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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF CLAIM OF KLOSTERMAN; MATTER  
OF CLAIM OF ALMINDO; MATTER OF CLAIM  
OF BRUYERE; MATTER OF CLAIM OF  
LAMPHIER; MATTER OF CLAIM OF DIXON-  
DOMINES; MATTER OF CLAIM OF DUNN, JR.,

Appellants NO. 105  
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20 Eagle Street  
Albany, New York  
November 19, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Brandon Deshawn  
Official Court Transcriber

1 CHIEF JUDGE WILSON: First case on the calendar  
2 is Matter of Claim of Klosterman and several others.  
3 Counsel?

4 MR. HUTTER: Just one minute, Judge. I just want  
5 to make - - - adjust this.

6 CHIEF JUDGE WILSON: Of course. Take your time.

7 MR. HUTTER: Good afternoon. May it please the  
8 court. I'd like to - - - may I reserve about five minutes  
9 for rebuttal, Your Honor?

10 CHIEF JUDGE WILSON: Yes.

11 MR. HUTTER: The Third Department below held that  
12 a worker's entitlement to federally provided COVID  
13 benefits, which is intended to supplement - - - not to  
14 supplement, to help workers who were out of work, lost  
15 earnings because of the COVID-19 and were not eligible for  
16 state unemployment benefits. That entitlement now,  
17 according to the state and the Department of Labor, is also  
18 largely governed, if not entirely, by state law. And state  
19 law now can impose additional requirements to condition the  
20 receipt of federal benefits. Now, the basis for that  
21 contention, which was accepted by the Third Department was  
22 not statutory authorization by the feds. The federal  
23 statute is absolutely silent about allowing the states to  
24 determine eligibility.

25 JUDGE SINGAS: But under regular federal



1 unemployment, the feds do defer to the states to figure out  
2 the - - - how it should be meted out. Isn't that right?  
3 So why should it be any different here?

4 MR. HUTTER: The - - - the difference between  
5 eligibility and processing, Your Honor. And I think that's  
6 what the Third Department got wrong. What the federal  
7 CARES Act did is set up eligibility for these - - - for  
8 these benefits. Then the - - - they work in tandem with  
9 the state. We're going to give you the money the - - - to  
10 the state. State, you now process them, not determine  
11 eligibility. There's nothing to indicate that the intent  
12 of Congress - - -

13 JUDGE SINGAS: But the CARES Act, there is no  
14 definitional terms there. They didn't define anything. If  
15 - - - if we agreed with you and it got sent back, what  
16 would happen? You'd apply the CARES Act. And what kind of  
17 standard would they apply?

18 MR. HUTTER: I - - - I don't - - - I don't - - -  
19 I'm not following your question, Your Honor, because I  
20 think it's - - - there's no statutory interpretation. The  
21 issue here is, are they covered individuals?

22 JUDGE SINGAS: And what does the - - -

23 MR. HUTTER: If you're a covered individual,  
24 you're entitled to benefits.

25 JUDGE SINGAS: And what does the CARES Act say?

1 Who's covered?

2 MR. HUTTER: The CARES Act says, ineligible for  
3 unemployment benefits under state. They're - - - they're  
4 not eligible. The state has made that clear. Second, they  
5 are unable to work - - - work due to the inability - - -  
6 the closed workplace due to COVID. And that's it.

7 JUDGE HALLIGAN: And does - - - does - - - does  
8 the federal - - - does the federal statute or regulations  
9 define what that means?

10 MR. HUTTER: Which - - - what means, Your Honor?

11 JUDGE HALLIGAN: What - - - what it means to be  
12 unemployed or partially unemployed or unable to work  
13 because your place of employment is closed?

14 MR. HUTTER: I don't think there's need - - -  
15 need for definitions, Your Honor. It's - - - it's just  
16 Webster's plain - - - plain meaning - - - inability - - -  
17 inability to work.

18 JUDGE RIVERA: Well, what would be partial  
19 unemployment? I work one day? I work one hour?

20 MR. HUTTER: I don't - - - I don't - - - I don't  
21 know the answer to that, Your Honor. I'd have to look at  
22 what the - - - if there may be something in the - - - in  
23 the federal regulations that say that. That's not an issue  
24 in this case. And - - - and I honestly just don't - - -  
25 don't know the answer. And I'm not even going to guess on

1 that.

2 CHIEF JUDGE WILSON: Well, then when you say  
3 that's not an issue in this case because your clients are  
4 not saying they were partially unemployed?

5 MR. HUTTER: No. We're not arguing that at all.

6 CHIEF JUDGE WILSON: Okay.

7 MR. HUTTER: We've argued from day one up to the  
8 ALJ always that the pandemic - - - that we come within the  
9 covered individual. We were unable to work because the  
10 workplace was shut down, their workplace being the ability  
11 to now provide the educational instructional services that  
12 they had been providing.

13 JUDGE HALLIGAN: But - - - but they didn't have a  
14 contract that they had signed or a firm offer, did they?

15 MR. HUTTER: No, Your Honor.

16 JUDGE HALLIGAN: So - - - so - - - and - - - and  
17 just in a colloquial sense, in what way were they  
18 unemployed given that they had a full-time job and were  
19 getting a salary based on that full-time employment?

20 MR. HUTTER: Well, in - - - in essence, Your  
21 Honor - - - and I think I'll answer your question by saying  
22 this. Their summer employment was the second job. We do -  
23 - - we know - - -

24 JUDGE HALLIGAN: But it wasn't guaranteed, was  
25 it?

1 MR. HUTTER: No.

2 JUDGE HALLIGAN: So - - - so if I have a hope  
3 that I will pick up some additional hours, but I don't have  
4 an offer and I haven't, you know, signed any contract or -  
5 - - or entered into any oral agreement, why - - - why  
6 doesn't that difference matter in terms of whether they're  
7 unemployed?

