Case No.: S235903

In The Supreme Court of the State of California

United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA,

Petitioner and Appellant,

vs.

California Unemployment Insurance Appeals Board,

Defendant, Cross-Defendant and Appellant,

San Francisco Unified School District

Real Party in Interest

On Review From The Court Of Appeal For the First Appellate District, Division One
Case No.: A142858/A143428

After An Appeal From the Superior Court of San Francisco County
Judge Richard B. Ulmer
Case Number CPF 12-512437

CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE'S BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT

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I. INTRODUCTION

Amicus Curiae, the California School Boards Association's Education Legal Alliance ("ELA") submits this brief in support of the San Francisco Unified School District ("SFUSD" or "District"). The issues presented in this litigation raise issues of statewide concern for hundreds of school districts and county offices of education. ELA asks this court to affirm the decision of the Court of appeal in its entirety, including the Court of Appeal's decision to invalidate *Alicia Brady* (2013) Precedent Benefit Decision No. P-B-505 ("*Brady*").

There are two primary reasons CUIAB ("California Unemployment Insurance Appeal Board") and United Educators of San Francisco's ("UESF") interpretations of Unemployment Insurance Code[1] section 1253.3 should be rejected and the Court of Appeal's decision should be affirmed:

First, the plain language and interpretive guidance support the Court of Appeal's decision. Section 1253.3 regulates the period between two "academic years or academic terms." This disjunctive construction plainly gives independent meaning to the phrases "academic year" and "academic term." Thus, even if summer session is construed as an "academic term," the summer session still occurs between two "academic years." A contrary reading would both render the phrase "academic year" superfluous, and effectively negate the reasonable assurance mechanism for school districts that offer summer session—creating unintended results contrary to the

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[1] All future references are to the Unemployment Insurance Code unless otherwise indicated.

statute.

Importantly, CUIAB agrees that treating summer session as an academic term for all employees would contravene statutory intent. However, it attempts to cure this consequence by creating an exception (not expressed in its briefing below) between on-call employees and salaried employees that does not exist in statute.[2]

Second, CUIAB's novel interpretation of section 1253.3 exceeds its rulemaking authority. CUIAB asserts a new standard, under which eligibility for benefits turns on an employee's status as an "on-call" employee. However, this approach presents an entirely new way of thinking about benefit eligibility that must come from the Legislature. Notably, both CUIAB and UESF ask this Court to support the on-call employee exception on public policy grounds, and rely heavily on arguments of policy rather than law in their briefing. While ELA does not necessarily disagree with these public policy considerations, reliance on them here signals that CUIAB's concerns are for the Legislature not the courts. Indeed, CUIAB has reached for policy arguments precisely because application of the plain language of the statute does not achieve the result it desires.

Further, even assuming the interpretation CUIAB urges is within its rulemaking authority, at the very least, the sweeping change it advocates must proceed through the formal rulemaking process. CUIAB has crafted

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[2] CUIAB and UESF use various labels to describe the employees in this action including per diem, on-call, substitute, paraprofessional, nonprofessional, and non-salaried. For simplicity, we generally refer to these individuals as "on-call" employees. However, we also note that CUIAB took the position in the Court of Appeal, that *Brady* extended benefits to full-time teachers that were placed "on call" over the summer.

new legal tests and coins new terms such as "reasonable expectation" of employment and "loss of customary work."

Additionally, as can occur in the litigation arena, CUIAB has shifted its position, and taken internally inconsistent positions with regard to its interpretation of the statute. CUIAB's inconsistency in its own statutory interpretation and definition of terms further demonstrates the inadequacies of this litigation to establish a new standard under which certain school employees, in some districts, may be eligible for benefits during some portion of the summer period. In short, the inevitable confusion that will be caused by such rule-through-litigation also indicates that the changes CUIAB seeks to make must go through the legislative and/or formal rule making processes.

Finally, ELA, ELA's members, stakeholders, and the public should be given the opportunity to provide input into the establishment of a new and novel legal test for benefit eligibility that could have sweeping effects on labor relations and summer school operations. The legislative and/or formal rule making processes provide the opportunity for such input; the litigation process does not. Thus, the unsoundness of CUIAB's rule-through-litigation approach is further evidenced by its inherent inability to adequately consider, address, and balance the competing policy and legal interests at stake.

Therefore, ELA requests that this Court affirm the Court of Appeal.

II. LEGAL ARGUMENT

A. THE PLAIN LANGUAGE OF SECTION 1253.3, DECISIONAL LAW AND OTHER INTERPRETIVE GUIDANCE SUPPORT THE INTERPRETATION OF THE COURT OF APPEAL

Section 1253.3, subdivisions (b) and (c) operate to make any

individual employed by an educational institution ineligible for unemployment insurance benefits "during the period between two successive academic years ***or*** terms" where the individual performs service in the first of the "academic years ***or*** terms" and there is reasonable assurance that the individual will perform services in the second of the "academic years or terms." (Cal. Unemp. Ins. Code § 1253.3(b),(c), emphasis added).)

