petition for redress concerning his 2025 claim for benefits. Thus, he cannot establish a substantial likelihood of success on the merits of his First Amendment claim, particularly under the heavier standard applicable to disfavored injunctions.

D. Plaintiff is not substantially likely to succeed on his Fourteenth Amendment claim.

Nor can Plaintiff establish a substantial likelihood of success on his Fourteenth Amendment claim. The Motion alleges the Division deprived Plaintiff of due process by imposing an "integrity hold" on his January 2025 claim, failing to explain the hold, and failing to provide a "process—let alone a fair one—to contest" the hold. Plaintiff claims he is unable to petition for relief because the Division has "no functional phone support, no messaging option, and no in-person recourse . . . ." ECF No. 8, p. 6.

Because Plaintiff seeks a disfavored injunction, he faces a heavier burden to satisfy the substantial likelihood of success factor. *Free the Nipple*, 916 F.3d at 797. To satisfy procedural due process in unemployment compensation proceedings, a claimant must be given "adequate advance notice and an opportunity to be heard prior to state action resulting in deprivation of a significant property interest." *Mountain States Tel. & Tel. Co. v. Dep't of Lab. & Emp't*, 520 P.2d 586, 588 (Colo. 1974).[4]

Plaintiff cannot establish that he exhausted his administrative remedies under state law or that any exception to the exhaustion requirement applies. "Under Colorado law, '[i]f complete, adequate, and speedy administrative remedies are available, a party must pursue these remedies before filing suit in district court.'" *Boulter v. Noble Energy, Inc.*, 521 F. Supp. 3d 1077, 1084 (D. Colo. 2021) (quoting *City & Cnty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000)). "Failure to exhaust administrative remedies before seeking judicial relief is a jurisdictional defect." *Id.* The exhaustion requirement "applies with equal force when the party seeks declaratory relief." *United Air Lines*, 8 P.3d at 1213.

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[4] As discussed above, Plaintiff cannot show a substantial likelihood of success on the merits because both of his § 1983 claims are barred by the Eleventh Amendment.

Here, Colorado statute establishes the framework by which claims for unemployment benefits "shall be made, processed, and reviewed . . . ." § 8-74-101(1), C.R.S. (2024). After the Division receives a claim, notifies interested parties, and provides an opportunity to provide information, a "deputy to be designated by the director of the division" reviews all the submitted materials and must "issue a decision . . . ." § 8-74-102(1). Under § 8-74-103(1), an interested party may appeal a deputy's decision "and obtain a hearing covering any issue relevant to the disputed claim," to be heard by "a hearing officer designated by the director of the division." "The hearing officer, after affording all interested parties a reasonable opportunity for a fair hearing in conformity with the provisions of this article and the regulations of the division, shall make a decision on each relevant issue raised, including findings of fact, conclusions of law, and an order. The division shall promptly provide all interested parties with copies of the hearing officer's decision." § 8-74-103(3). Under § 8-74-107(1), C.R.S. (2024), "No action, proceeding, or suit to set aside an industrial claim appeals panel's decision or to enjoin the enforcement thereof shall be brought unless the petitioning party has first complied with the review provisions of sections 8-74-104 and 8-74-106." "Actions, proceedings, or suits to set aside, vacate, or amend any final decision of the industrial claim appeals panel or to enjoin the enforcement thereof may be commenced in the court of appeals by any interested party, including the division." § 8-74-107(2), C.R.S.