8 MR. HUTTER: The way this case was structured,  
9 Your Honor - - - and the argument that you're making was  
10 not raised by the state at all. The point is here - - -  
11 and this is why we have - - -

12 JUDGE HALLIGAN: Are you asking us - - -

13 MR. HUTTER: This is why we have six cases. The  
14 - - - the basis was that the first group that - - - we have  
15 475 DOCCS workers. The vast majority of them always had  
16 worked in previous summers.

17 JUDGE HALLIGAN: I understand. But what I'm  
18 asking is - - -

19 MR. HUTTER: But there's no contract.

20 JUDGE HALLIGAN: I - - - I - - - I understand.  
21 And - - - and no offer that had been extended. Suppose,  
22 you know, the - - - the location wasn't operating for some  
23 other reason. Maybe they lost funding or something like  
24 that. I - - - I mean, there's some contingency that's at  
25 play, it seems to me, in terms of whether there will be a

1 job available, and separately, they, otherwise, have full-  
2 time employment. So I'm - - - I'm trying to understand in  
3 - - - in what meaningful sense they're unemployed - - -  
4 totally unemployed.

5 MR. HUTTER: Are you looking at the state  
6 definition of totally unemployed?

7 JUDGE HALLIGAN: Well, I'm asking - - - I'm  
8 asking you that - - -

9 MR. HUTTER: Okay.

10 JUDGE HALLIGAN: - - - that question. That is -  
11 - -

12 MR. HUTTER: Totally unemployed means you - - -  
13 under 590 of the Labor Law, you're not - - - you're not  
14 working at all. You're getting no second job, no third  
15 job, nothing.

16 JUDGE HALLIGAN: Right.

17 MR. HUTTER: That's not the requirement in COVID.

18 JUDGE HALLIGAN: But they do have a full-time  
19 job. And I take it that what the argument is, is that this  
20 additional position which they would like to obtain is no  
21 longer available?

22 MR. HUTTER: Exactly, Your Honor.

23 JUDGE HALLIGAN: Okay. And so I'm just asking  
24 how - - - how does that constitute total unemployment?  
25 Maybe we're talking - - -

1 MR. HUTTER: We're not arguing total  
2 unemployment.

3 JUDGE HALLIGAN: You know, may - - - may - - -  
4 maybe we're - - - we're - - -

5 MR. HUTTER: No. I - - - I think here - - -

6 JUDGE HALLIGAN: No.

7 MR. HUTTER: - - - it would - - - remember there  
8 are alternatives, total unemployment, partial unemployment,  
9 or inability to work due to a COVID.

10 JUDGE HALLIGAN: Okay. And so you're relying  
11 only on the third then - - -

12 MR. HUTTER: Exactly, Your Honor.

13 JUDGE HALLIGAN: - - - unable? Okay.

14 MR. HUTTER: We're not relying on totally  
15 unemployed. We're not relying on partial.

16 JUDGE TROUTMAN: And so your argument is that the  
17 CARES Act spells out they're not otherwise eligible, and as  
18 long as they fit within one of the specified persons as  
19 unemployed or partially, they're covered. Would you argue  
20 that the state is simply the conduit for the payments, that  
21 they don't get to define who gets them?

22 MR. HUTTER: Exactly, Your Honor. In fact, I  
23 think the instructional letters that the state relies on at  
24 the Third Department cited made clear that this - - - the  
25 whole system was set up by Congress. We have an emergency

1 situation, the pandemic. And we want to get money to  
2 workers who need the money who are not working.

3 JUDGE RIVERA: Yeah. But that's the crux of the  
4 issue. Who are the workers who are going to get the money?  
5 So if the CARES Act is tied and tracks the state law, and  
6 there is no definition, as Judge Singas has already pointed  
7 out, to the three categories, unemployed, partially  
8 unemployed, or unable or unavailable to work because of et  
9 cetera, et cetera, there's no definition for that in the  
10 federal statute or the regs, where - - - where does one  
11 look to figure out whether or not the worker who's seeking  
12 these benefits is eligible?

13 MR. HUTTER: I - - - I think the statute language  
14 is clear. There's no ambiguity.

15 JUDGE RIVERA: What - - - okay, well, I asked you  
16 what's partially unemployed and you couldn't give me an  
17 answer. You said, I have to go look at the regs.

18 MR. HUTTER: I - - - I - - - I can't answer the  
19 total unemployment, Your Honor. I don't know if it's  
20 specified. I - - - I - - - I just don't know the answer to  
21 that, and - - -

22 JUDGE RIVERA: Well, then why is the category you  
23 rely on specified? What's so obvious about unable or  
24 unavailable to work? What is unavailable to work?

25 MR. HUTTER: Unavailable or in - - - inability?

1 JUDGE RIVERA: No. It says unable or unavailable  
2 to work.

3 MR. HUTTER: 9021 talks about, the individual's  
4 place of employment is closed as a direct result of the  
5 COVID - - - he's unable or unavailable to work - - - unable  
6 to work. You can't work if the place of employment is  
7 closed.

8 CHIEF JUDGE WILSON: So how - - -

9 JUDGE RIVERA: But that would be almost  
10 everybody. Right, that's not what it means. It can't be  
11 the - - - that in and of itself.