This statutory language unambiguously indicates that: a) the phrases "academic year" and "academic term" have independent meaning under the statute; b) "academic year" cannot mean calendar year or otherwise include the summer period; c) summer school does not constitute an "academic term;" and d) the statute makes no distinctions regarding eligibility for benefits based on whether an employee is temporary, on-call, or full-time. Each of these necessary conclusions demonstrates that school district employees who are not employed during a district's summer session, but who receive a contract or reasonable assurance of employment in the next academic year, are not entitled to unemployment insurance benefits during the summer. Further, this conclusion must apply to all school district employees, without regard to the nature of their employment. Nothing in the plain language of the statute creates the distinctions, definitions, structures, or processes that would be necessary to find and implement an unemployment benefit that applies only to certain part-time, per diem, and/or on-call employees.

1. "Academic year" and "academic term" must be given independent meaning

Section 1253.3 subdivisions (b) and (c) provide that benefits are not payable to employees of educational institutions in any week beginning

"between two successive academic years or terms...if the individual performs services in the first of the academic years or terms and if there is a contract or a reasonable assurance that the individual will perform services for any educational institution in the second of the academic years or terms." The statutory language provides for a denial of benefits between "academic terms" *or* "academic years," and any interpretation which renders one meaningless is disfavored under well-established principles of statutory construction. Thus, independent of how "academic term" is defined, the statute provides that benefits shall also not be available between "academic years," and fundamental rules of statutory construction preclude implied nullification of this language.

2. "Academic year" does not include the summer period between the academic terms when students complete one school year and grade and advance to the next school year and grade, and therefore does not mean "calendar year"

As the trial court and Court of Appeal recognized, the term "academic year" as used in section 1253.3, cannot reasonably be read to mean "calendar year" or otherwise include the summer period between mandatory academic terms. "If the 'academic year' truly ran the entire calendar year..., a 'period between two successive academic years' could never exist." (*United Educators of San Francisco AFT/CFT v. California Unemployment Insurance Appeals Board* (2016) 247 Cal.App.4th 1235, 1250.) Since this reading would render the phrase "period between two successive academic years" meaningless, it is disfavored. (*San Diego Police Officers' Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 284, as modified (Dec. 11, 2002), as modified on denial

of reh'g (Jan. 9, 2003)

Further, even if the statutory language were considered ambiguous, interpretive aids confirm that "academic year" means the traditional fall and spring semesters. Most importantly, this Court should look to how the Education Code treats terms fundamental to the operation of school districts. Such a review demonstrates that the meanings given to "academic year" and "school year" that permeate the Education Code preclude treating "academic year" in the Unemployment Insurance Code to mean a 12-month period, or to otherwise include the summer period.

For example, Education Code section 45102(d) provides, "[i]f it is necessary to assign classified employees not regularly so assigned *to serve between the end of one academic year and the commencement of another*, that assignment shall be made on the basis of qualifications for employment in each classification of service that is required." (Emphasis added.) Similarly, Education Code section 45102(d)(1) provides, "[a] school district may not require a classified employee whose regular yearly assignment for service excludes all, or any part of, the *period between the end of the academic year in June to the beginning of the next academic year in September to perform services during that period.*" (Emphasis added.)

The Education Code's use of the term "academic year" in the context of educational services also excludes summer session. For example, section 51851(c) provides that driver education courses must "[b]e completed by the pupil within *the academic year or summer session* in which it was begun." (Emphasis added.) Education Code section 66028.3(d) also provides that the regents may not "increase [ ] mandatory systemwide fees after the 90th day prior to the commencement of classes for the *academic year*. This prohibition shall not apply to an increase in

mandatory systemwide fees for a *summer session*." (Emphasis added.)

Further, excluding summer session from the definition of "academic year" coincides with the general exclusion of summer session from school districts' mandatory program. The California Education Code establishes a mandatory period of instruction of at least 175 days. (Ed. Code, § 37620.) During this period, schools are mandated to provide instruction; attendance is compulsory; and certificated employees receive credit toward permanent status. (See, e.g., Ed. Code, §§ 37620, 41420, 48200, 44913.) Moreover, Education Code section 37620 expressly describes this mandatory period of instruction as occurring "during the *academic* year," which it distinguishes from the "*school* year." Although Education Code 37620 concerns year-round schools, this provision further demonstrates that the Education Code uses the term "academic year" to reference the compulsory education period. Under a traditional school schedule, compulsory education occurs during the fall and spring semesters. In contrast, summer sessions are typically non-compulsory.

Moreover, the Education Code provides no right to summer employment, as indicated by the Education Code's detailed statutory scheme regarding teacher layoffs. This scheme makes clear that the on-going right to employment applies to the academic year—and that the "academic year" does not include summer. (Ed. Code, § 44949.) Under this scheme, the rights and protections of a layoff arise upon notice that a teacher will not be employed in the next *academic* year. There is no duty to provide notice that a teacher will not be employed during the intervening summer, and the failure to do so does not constitute a layoff. Accordingly, the Education Code and the realities of summer employment in the school context require reading "academic year" to mean the period during which

schools are required to be open and students required to attend.