Plaintiff moved for an injunction in federal district court just twenty-six days after submitting his claim for benefits to the Division. As a threshold matter, there is nothing for the Court to enjoin because Plaintiff is receiving unemployment benefits. Ex. C, ¶¶ 20-25. Even if he was not receiving them, Plaintiff has not exhausted his administrative remedies under applicable state statutes or the Division's regulations. The Motion also fails to establish the applicability of any exception to the exhaustion requirement. And

Plaintiff cannot establish that it is "'clear beyond a reasonable doubt' that further administrative review by the agency would be futile because the agency will not provide the relief requested." *Boulter*, 521 F. Supp. 3d at 1084.[5]

Plaintiff's Fourteenth Amendment claim is not substantially likely to succeed because it is subject to dismissal for lack of jurisdiction. *United Air Lines*, 8 P.3d at 1217; *Boulter*, 521 F. Supp. 3d at 1084-87 (dismissing federal suit for lack of jurisdiction due to failure to exhaust administrative remedies under state law). Because Plaintiff has failed to show he is substantially likely to succeed on the merits of the claims underlying his Motion, the Motion must be denied.

II. The remaining preliminary injunction factors overwhelmingly favor State Defendants.

A. Plaintiff has not shown irreparable harm.

Irreparable harm may occur when injuries cannot be adequately remedied with money or when complete relief cannot be granted following a final determination on the merits. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (internal citation and quotations omitted). The threatened injury "must be both certain and great," and "not be merely serious or substantial." *Id.* "A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001).

As explained above, Plaintiff is currently receiving unemployment benefits. Ex. C, ¶¶ 24-25. Thus, not only can he not show irreparable harm, but the alleged harm is not occurring at all. Even if he were not receiving unemployment benefits, that would not

[5] Plaintiff does not challenge the constitutionality of any statute or allege the Division acted outside the scope of its authority.

constitute irreparable harm. *See Villecco v. Spesshardt*, No. 1:23-CV-01265-DDD, 2023 WL 3855488, at *1 (D. Colo. June 1, 2023) (finding no irreparable harm when plaintiff alleged he was unable to access unemployment benefits application). Additionally, because he is not substantially likely to succeed on the merits of his claims, he cannot show irreparable harm. *Harmon v. City of Norman, Okla.*, 981 F.3d 1141, 1146 (10th Cir. 2020) (district court properly based its denial of motion for preliminary injunction solely on conclusion that plaintiffs did not establish a substantial likelihood of prevailing on the merits). Because Plaintiff has failed to show irreparable harm, the Court should deny the motion.

B. The balance of equities and public interest strongly favor denying the requested relief.

The third and fourth preliminary injunction factors require the Court to balance the harm to Plaintiff of not obtaining the injunctive relief he requests against the Division's harm if the injunction is granted and to determine whether the requested relief will adversely affect the public interest. *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). These two factors merge where the requested injunction is opposed by an arm of the State. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, Plaintiff requests the Court order the Division to change their phone systems and hire additional staff to ensure telephone hold times do not exceed thirty minutes; change their appointment system to ensure an appointment within two days of contacting the Division; change their online portal system in multiple ways; and respond to all inquiries within three business days. ECF No. 8, pp. 4-5. Plaintiff demands all this be done within fourteen days. *Id.* at 4. This is an extraordinary request that is virtually impossible to meet and would undoubtedly harm the public interest. Ex. B, ¶ 14 (Division cannot make unilateral changes to online system; any changes would take months to complete); Ex. D, ¶¶ 7, 12 (Division would need to hire 60 call center agents to comply with Plaintiff's requests). The relief requested would require the Division to divert its limited resources away from fulfilling its statutory mandates to meet Plaintiff's requests. *See* Ex. D, ¶ 13. Moreover, given that Plaintiff is in fact receiving unemployment benefits, there is no harm to him at all and the balance of equities does not tip in his favor. For that reason, the Court should deny the motion.

CONCLUSION

For the reasons stated herein, and pursuant to the cited authorities, State Defendants respectfully request this Court deny Plaintiff's motion for emergency injunction.

Respectfully submitted this 21st day of April 2025,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **STATE DEFENDANTS' RESPONSE TO MOTION FOR EMERGENCY INJUNCTION [ECF 8]** upon all parties herein by e-filing with the CM/ECF system maintained by the court, by email and/or by causing same to be deposited in the United States Mail, with First Class postage prepaid, at Denver, Colorado, on this 21st Day of April 2025, addressed as follows:

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s/ Xan Serocki