12 MR. HUTTER: I would - - - I disagree with you,  
13 Your Honor. I think the language here is clear.

14 JUDGE RIVERA: What if you've got a job somewhere  
15 else?

16 MR. HUTTER: That may be something different.  
17 But again, what we're doing here - - -

18 JUDGE SINGAS: But if I - - - if I have a full-  
19 time job as a music teacher at a school, full time, I'm  
20 getting my full salary, but I like to give music lessons on  
21 the side on the weekends, but I can't do that anymore  
22 because of COVID and nobody wants me in their home, you're  
23 saying I'm unemployed for CARES Act purposes?

24 MR. HUTTER: For the loss, yes. For the lost  
25 wages that you can't make on your weekend jobs.

1 JUDGE SINGAS: So everyone who has a full-time  
2 job that misses out on - - - on getting a second job or  
3 getting additional income, you think is eligible for CARES  
4 Act relief?

5 MR. HUTTER: That's what Congress intend.

6 CHIEF JUDGE WILSON: So could the - - -

7 MR. HUTTER: Congress did not say - - - say - - -  
8 well - - -

9 CHIEF JUDGE WILSON: Well - - -

10 MR. HUTTER: - - - if you have a second job, you  
11 - - - you required a second job because a need - - -

12 JUDGE RIVERA: What if it's an individual who  
13 does not - - - I'm over here - - - regularly work at the  
14 second job? Sometimes they do, sometimes they don't. Of  
15 their own choice.

16 MR. HUTTER: Well, here, the record in this case,  
17 Your Honor, is that they had worked every summer for the  
18 past several years.

19 JUDGE RIVERA: I'm asking you a hypothetical  
20 because we're trying to figure out the definition - - -

21 MR. HUTTER: I'm sorry. What?

22 JUDGE RIVERA: - - - of what - - - I'm asking you  
23 a hypothetical, though.

24 MR. HUTTER: I - - - I - - - I honestly didn't -  
25 - -

1 JUDGE RIVERA: What if it's a worker that does  
2 not work that second job regularly? Let's take an  
3 instructor - - -

4 MR. HUTTER: Well - - -

5 JUDGE RIVERA: - - - like this who works one  
6 summer and then takes off the next summer.

7 MR. HUTTER: That would be a different - - -  
8 that'd be, obviously, a different situation. But I think  
9 my answer - - -

10 JUDGE RIVERA: But how would they fit within the  
11 CARES Act?

12 MR. HUTTER: The CARES Act simply says any  
13 covered individual.

14 CHIEF JUDGE WILSON: So - - -

15 MR. HUTTER: And left open in that regard anyone  
16 who now has a second job, third job, they've lost that  
17 second or third job.

18 CHIEF JUDGE WILSON: So what would you - - - what  
19 would you - - - what would you - - -

20 MR. HUTTER: Now, again, we - - - we agree that  
21 they're getting money for the whole year.

22 CHIEF JUDGE WILSON: What - - - what would you do  
23 in this circumstance? I'm a junior in college. My  
24 freshman and sophomore years after college, I came home. I  
25 looked for jobs. I got work each summer. I'm planning to

1 do that after my junior year. COVID hits in March, and now  
2 I can't apply for a summer job, although I've had one every  
3 summer for the last several years at different places. Am  
4 I covered or not covered?

5 MR. HUTTER: Well, obviously, it's a different  
6 situation what we have here.

7 CHIEF JUDGE WILSON: Right.

8 MR. HUTTER: I think on your case, probably not  
9 covered.

10 CHIEF JUDGE WILSON: Why?

11 MR. HUTTER: Because you - - - you - - - it's  
12 your first time. You had no - - - unless you had a real  
13 assurance, so as Judge Halligan was getting at, it was a  
14 contract.

15 JUDGE CANNATARO: So there's an exemption for  
16 first - - -

17 MR. HUTTER: We - - - we don't - - - obviously,  
18 it could be abused. Well, gee - - - okay, gee, maybe I can  
19 get some free money here. I'll say now I - - - I wanted to  
20 get a job, but I didn't.

21 JUDGE HALLIGAN: It sounds like you're - - -  
22 you're resting - - - over here. You're - - - it sounds  
23 like you're resting this on a unilateral expectation. In  
24 other words, I've worked there the past couple of years,  
25 however many, two, five. I don't know how many. We'd have

1 to decide. And so I have an expectation that I'll be able  
2 to come back the next summer. But you're - - - you're, I  
3 think, telling the Chief that if I haven't worked there  
4 every summer, I don't have - - - I - - - I don't have a  
5 claim. How - - - how - - -

6 MR. HUTTER: Yes. I - - - I think that - - -

7 JUDGE HALLIGAN: What's the rule that - - - well,  
8 what's the rule you're asking for? Who - - - who's in and  
9 who's out?

10 MR. HUTTER: If you have an expectation and  
11 because you've been doing it in the past.

12 JUDGE HALLIGAN: For one year, two years, five  
13 years? Then - - -

14 MR. HUTTER: Well, to answer your question, Your  
15 Honor, the reason why we have six appeal - - -

16 JUDGE HALLIGAN: Yeah. But we're - - - we're - -  
17 - we - - - we're trying to figure out what a rule would be  
18 that could be applied, I think.

19 MR. HUTTER: I think, here, if - - - if you've  
20 had - - - if you've worked in the past two or three years.

21 JUDGE HALLIGAN: But not one year?

22 MR. HUTTER: One year.

23 JUDGE HALLIGAN: Okay.

24 MR. HUTTER: And you did it before. Again,  
25 reason why I say that is the rule - - - statute says any -

1 - - any individual. It doesn't talk about that.