The California Department of Education ("CDE"), the regulatory body with the authority and expertise to interpret the Education Code, is in accord. In explaining the difference between a traditional school year and a year-round school calendar, CDE explains:

> Both traditional and some year-round school calendars can have 180 days of instruction. The traditional calendar, of course, is divided into nine months of instruction and three months of vacation during the summer. Year-round calendars break these long instructional/vacation blocks into shorter units.

(Year Round Education Program Guide, California Department of Education.)[3] CDE further notes, in discussing the potential merits of year-round schools, that "summer school, the typical time for remediation in traditional calendar schools, is held just once a year. *It is scheduled after the school year has been completed . . . .*" (*Ibid.* Emphasis added.)

The Department of Labor's ("DOL") guidance also demonstrates that "academic year" does not include summer. CUIAB and UESF both assert the persuasive value of DOL definitions in referencing DOL's definition of "academic terms" in the Conformity Requirements for State UC Laws, Educational Employees, the Between and Within Terms Denial Provisions (Hereafter, "Conformity Requirements").[4] However, they fail to acknowledge DOL's separate and relevant definition of "academic year." DOL defines an "academic year" as "the period of time characteristic of a

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[3] Available at: http://www.cde.ca.gov/ls/fa/yr/guide.asp.

[4] Available at: https://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf.

school year. It most usually means a fall and spring semester."

Finally, CUIAB appears to concede the point, in acknowledging that the Merriam-Webster's Collegiate Dictionary defines "academic year" as "the annual period of sessions of an educational institution usually beginning in September and ending in June." (CUIAB OB, p. 15.) Thus, technical sources such as the Education Code, plain meaning sources such as the dictionary, and the regulatory guidance of CDE and DOL all support ELA's position that the "academic year" does not include summer session.

In sum, regardless of how "academic term" is defined, the statutory prohibition against providing benefits between "academic years" must be given meaning. Therefore, school employees who work in an academic year, and are given reasonable assurance of work in the next academic year, are not eligible to receive unemployment benefits between those years. Because the plain language of Section 1253.3, and the interpretive aids relied upon by all parties, demonstrate "academic year" does not include summer, the statute must be read to mean that any school employee who is employed in the spring term, and given reasonable assurance of employment in the next fall term, is not entitled to receive benefits during the intervening summer period.

3. Even if the "academic year" language were not controlling, summer school does not constitute an "academic term," and such an interpretation would render the "academic year," language superfluous and the reasonable assurance language illusory

CUIAB argues that the period during a district's optional summer session constitutes an "academic term"—but only for some employees. This interpretation should be rejected because it is not grounded in the plain

meaning of the statute. Indeed, such a reading would create superfluous language and render key statutory language virtually meaningless.

First, if "academic term" applied to any period where school is in session, it would make the phrase "between academic years" indistinguishable from the phrase "between academic terms." In other words, there could never be a situation where a school employee was between "academic *years*," and not also between "academic *terms*." Thus, interpreting a summer session to be an academic term renders the phrase "academic years" superfluous.

Rather, the plain language of section 1253.3 operates to deny eligibility for summer-month benefits to employees who work the spring term and receive contracts or assurances for work in the next fall term. That a district offers a summer school session has no impact on the ongoing employment or assurance of employment of academic-year employees.

Second, treating a district's intervening summer session as the next "academic term" would render the "reasonable assurance" language virtually meaningless for districts that offer a summer session. This is because, under this interpretation, providing notice of reasonable assurance in the spring that an employee will be employed in the fall, cannot constitute reasonable assurance of employment in the *next* "academic term." As a result, in districts that offer summer school, all district employees who do not actually receive work during the summer "academic term" are necessarily employees who are: a) unemployed; and b) without reasonable assurance of future work, thereby entitling them to benefits.

ELA asserts that such a result contravenes the plain meaning and intent of the statute, and that CUIAB's interpretation must therefore be rejected. Indeed, CUIAB agrees that making all employees eligible for

summer benefits would work an absurd result contrary to the statute. CUIAB attempts to address the problems arising from its own statutory interpretation by limiting its application through a "carve-out" for certain employees. However, as discussed more fully below, this exception appears nowhere in section 1253.3, and neither CUIAB nor this Court has the authority to read it into the statute.

Further, other statutory schemes administered by the DOL support the conclusion that a district's summer session does not constitute an "academic term." For example, the DOL has grappled with "academic terms" under the Family Medical Leave Act ("FMLA"). In discussing intermittent leave for instructional employees, the FMLA regulations provide in part, "[f]or purposes of these provisions, academic term means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA." (29 C.F.R. § 825.602(b).) Here, the phrase "academic term" should be read consistently with other laws concerning employee leaves of absence.

CUIAB and UESF point to DOL's interpretation of "academic term" in the Conformity Requirements for support. Their reliance is misplaced. First, as discussed above, CUIAB and UESF ignore the publication's definition of an "academic year." Second, while the Conformity Requirements generally opine that, ". . . terms can also be other nontraditional periods of time when classes are held, such as summer sessions," this statement is insufficient to support CUIAB's position. Indeed, CUIAB *opposes* application of a sweeping rule that summer session constitutes an academic term for all employees. (CUIAB RB, p. 27, fn. 16.)

CUIAB also cites the EDD's Benefit Determination Guide, Miscellaneous MI 65 ("MI 65") in support of its interpretation. However, the portions cited by CUIAB are unpersuasive. Indeed, when read as a whole, the guide supports the position of ELA. The MI 65 has a section entitled "between two successive years or terms." In discussing professional employees, it provides as follows:

> "Two successive" periods means the second term immediately follows the first. The fall semester and the spring semester are two successive terms. The end of the one traditional school year in June and the beginning of the new school year in August or September is considered two successive years.

Similarly, with respect to nonprofessional employees, the MI 65 states:

> Nonprofessional school employees are considered to be on a school recess when the break is between two successive academic years or terms. When the school break is between the end of the traditional school year in June, and the beginning of the next traditional school year in August or September, this is considered a break between two successive terms, as well as two successive academic years.

Thus, regardless of whether the summer is an "academic term," the "academic year" ends in June and a new one starts in August or September. This treatment of "academic year" by EDD supports ELA's position that, even if summer session is defined as an "academic term," benefits are still not payable because the summer falls between "academic years," at least for schools that do not operate on a continuous schedule.

Finally, as noted above, CUIAB agrees that treating summer session as an academic term for all purposes is unworkable, as it would "require

[CUIAB] to provide benefits precisely during recess periods that are fully contemplated by the parties, allowing employees to seek additional employment if they so choose." (CUIAB RB, p. 27.) It attempts to address this by applying the summer "academic term" only to on-call employees.[5] However, as discussed below, the on-call employee "carve-out" urged by CUIAB appears nowhere in the statute.

4. The denial of benefits provision does not provide any exception for on-call employees

CUIAB and UESF appear to recognize that uniform application of "academic year" and "academic term" as creating a summer academic term would create an absurd result contrary to the plain meaning and intent of section 1253.3. Hence, they purport to limit the reach of their interpretation by stating, without providing any textual support, that the application of the denial provision is limited to specified "on-call" employees. However, such an exception cannot be read into the statute. Indeed, under standard rules of statutory construction, such an interpretation must be read as contrary to the statute's plain meaning and intent.

First, there can be no dispute that the carve-out advocated by CUIAB and UESF cannot be found in the statutory language. The statute nowhere discusses, defines or distinguishes among "on-call," "substitute,"

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[5] The MI 65 states that claimants placed on call during the summer recess period may be entitled to benefits. However, the statement is unpersuasive because it simply informs the reader as to the current state of the law by restating *Brady,* which is still listed as a precedential decision. The EDD neither endorses *Brady*, nor interprets or elucidates the law. Indeed, it is noteworthy that the EDD denied benefits for every claimant who is a part of this litigation before the decisions were reversed by CUIAB.

"per diem," or "full-time" employees. Instead, the denial of benefits provisions are plainly made applicable to "any individual."

Second, the absence of the exception should be considered intentional. Lack of the carve-out constitutes evidence that it was not intended, and therefore should not be inferred. (*In re J.W.* (2002) 29 Cal.4th 200, 209 ["The other principle, commonly known under the Latin name of *expressio unius est exclusio alterius,* is that the expression of one thing in a statute ordinarily implies the exclusion of other things."].) This is especially true given that the interpretation urged by appellants —if intentional—would necessarily be express, as it asserts an exception to the otherwise-stated rule in the statute. Further, implementation of the purported exception requires distinguishing among employees based upon their employment status (e.g., full-time, on-call, per diem, substitute, etc.). Had had the Legislature intended a carve-out based upon various possible employment relationships, these terms and distinctions would have been identified and defined in the statute. That they are not further indicates that the Legislature intended no such distinctions or exceptions.

Moreover, the perils of creating broad rules through litigation are exemplified by the strained (and contradictory) attempts of CUIAB to establish this exception. Not only do CUIAB and UESF disagree with each other over how far this contrived "on-call exception" extends, but in distancing itself from UESF, CUIAB advances an internally inconsistent interpretation of section 1253.3.

For example, in distancing itself from UESF's more extreme position that all on-call employees are entitled to unemployment benefits when a summer session is offered, CUIAB actually concedes ELA's position. It states, "[t]he Union suggests that its interpretation of section

1253.3 applies only to 'substitute teachers and paraprofessional employees,' and not to full-time salaries professionals. [Cite.] But that view cannot be reconciled with the text of the between-term exception which states that it applies to '*any* individual' who performs services for an educational institution." (CUIAB RB, p. 27, fn. 16.) Thus, at least in the context of analyzing reasonable assurance, CUIAB recognizes that there is no statutory language that limits benefits to substitutes, nonprofessionals, or on-call employees.