2 JUDGE CANNATARO: Counsel, what - - - what is it  
3 about the CARES Act that dictates that result? Because,  
4 you know, as we've all recognized, it doesn't say a lot.  
5 It just says unemployed, underemployed, et cetera. So why  
6 is there a difference between someone who's worked every  
7 summer for the last six summers and someone who just  
8 decides in, I don't know, January of 2020, oh, I'm - - -  
9 I'm going to go do that work this summer? Why is it that  
10 you say there is - - - there's a expectation.

11 MR. HUTTER: Well, I - - - I think, first of all,  
12 it's - - - it's a clear-cut case if they've been - - - done  
13 it before with the mere expectation, and said, yeah, I want  
14 to try it for the first time.

15 JUDGE CANNATARO: But you seem to suggest that  
16 you wouldn't be able to do it if you had never done the  
17 work before. There's something significant in your mind,  
18 or so I understood, to the fact that they had a history of  
19 doing this before, and I'm just wondering if there's  
20 anything in the CARES Act itself that leads you to that  
21 conclusion.

22 MR. HUTTER: No. I - - - I think what leads me  
23 to the conclusion is that, again, the language is covered  
24 individual is quite broad. Now, what we're saying here - -  
25 -

1 JUDGE CANNATARO: So it could be a first-time  
2 worker. It could be the - - -

3 MR. HUTTER: It - - - it - - -

4 JUDGE CANNATARO: - - - the person who just says  
5 in January 2020, you know what, I'm going to do some summer  
6 school at DOCCS this summer.

7 MR. HUTTER: I - - - I agree. You - - - you  
8 don't have to reach that - - - you don't have to address  
9 that issue in this case, though. That'd be a different  
10 case. What I'm suggesting, and I'm going out - - - maybe  
11 going out on a limb, if maybe there is an expectation, that  
12 would - - - that would be covered. The - - - the key is,  
13 Your Honor, the public policy of the CARES Act. If you're  
14 out of work, we want to get money to you, especially if  
15 you're not getting money from the state.

16 In fact, it's very interesting is, the state now  
17 is trying to nullify that. Why would the state now - - -  
18 it's not the state's money. It's not the employer's money.  
19 Why is the state now saying that you have to be totally  
20 unemployed when they're not working? And the whole intent  
21 of Congress was, get money into these people's pockets.  
22 And the state is frustrating that.

23 Now, whether it's a second job or a third job, I  
24 don't think it makes any difference. Again, we're - - - a  
25 lot of people in this economy are working a second and a

1 third job to make ends meet. So yes, they're getting their  
2 salaries, Judge Singas was getting at, the music teacher  
3 for an entire year, but that one year's salary doesn't  
4 work. They need extra money. So it's that second job  
5 that's being covered. And there's nothing in the CARES Act  
6 that precludes any coverage for that. And certainly, in  
7 that respect, we can point out now to the - - - I'm sorry,  
8 may I just one more minute, Your Honor?

9 CHIEF JUDGE WILSON: Yes. Go ahead.

10 MR. HUTTER: If you point out the state relies  
11 upon - - - the Third Department relied upon these program  
12 letters, the program letters have nothing to do with  
13 eligibility. The program letters that provides states with  
14 guidance for - - - for reporting financial instructions  
15 work in tandem. All we want the states to do is to process  
16 the darn claims. You have the infrastructure. We feds are  
17 not going to set up a separate structure. We're going to  
18 rely upon you.

19 And the State of New York agreed. This was not  
20 mandated. Every state had the option to say, we're not  
21 going to go along with this. New York jumped in. And as  
22 we point out in my reply brief with the Helvering case,  
23 once you now accept federal benefits and you're going to -  
24 - - you - - - you agree to the conditions, you now can't  
25 say, oh, no, we didn't do that unless there's specification

1 for that. And there's nothing in the CARES Act that allow  
2 - - - allows the states to say, you know what? You've got  
3 to be - - - still be totally unemployed.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. HUTTER: Thank you, Your Honor.

6 MR. LUSIGNAN: Good afternoon, Your Honors. May  
7 it please the court. Brian Lusignan, with the Office of  
8 the Attorney General, representing the - - -

9 JUDGE TROUTMAN: What is - - -

10 MR. LUSIGNAN: - - - commissioner of labor.

11 JUDGE TROUTMAN: What is the state's authority  
12 that, despite the verbiage of the CARES Act, that total  
13 unemployment is required?

14 MR. LUSIGNAN: The CARES Act is silent as to what  
15 it means to be unemployed, partially unemployed, or unable  
16 or unavailable to work. Instead, the CARES Act - - - when  
17 Congress enacted the CARES Act, it relied on the existing  
18 federal state unemployment system. And under that system,  
19 states generally define the eligibility requirements for  
20 unemployment.

21 JUDGE TROUTMAN: But it also starts out with not  
22 eligible for regular compensation or extended benefits  
23 under state or federal law. It - - - it begins with,  
24 you're not otherwise eligible, and then it goes on that,  
25 you can't for partially or totally because of COVID. So



1 aren't they setting out what the parameters are? Yes,  
2 normally, you wouldn't get the money, but under CARES, the  
3 - - - the object is, we want that money going to people.