CUIAB cannot have it both ways. Coherent law must give the same term the same meaning throughout its provisions. CUIAB appears unaware that its statement concerning UESF's interpretation must apply equally to CUIAB's own interpretation of "academic term" or "academic year." As such, CUIAB's own creation of an "academic term" for some on-call employees based on "reasonable expectations," or "loss of customary work," or being placed "on-call" is equally unsupported and violates the plain language of the statute. It also would negate the reasonable assurance language for the hundreds of school districts that offer a summer session.

Moreover, CUIAB has previously been counseled by courts that distinctions based on the employee's status as a substitute are impermissible in the face of clear statutory language to the contrary. In *Board of Education v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 682 (*Long Beach*), the court agreed with the trial court that "[CUIAB]'s reliance on the tenuous impermanent nature of substitute teacher Smith's employment...are irrelevant to the 'reasonable assurance' issue within the meaning of section 1253.3." "Consideration of such tenuous aspects are extrinsic to clear legislative language and sources and therefore cannot be a basis for resolving the 'reasonable assurance' issue."

(*Ibid.*) Here, the Court of Appeal correctly applied this precedent and determined that "there is nothing in section 1253.3 suggesting any exceptions to the rule that school employees who receive reasonable assurance of continued employment are not entitled to unemployment benefits between the spring and fall academic terms." (*United Educators of San Francisco AFT/CFT, supra*, 247 Cal.App.4th at 1253.)

Neither CUIAB nor UESF have raised any compelling argument regarding why *Long Beach* is not equally applicable in determining whether a carve-out should exist for per diem substitutes and nonprofessionals or that "academic term" should be defined differently for them.

Accordingly, the statute applies to all employees equally, and CUIAB and UESF's unsupported carve-outs should be rejected because they violate the plain meaning of the statute. As laudable as CUIAB's policy arguments may be regarding the safety-net needs of on-call employees, section 1253.3 does not offer the solution. Rather, such policy-driven shifts in law must be achieved through the statutory process, where potential unintended consequences, budget impacts, implications for existing bargaining agreements, and possible effects on summer school operations and viability can be properly analyzed and addressed.

5. The authority in other jurisdictions overwhelmingly supports the Court of Appeal's decision

As the trial court and Court of Appeal discussed, the weight of authority in other jurisdictions supports their decisions. In contrast, there is virtually no authority finding that benefits are payable over the summer to employees who have a contract or reasonable assurance of work in the next academic year, including where summer sessions are offered. Further, even

if the authority of other jurisdictions were distinguishable (which it is not), neither CUIAB nor UESF has identified any case that supports the interpretation that benefits, while not payable generally, are payable to on-call and per diem substitutes and other nonprofessional employees. Finally, no court has found that the definition of an "academic term" or "academic year" turns on the nature of the individual's employment.

a. The cases cited by the Court of Appeal are demonstrative of the overwhelming authority in support of its interpretation

Courts addressing similar language in other jurisdictions have nearly uniformly arrived at the same conclusion as the trial court and Court of Appeal. Like California, the statutes of the other jurisdictions are modeled after federal law. In this context, the interpretation of other courts is "unusually persuasive." (*Long Beach*, *supra*, 160 Cal.App.3d at 685.)

The New Your Supreme Court, Appellate Division held in *Claim of Lintz* (N.Y. App. Div. 1982) 89 A.D.2d 1038, 1039, that

> The board's holding that because claimant chose to teach two days a week during a five-week summer session she was 'not between academic terms' and, therefore, eligible, is both irrational and unreasonable and thwarts the clear legislative intent. The law was . . . not enacted to supplement the income of a regularly employed teacher who chose to teach a few days during her regular summer vacation while awaiting the commencement of the next academic year for which she had unquestioned assurance of employment.

Similarly, in *Friedlander v. Employment Div.* (1984) 66 Or.App. 546, 676 P.2d 314, 318, the Court of Appeals of Oregon upheld a denial of benefits where an employee worked in one summer and hoped to work in the following summer. The court concluded that the unemployment

insurance board's finding that the instructor had reasonable assurance of employment for the upcoming fall term and was precluded from receiving benefits during the summer was supported by substantial evidence. The court stated, "an abbreviated summer session can and regularly does co-exist with a traditional academic year." (*Friedlander*, *supra*, 66 Or.App. 546, 552.) The court held that an "academic year" was the traditional fall through spring sessions. (*Ibid.*)

CUIAB and UESF attempt to distinguish some of the out-of-state cases by arguing that the cases did not analyze the differences between substitutes and other salaried employees. However, as discussed above, this is a distinction fabricated by CUIAB and UESF for which there is no legal basis. Thus, judicial failure to address the distinction does not make the cases distinguishable.

Moreover, despite CUIAB's and UESF's contentions, several courts have addressed substitutes and temporary employees—all reaching the same result as the Court of Appeal. In *Harker v. Shamoto* (Hawaii Ct. App. 2004) 104 Haw. 536, 545, the Hawaii Court of Appeals determined that a *substitute* teacher who teaches during the regular school year was ineligible for unemployment benefits during the summer session, even where he sought available summer school substitute teaching positions.

In *Claim of Alexander* (N.Y. App. Div. 1988) 136 A.D.2d 788, the Supreme Court of New York, Appellate Division, held that a *temporary* registration clerk was ineligible to receive benefits where the employee was laid off during the summer session. The period of employment was between two academic terms and there was reasonable assurance she would be rehired in the next succeeding term. (*Ibid.*) In *Claim of Huff* (N.Y. App. Div. 1995) 222 A.D.2d 919, the court reached a similar result with respect

to a teacher's aide laid off in the summer. (See also *Claim of Sifakis* (N.Y. App. Div. 1987) 133 A.D.2d 511, 512.)

Further, similar results have been reached in Minnesota (*Halvorson v. County of Anoka* (Minn. Ct. App. 2010) 780 N.W.2d 385, 392 [Summer term is between academic terms when entity follows typical school calendar.]); Illinois (*Campbell v. Department of Employment Sec.* (Ill. App. Ct. 1991) 211 Ill.App.3d 1070, 1081 [Instructor's "employment or lack of employment during the summer months is irrelevant because the applicable Federal and state statutes (citations), were designed to address the common academic practice of instructors not teaching during the summer months."]; *Doran v. Department of Labor* (Ill. App. Ct. 1983) 116 Ill.App.3d 471, 475-76 [Teacher who taught eight week summer course not entitled to unemployment insurance benefits when summer session was eliminated because session constituted a period between academic terms.]); Colorado (*Herrera v. Industrial Claim Appeals Office of State of Colo.* (Colo. App. 2000) 18 P.3d 819); Pennsylvania (*DeLuca v. Com., Unemployment Compensation Bd. of Review* (Pa. Commw. Ct. 1983) 74 Pa.Cmwlth. 80; *Glassmire v. Unemployment Compensation Bd. of Review* (Pa. Commw. Ct. 2004) 856 A.2d 269); Ohio (*University of Toledo v. Heiny* (1987) 30 Ohio St.3d 143); Indiana (*South Bend Community School Corp. v. Swartz* (Ind. Ct. App. 2008) 881 N.E.2d 1093); and Maryland (*Thomas v. Department of Labor, Licensing, and Regulation* (Md. Ct. Spec. App. 2006) 170 Md.App. 650); among others.

In short, CUIAB and UESF raise no persuasive argument that this Court should decline to follow virtually all other jurisdictions that have considered the issue.

b. The cases CUIAB and UESF cite in support of their interpretation are easily distinguishable and do not support their position

The few cases cited by CUIAB and UESF in support of their interpretation are not only readily distinguishable, but also do not provide any substantive support for their interpretation. Most of the cases involve scenarios where the fall or spring semester suddenly ended. None of the cases support a finding that the summer is an "academic term" for school districts operating on a traditional schedule; that the summer session is part of the "academic year;" or that unemployment benefits turn on whether the individual is a full-time employee or an on-call or per diem employee.

The primary case identified by CUIAB and UESF in support of their position is *Evans v. State Dept. of Employment Sec.* (Wash. Ct. App. 1994) 72 Wash.App. 862. The case has been all but abrogated, may have caused conformity problems, and is not factually similar. In that case, the Court of Appeal of Washington held that a summer term was an academic term for the purposes of the denial provision. As the Court of Appeal noted, *Evans* is "solidly in the minority." It also correctly noted that *Evans* was later distinguished by *Thomas v. State, Dept. of Employment Sec.* (Wash. Ct. App. 2013) 176 Wash.App. 809. Specifically, after *Evans* was decided, the DOL informed the Washington Employment Security Department that *Evans* raised conformity concerns. (*Id.*, at 816-17.) The Washington legislature acted in the 1995 session, the year after *Evans* was decided, to amend the statute. (*Id.*) *Thomas* determined that, under the applicable

statute, the period between "academic years" was determined by objective criteria such as enrollment and staffing. (*Id.*, 817.)[6] The claimant in *Thomas* argued, as the CUIAB does here, that his benefits should be based on the particular nature of his employment. The *Thomas* court declined this invitation. *Thomas* also explicitly stated that *Evans* was based on the fact that it concerned a college that ran on a year-round schedule. (See *Id.*, at 816-817 ["We based our decision in *Evans* on the fact that the college ran continuously on a year-round schedule, not on details regarding the claimant's individual employment."].)

The remainder of the cases cited by CUIAB are inapposite. Generally, these decisions concern situations where the employee was laid off *during* the academic term or year. In *Chester Community Charter School v. Unemployment Compensation Bd. of Review* (Pa. Commw. Ct. 2013) 74 A.3d 1143, the claimant was laid off two months *before* the end of the school year due to budget cuts. This fact is expressly noted in the court's holding. (*Chester Community Charter School, supra*, 74 A.3d 1143, 1145 ["If a school employee is laid off and receiving benefits prior to the end of the academic term, she remains eligible for benefits during the summer break even if she has a reasonable assurance of work in the next term."].)