4 MR. LUSIGNAN: In - - - yes, Your Honor. In  
5 general, that's correct. What Congress did, though, was  
6 they expanded eligibility in certain specific ways. So for  
7 instance, generally under state laws, individuals who lack  
8 an attachment to the labor market are ineligible for  
9 unemployment. In this - - - under the CARES Act, those  
10 individuals were eligible. This includes independent  
11 contractors. A - - - a college student, to go back to - -  
12 - to one of the hypotheticals, a college student who had a  
13 firm offer - - - a bonafide offer from an employer to start  
14 after they graduated from college in 2020, who then lost  
15 their job because of COVID, they wouldn't have the work  
16 history to generally qualify for unemployment, but that  
17 individual under the CARES Act would be qualified - - -

18 JUDGE HALLIGAN: So - - -

19 MR. LUSIGNAN: - - - to receive unemployment.

20 JUDGE HALLIGAN: So under your reading, what  
21 meaning do the words partial unemployment have with respect  
22 to New York? It looked to me that there are - - - the - -  
23 - the - - - the Senate memorandum suggested that there are  
24 at least a few other states that do allow for coverage of  
25 partial unemployment. Does it just have no purchase as to

1 New York State?

2 MR. LUSIGNAN: No, Your Honor. In - - - at the  
3 time in question - - - of course, this has all changed.  
4 But - - -

5 JUDGE HALLIGAN: Yeah.

6 MR. LUSIGNAN: - - - in 2020, the concept of  
7 total unemployment is measured on a day-by-day basis. So  
8 it actually - - - the concept of total unemployment  
9 captures, traditionally, what we would think of as someone  
10 who's unemployed. Their stay - - - they stay home seven  
11 days a week and don't make any money. It also captures  
12 folks who are partially unemployed in the sense that they  
13 work up to - - - up to three days a week. They can work  
14 and still receive unemployment because they were totally  
15 unemployed on four days a week.

16 JUDGE HALLIGAN: And - - - and if instead your  
17 hours are cut from seven and a half to three, you're - - -  
18 you're, I take it, not partially unemployed under your  
19 reading; is that right?

20 MR. LUSIGNAN: If you worked three hours on a day  
21 that - - - that day would not count towards your benefits.

22 JUDGE HALLIGAN: Right.

23 MR. LUSIGNAN: But if you were totally unemployed  
24 on four or more days of the week, you would be eligible for  
25 benefits.

1 JUDGE HALLIGAN: Okay. So you're - - - you're  
2 saying that the words in the federal statute still have  
3 some meaning under your reading of the law and under New  
4 York law because total unemployment may subsume what we  
5 might think of as a practical matter as partial  
6 unemployment. Is that - - - is that right?

7 MR. LUSIGNAN: Correct, Your Honor. And it - - -  
8 it subsumes as well the unable to work prong.

9 JUDGE HALLIGAN: And - - - and who then gets the  
10 benefits available under the CARES Act in New York State?  
11 Who is covered?

12 MR. LUSIGNAN: Individuals who are independent  
13 contractors traditionally wouldn't - - - wouldn't have an  
14 employer, they wouldn't be eligible for unemployment.  
15 Under the CARES Act, they were covered. Individual - - -

16 JUDGE HALLIGAN: Presumably, they're totally  
17 unemployed.

18 MR. LUSIGNAN: If - - - if they have four or more  
19 days of total unemployment in a given week, yes.

20 JUDGE HALLIGAN: And - - - and is the notion that  
21 at some point their benefits would run out and this would  
22 extend them, or how would it benefit somebody who is  
23 totally unemployed?

24 MR. LUSIGNAN: That's another category, is folks  
25 who have used up all their state benefits would be

1 ineligible for further coverage, but under the CARES Act,  
2 they would get those federal benefits.

3 JUDGE CANNATARO: And why not these people?  
4 What's the distinction?

5 MR. LUSIGNAN: The distinction is that these  
6 individuals received a annual salary for ten months of  
7 work, and they were - - - the state, by contract and by  
8 statute, cannot require them to work in the summer. They  
9 have to pay them additional hourly wage if - - - if they're  
10 asking them to work during the summer.

11 JUDGE CANNATARO: And what if we view this as  
12 supplemental employment, a second job, or like Judge  
13 Singas' hypothetical, someone who has a job, but they also  
14 have some weekend work that they do? This is - - - sounds  
15 conceptually similar to that.

16 MR. LUSIGNAN: It is conceptually - - -  
17 conceptually similar to that. And I - - - Congress did not  
18 intend to cover that aspect.

19 JUDGE HALLIGAN: How do we know that?

20 MR. LUSIGNAN: Congress intended to cover folks  
21 who lost - - -

22 JUDGE HALLIGAN: How - - - how do we know that?  
23 I mean, I - - - I take it under - - - if - - - under your  
24 reading, then even if someone had signed a contract for a  
25 second job, they wouldn't be covered - - -

1 MR. LUSIGNAN: That's correct, Your Honor.

2 JUDGE HALLIGAN: - - - for that second job.

3 MR. LUSIGNAN: If they had a primary job - - -

4 JUDGE HALLIGAN: Yeah.

5 MR. LUSIGNAN: - - - that they were still  
6 receiving their full - - -

7 JUDGE HALLIGAN: Right.

8 MR. LUSIGNAN: - - - salary for - - -

9 JUDGE HALLIGAN: So - - - so what can you point  
10 us to to confirm that that's not what Congress meant to - -  
11 -

12 MR. LUSIGNAN: I - - -

13 JUDGE HALLIGAN: - - - was to cover the second  
14 job?

15 MR. LUSIGNAN: Sure. So one piece of evidence is  
16 not conclusive, but Congress in the CARES Act said that  
17 individuals who could telework with pay or who received  
18 paid leave benefits like paid sick leave are not eligible  
19 for CARES Act benefits. That suggests that you have to  
20 have actually lost income. The fact that you're unable to  
21 work in the sense that you're at home isn't enough to  
22 qualify.

23 JUDGE CANNATARO: You're saying there's no - - -  
24 there's no way to show loss of income when it's a second  
25 job?

1 MR. LUSIGNAN: It's - - - it's a loss of income.  
2 But it's not - - - there's no days of total unemployment.  
3 These folks were being paid an annual salary. There's also  
4 - - -

5 JUDGE CANNATARO: And essentially for you,  
6 really, what it comes down to is, regardless of how they  
7 get paid - - - although I think many of these petitioners  
8 were getting paid twelve months out of the year, even  
9 though they were only working nine months out of the year  
10 or reporting to work nine months out of the year, that  
11 precludes them from a recovery under - - - under the CARES  
12 Act even if they previously were able to do other things  
13 with that time? Is that how - - -

14 MR. LUSIGNAN: Correct, Your Honor. Yes.

15 JUDGE CANNATARO: And so it's all key to their  
16 status as full-time employees?

17 MR. LUSIGNAN: The CARES Act does not cover  
18 second jobs. It does not cover overtime that you might  
19 have had an expectation to make prior to the COVID-19  
20 pandemic. I'll give you some additional - - -

21 JUDGE CANNATARO: And the way you know that - - -  
22 because I think that this was the question you were just  
23 asked - - -

24 MR. LUSIGNAN: Yeah.

25 JUDGE CANNATARO: - - - the way you know that is



1 because of sick time provisions?

2 MR. LUSIGNAN: That's - - - so that's one - - -  
3 that's one piece of evidence that Congress didn't intend  
4 this coverage to include individuals who are making their  
5 full salary - - -

6 JUDGE HALLIGAN: I'm not sure I follow that  
7 you're saying if we - - - maybe run through that again  
8 because it didn't make sense to me.

9 MR. LUSIGNAN: Sure. So under Section  
10 9021(a)(3)(B), Congress specifically said, just because you  
11 are not going to work - - - if you're at home, if you're  
12 getting paid to telework, or if you're getting sick leave -  
13 - -

14 JUDGE HALLIGAN: Yeah.

15 MR. LUSIGNAN: - - - you're not included under  
16 the CARES Act.

17 JUDGE HALLIGAN: But - - - but how does that show  
18 that a second job is not covered?

19 MR. LUSIGNAN: It's one - - -

20 JUDGE HALLIGAN: That's the connection I don't  
21 understand.

22 MR. LUSIGNAN: It's a piece of evidence that  
23 Congress was talking about loss of your - - -

24 JUDGE HALLIGAN: Your main job?

25 MR. LUSIGNAN: - - - of your salary, of your - -

1 - of your full-time salary. And there's additional  
2 evidence I can give you - - -

3 CHIEF JUDGE WILSON: Well, let me - - -

4 MR. LUSIGNAN: - - - from these Department of  
5 Labor program letters. Now under Section 9032 of the CARES  
6 Act, Congress specifically authorized the Department of  
7 Labor to issue operating instructions. This is how the  
8 Department of Labor tells the states to comply with the  
9 CARES Act. How the - - - how the Department tells the  
10 state to comply with the general federal unemployment  
11 scheme. In those letters - - - you can look at 1620 change  
12 5 at page 4. An individual who continues to receive their  
13 full pay is not eligible for CARES Act benefits.

14 A teacher in a traditional educational program  
15 with a reasonable assurance of return to work at the end of  
16 the summer is not eligible. That's in program letter 1620  
17 change 5 at page 7. And - - - and as well as several  
18 additional of those program letters. An individual who  
19 cannot find a job because businesses are closed due to  
20 COVID under program letter 1622, the Department of Labor  
21 said that's not covered under the CARES Act.

22 And even under subdivision KK, which is the  
23 subdivision that claimants here are relying on, any  
24 individual - - - individual who's working reduced hours  
25 while her place of employment continues to operate is



1 generally not covered by that subdivision KK, although they  
2 may be covered by another provision of the CARES Act.

3 So folks who are covered, according to the  
4 Department of Labor, which, again, is responsible for  
5 approving the state's agreement with the federal government  
6 and telling the states how to comply with the CARES Act,  
7 folks who are covered are self-employed freelance writers,  
8 independent contractors who experience a significant  
9 diminution in their work, individuals caring for members of  
10 their household whose ability to perform other work  
11 functions is severely limited, and an individual who has  
12 their hours reduced or has been laid off due to COVID.  
13 These are all in these program letters.

14 So again, I don't know that you need to go to the  
15 program letters because the statute itself is silent and is  
16 kind of built on top of this existing federal state  
17 unemployment program. But the Department of Labor has  
18 repeatedly told states that individuals who are making  
19 their full annual salary don't qualify for CARES Act  
20 coverage.

21 And I want to talk a little bit specifically  
22 about the unable to work prong of the - - - the - - - of  
23 the CARES Act. There's a couple examples of individuals  
24 being unable to work that the Department of Labor has  
25 referenced. There's an individual who has to stay at home



1 because they've contracted COVID or someone in their family  
2 has contracted COVID. There's also individuals who have to  
3 stay at home to take care of a child whose school is closed  
4 due to COVID.

5 And in those situations, the individual would be  
6 unable to work in the sense of they - - - they can't go to  
7 their office, but they're not unemployed in the traditional  
8 sense of having lost their job - - - involuntarily. The  
9 CARES Act covers those individuals. Those individuals,  
10 though, would also have experienced days of total  
11 unemployment. That is, when they're staying home with  
12 their kid or with their sick relative or - - - or  
13 recovering themselves. They have days when they don't go  
14 into the office, they don't get paid, and therefore they  
15 are covered under the CARES Act.