Next, CUIAB cites *McKeesport Area School Dist. v. Com., Unemployment Compensation Bd. of Review* (Pa. Commw. Ct. 1979) 40

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[6] The statute at issue in *Thomas* specifically instructed the court to look to objective criteria including enrollment and staffing to define academic term.

Pa.Cmwlth. 334. In that case, employees reported to their first scheduled day of work, but, after the first day of work, were prevented from working under an expired collective bargaining agreement. (*McKeesport Area School Dist.*, *supra*, 40 Pa.Cmwlth. 334, 340). The court determined that this constituted a "lockout" and awarded benefits. (*Id.*)

Similarly, in *Chicago Teachers Union v. Johnson* (7th Cir. 1980) 639 F.2d 353, employees were laid off three weeks *before* the end of the academic year. The court determined that the three week period could not be excluded from benefits. (*Chicago Teachers Union*, *supra*, 639 F.2d 353, 359.) The case had nothing to do with summer session or whether benefits were payable during summer session.

Finally, *Baker v. Department of Employment and Training Bd. of Review* (R.I. 1994) 637 A.2d 360, 365 merely discusses reasonable assurance when there may be impending layoffs and attrition. It does not stand for any interpretation urged by CUIAB.

The only case UESF identifies in addition to *Evans* is *Wilkerson v. Jackson Public Schools* (Mich. Ct. App. 1988) 170 Mich.App. 133. That case involved a situation where there was no established and customary summer break period because the breaks changed each year and the length of the breaks were too unpredictable.

Thus, despite an abundance of out-of-state authority on the subject, CUIAB and UESF can find no valid case that supports their position. Similarly, they cannot locate any authority that would undermine the Court of Appeal's analysis.

B. CUIAB URGES AN INTERPRETATION OF 1253.3 THAT IS GROUNDED IN POLICY NOT LAW, HAS SWEEPING IMPLICATIONS FOR LABOR REALTIONS AND SUMMER SCHOOL PROGRAMS, AND FAR EXCEEDS ITS RULEMAKING AUTHORITY

The substantive changes that CUIAB seeks to make to section 1253.3 exceed its rulemaking authority, and must instead be accomplished through legislation. Moreover, even assuming that CUIAB's interpretation of the law falls within the scope of its rulemaking authority, it must effect such change through the formal rulemaking process—not litigation.

1. CUIAB's interpretation constitutes a substantive and novel departure from existing law that must be effectuated through legislation

The limits on CUIAB's authority preclude it from contradicting, altering, or expanding the underlying statutes it interprets. The precedent decisions adopted by the CUIAB are reviewed similarly to regulations, and "[i]t is well established that administrative regulations must conform to applicable legislative provisions, and that an administrative agency has no discretion to exceed the authority conferred upon it by statute." (*California Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 242.) Thus, where statutory language is unambiguous, an agency's contrary interpretation is entitled to no deference and the agency's interpretation does not enter into the court's interpretation of the statute. (*Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1261. See also *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 117 [Administrative interpretation of a statute cannot prevail where a contrary legislative purpose is apparent.].) Moreover, the nonprecendent

decisions at issue here are subject to even greater scrutiny because they do not follow the required rulemaking or even precedent decision process.

Further, due to CUIAB's inconsistent approach, deference is inappropriate. Deference is unwarranted where the application and interpretation of a regulation is inconsistent. (*California Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 254 ["(A)n agency's vacillating practice—i.e., adopting a new interpretation that contradicts a prior interpretation—is entitled to little or no weight.") Similarly, where there is no long-standing interpretation and the agency has not proceeded through the appropriate formal regulation process, the interpretation may be disregarded. (*Styrene Information and Research Center v. Office of Environmental Health Hazard Assessment* (2012) 210 Cal.App.4th 1082, 1099, as modified (Nov. 15, 2012).)

Applying this standard here, the interpretation urged by CUIAB must be rejected. First, as discussed above, the statutory language is unambiguous. CUIAB attempts to carve out a distinction for on-call employees that does not find any support in the plain language of the law; is contrary to express language applying the denial provisions to "any individual;" and requires a strained interpretation that renders plain language meaningless. (See *Long Beach*, *supra*, 160 Cal.App.3d at 682; CUIAB RB, p. 27, fn. 16.)

CUIAB's repeated reliance on policy considerations (rather than legal authority) further signals that it has strayed into the realm of legislation. (See, e.g., CUIAB OB, pp. 2-3.) CUIAB urges a statutory interpretation that goes beyond the plain statutory language on the basis that substitutes and nonprofessionals are more economically vulnerable than other school district employees. (CUIAB OB, pp. 1-2.) CUIAB's

statutory construction and interpretive guidance arguments merely attempt to bolster its public policy rationale. While ELA does not necessarily disagree with this policy argument, and would certainly support increased state funding allocations to address these issues, CUIAB's position is at odds with the statutory language, applies an overly broad and legally flawed test, and does not adequately consider all of the relevant public policy considerations at stake.