16 JUDGE RIVERA: Just to be clear, if they were  
17 working remotely and being paid, they would not be covered?  
18 The parent - - -

19 MR. LUSIGNAN: That's correct.

20 JUDGE RIVERA: The example of the parent.

21 MR. LUSIGNAN: That's - - - that's correct. And  
22 there's some guidance letters about this saying, if your  
23 kids are so unruly that you can't get your job done - - -  
24 your normal job duties done while you're at home, you may  
25 be unemployed. But if you're teleworking with pay while



1           you're kind - - - kind of keeping an eye on the kids, as  
2           many of us did, then you're not covered by the CARES Act.

3                       And I just - - - I don't - - - I don't want to  
4           minimize the harm that these claimants endured during this  
5           period. Many of them testified that they relied on the  
6           supplemental summer income. But that's just not what the  
7           CARES Act gets at with these - - - these unemployment  
8           provisions. There were federal stimulus checks that were  
9           sent out to virtually everyone to try to account for some  
10          of that economic collateral - - - collateral damage. But  
11          the CARES Act itself just doesn't - - - doesn't cover those  
12          individuals. And it doesn't supplant existing state law,  
13          including in New York in 2020, the total unemployment  
14          requirement.

15                      JUDGE RIVERA: Is - - - is a minimum salary a  
16          factor at all?

17                      MR. LUSIGNAN: In New York, it has - - - there -  
18          - - it - - - it - - - the - - - it comes into play if an  
19          individual is partially unemployed in the sense of being  
20          totally unemployed on fewer than seven days a week, which  
21          is to say, if you work two or three days, one day a week,  
22          but you make over a certain threshold on those days, then  
23          you're not eligible for unemployment benefits. But at the  
24          time - - -

25                      JUDGE SINGAS: And that seems to be some of the

1           problem here because total unemployment is just a misnomer,  
2           and maybe it would be helpful to find another word for that  
3           because you can - - - you can still get benefits if you're  
4           part - - - you can still be considered totally unemployed  
5           if you're partially employed.

6                   MR. LUSIGNAN: That's correct, Your Honor. And  
7           the state legislature did change that program. So you may  
8           not have to hear about total unemployment again, but it is  
9           used in a - - - in a - - - not in a intuitive manner.

10                   JUDGE SINGAS: Yes.

11                   MR. LUSIGNAN: And much of the unemployment law  
12           is not intuitive, although I think the outcome here is - -  
13           - is fairly intuitive, which is individuals receiving their  
14           full annual salary are not eligible for unemployment  
15           benefits.

16                   JUDGE RIVERA: So - - - so just to be clear,  
17           looking at the CARES Act provision that we're most  
18           concerned with here, the first part is about eligibility -  
19           - - I'm sorry - - - individual is not eligible to receive  
20           state unemployment benefits. And the second part that does  
21           refer to unemployed, partially unemployed, or unable or  
22           unavailable to work, your position is that is still based  
23           on how the state would define those things, correct?

24                   MR. LUSIGNAN: Correct. In the absence of  
25           anything in the CARES Act, specifically expanding the

1 eligibility or removing a disqualification - - -

2 JUDGE RIVERA: As in the enumerated COVID related  
3 reasons - - -

4 MR. LUSIGNAN: Correct, Your Honor.

5 JUDGE RIVERA: - - - which is specific to the  
6 CARES Act?

7 MR. LUSIGNAN: Yes.

8 JUDGE RIVERA: Okay. So that might differ across  
9 jurisdictions?

10 MR. LUSIGNAN: Correct, Your Honor.

11 JUDGE RIVERA: So the CARES Act doesn't have a  
12 uniform criteria then?

13 MR. LUSIGNAN: That's correct. There's fifty  
14 states - - - there's fifty different unemployment systems.  
15 They all work a little bit differently, although they - - -  
16 they share certain features.

17 JUDGE RIVERA: So it might be possible then for  
18 someone who New York would say you're not eligible for the  
19 CARES Act, that New Jersey might say you are eligible for  
20 the benefits under the CARES Act that are - - - are similar  
21 otherwise?

22 MR. LUSIGNAN: That's correct, Your Honor.  
23 Similarly situated individuals might be eligible in one  
24 state, but not in - - - in New York.

25 JUDGE RIVERA: Uh-huh. Okay.

1 JUDGE SINGAS: And do you know if any other  
2 states are - - - are all the states using their own  
3 definitions? Has any state said, no, like, go back to U.S.  
4 DOL and try to figure out what these terms mean?

5 MR. LUSIGNAN: Not as far as I'm aware, Your  
6 Honor. Our brief cites several state cases that have  
7 applied state law to CARES Act claims. None are directly  
8 applicable to this specific situation, but I am aware of no  
9 state case in which the state said the federal law  
10 establishes the full scope of coverage, and we're just  
11 going to look at the federal law and apply those plain  
12 terms.

13 Unless Your Honors have any further questions, I  
14 would ask that you affirm the Third Department in these  
15 cases.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. LUSIGNAN: Thank you, Your Honors.

18 MR. HUTTER: Initially, I stressed what Judge  
19 Troutman was getting at. There are three options here,  
20 total unemployed, partially unemployed, inability to work.  
21 We're simply dealing with the inability. And what was just  
22 asked by Judge Singas about other states, other states are  
23 not cited in my brief because I didn't think I had to. But  
24 if you do put in the CARES Act, you'll see that all these  
25 other states that have had issues like this have simply

1 said, are you a covered individual? And leave it at that.

2 JUDGE CANNATARO: But do they do that, Counsel?

3 MR. HUTTER: Precisely at those three language of  
4 the - - - of the statute.

5 JUDGE SINGAS: But how do they define a covered  
6 individual? Where do they - - -

7 MR. HUTTER: They - - - 9021.

8 JUDGE SINGAS: Where do they get that definition  
9 from?

10 MR. HUTTER: 9021(a)(1).

11 JUDGE SINGAS: But I feel like that's circular.

12 MR. HUTTER: I - - - I honestly don't - - - I - -  
13 - I dis - - - I honest - - - respectfully disagree with  
14 you, Your Honor. I think that statute is quite clear, and  
15 other state courts have said that same. Now, the other  
16 thing too I get at in what Judge Halligan raised about, you  
17 know, the individuals, what's interesting is the example of  
18 the gig - - - gig employee, can't get unemployment. He may  
19 just - - - he's an independent contractor. Under the stat  
20 - - - under their reading is that, well, is he going to - -  
21 - he's not eligible, can't get in. But what the  
22 legislative history of the CARES Act clearly indicated, we  
23 want those people who can't get unemployment benefits to  
24 get federal benefits.

25 And then, lastly - - - and again, this is what I

1 was getting at with - - - trying to get at you with - - -  
2 Judge Halligan, but I think you thought I was maybe trying  
3 to avoid you, but I wasn't. With respect to the  
4 expectations, there are six text - - - six cases here. Why  
5 six cases? Well, the first four are based on the test  
6 cases. What they're based upon is, how many years those  
7 employees had been working summers.

8 And so the first group, Almino, they go back to  
9 2012. The second group, I think, went back about four  
10 years. And then the last two were - - - were individuals  
11 that didn't get into that. But all that now bears forth.  
12 And what's clear is, if you take a look at what I'm saying,  
13 Your Honor, in - - - in each of the appendices, right  
14 before the last page, right before the additional papers of  
15 the Court of Appeals, there's a stipulation that everyone  
16 entered into. If you look at 6C - - - 6 - - - paragraph 6C  
17 of that stipulation, it specifies the expect - - - who's  
18 been working.

19 So this case has been tried solely on the  
20 expectation. I had it in the past. I'm going to do it  
21 now. And again, there's no contractual, but no one's ever  
22 argued - - - state has never argued that mere expectations  
23 alone is insufficient.

24 CHIEF JUDGE WILSON: So unable or unavailable to  
25 work has to be because of one of the - - - or more of the

1 enumerated reasons in the federal statute?

2 MR. HUTTER: Correct.

3 CHIEF JUDGE WILSON: Right? So which one or ones  
4 fit your clients?

5 MR. HUTTER: Double J.

6 CHIEF JUDGE WILSON: Just double J?

7 MR. HUTTER: The - - - the place of employment is  
8 closed due to COVID.

9 CHIEF JUDGE WILSON: Okay.

10 MR. HUTTER: And the state - - -

11 CHIEF JUDGE WILSON: And so - - -

12 MR. HUTTER: - - - now tries to respond by  
13 saying, well, it really wasn't closed.

14 CHIEF JUDGE WILSON: Yeah. So that - - - then  
15 that raises the question of who has - - - when does  
16 somebody have a place of employment?

17 MR. HUTTER: Well, that would be a question of  
18 interpretation, yes, Your Honor.

19 CHIEF JUDGE WILSON: Right.

20 MR. HUTTER: And our argument is that, well - - -

21 CHIEF JUDGE WILSON: And - - - and if you look,  
22 for example, at GG, the individual was scheduled to  
23 commence employment and doesn't have a job or is unable to  
24 reach the job, which implies that if you weren't scheduled  
25 to commence employment, maybe you don't have a place of

1 employment.

2 MR. HUTTER: That - - - that's - - - again,  
3 that's a separate - - - separate category.

4 CHIEF JUDGE WILSON: It is. But maybe that  
5 informs us about how to read - - -

6 MR. HUTTER: I - - -

7 CHIEF JUDGE WILSON: - - - how to interpret JJ.

8 MR. HUTTER: I would - - - to the extent that  
9 you're suggesting that it may inform - - -

10 CHIEF JUDGE WILSON: Yeah.

11 MR. HUTTER: - - - the definition of place of  
12 employment, I would respectfully disagree. I think they're  
13 separate discrete categories. And the place of employment  
14 that we're saying is - - - and had not yet really been  
15 litigate - - - argued at all - - - the state argues it a  
16 little bit in their brief - - - is that, well, is this  
17 place of employment really closed? Well - - -

18 CHIEF JUDGE WILSON: Did - - -

19 MR. HUTTER: - - - the facility is not shut down.

20 CHIEF JUDGE WILSON: Did they work at the same -  
21 - - did they - - - did - - -

22 MR. HUTTER: But the - - - the facilities where  
23 the education was were shut down.

24 CHIEF JUDGE WILSON: Did they work at - - -

25 MR. HUTTER: That's the place of employment.



1 CHIEF JUDGE WILSON: Did they - - - did each of  
2 them work at the same prison every year, or did they go  
3 from prison to prison?

4 MR. HUTTER: I'm not sure. My understanding - -  
5 - and - - - and - - - and I can't vouch for this, Your  
6 Honor - - - I think they all worked at the - - - they kept  
7 on working at the same facility.

8 CHIEF JUDGE WILSON: Okay.

9 MR. HUTTER: That they didn't travel around and  
10 go to different facilities.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. HUTTER: Thank you, Your Honors.

13 (Court is adjourned)

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I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Claim of Klosterman; Matter of Claim of Almindo; Matter of Claim of Bruyere; Matter of Claim of Lamphier; Matter of Claim of Dixon-Domines; Matter of Claim of Dunn, Jr., No. 105-110 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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