CUIAB asks this Court to create a policy-based statutory exception that finds no support in the plain language of the statue, but instead turns statutory interpretation on its head by requiring the interpretation of an "academic term" and "academic year" to depend on the nature of the claimant's employment. ELA and the hundreds of school districts that offer summer sessions should have an opportunity to provide input regarding the sweeping fiscal, programmatic, operational, and contractual impacts that could result from such carve-outs.

Further, California's school districts need the clarity, consistency, and predictability that the legislative process affords. CUIAB's statutory interpretation leaves numerous operational questions unanswered such as:

- What effect does this rule have on current collective bargaining agreements?
- What does "on-call" mean?
- Does an on-call employee indicating his or her willingness to accept summer assignments make them eligible for benefits?
- If an individual works one day of a summer session, does he or she have a continued expectation of summer employment?
- Does one day of on-call work in the summer entitle an employee to benefits for the entire summer session, despite

that on-call employees would not be expected to work every day of a summer session?

- Could school districts refuse to allow any on-call employees to be "on-call" during the summer and only use full-time contract employees to fill positions on an on-call basis when needed?
- May districts avoid the carve-out by informing substitutes that they have no assurance of summer work?
- Does the rule apply differently to substitutes, on-call employees, and per diem employees, and how are these different categories defined and distinguished?

It is impossible for stakeholders, which go well beyond the parties to this litigation, to manage their expectations when it is not clear what rules govern the legal landscape. That the answers to these questions are unknown, and their answers are outside the preview of CUIAB and this Court to answer, further indicates that we are in the world of legislation, not litigation.

Finally, it is noteworthy that a more expansive bill that attempted to exempt all classified employees from the benefit denial provision was recently vetoed by the Governor. (Assem. Bill No. 2197 (2015-2016 Reg. Sess.).)[7] Three similar bills died without making it out of the Legislature. (See Assem. Bill No. 399 (2015-2016 Reg. Sess.); Assem. Bill No. 1638

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[7] See: http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160AB2197. The bill was supported by AFL-CIO, an affiliate of UESF.

(2013-2014 Reg. Sess.); Assem. Bill No. 615 (2013-2014 Reg. Sess.).) This legislative history suggests that CUIAB seeks to modify the law in an area that is manifestly complex, and where the Legislature has repeatedly and recently considered making revisions. It also indicates that the Legislature is aware of possible amendments that could be made to section 1253.3, but has been unable or unwilling to make amendments that create a broader, but different, entitlement to benefits than the current modification sought by CUIAB. Undoubtedly, a more limited carve-out would similarly be within the Legislature's purview.

In sum, CUIAB has exceeded its rulemaking authority. If a change in the application of section 1253.3 is going to be made, the change must be made by the Legislature and should not rest on an interpretation that is not grounded in the statutory language and is vague and uncertain.

2. Even if CUIAB's interpretation falls within the pruview of rulemaking, , it should be required to proceed through the formal rulemaking process

Even if CUIAB's interpretation of section 1253.3 were considered to be within the realm of regulatory enforcement—it still cannot be achieved through this litigation. Rather, the questions and uncertainties enumerated above highlight the inadequacies of circumventing the formal rulemaking process.

CUIAB's circumvention of the formal rulemaking process is of great concern to ELA and its members who have valuable input and expertise concerning summer session and practices among varying districts. The formal rulemaking process is designed to seek input from stakeholders and experts and promote meaningful public participation in agency rulemaking. (*POET, LLC v. California Air Resources Board* (2013) 217 Cal.App.4th

1214, 745, as modified on denial of reh'g (Aug. 8, 2013).) Importantly, the formal rulemaking process also creates an administrative record, which facilitates effective judicial review. (*Sims v. Department of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1077.)

The benefits of the formal rulemaking process are all too apparent in this matter. ELA submits that CUIAB and UESF argued for much broader application of the nonprecedent decision and *Brady* in the Court of Appeal. (See CUIAB Consolidated Opening Brief, p. 22, fn. 12; UESF Opening Brief, p. 31.) Moreover, the failure to proceed through the formal rulemaking process has caused CUIAB to overlook and improperly weigh important legal and public policy considerations.

For example, CUIAB and UESF's arguments ignore the collective bargaining process and the status quo under which these types of issues are negotiated, and which permeate the school district employment market. The employees in this action are members of a collective bargaining unit and their wages, hours, and terms and conditions of employment are negotiated with the District. Discussions regarding the lack of summer work and compensation are a common feature at the bargaining table and are a factor in discussions concerning wages. In many cases, the summer periods are factored into the compensation negotiations for employees. These negotiations also undoubtedly impact the wages paid to unrepresented employees, as districts must compete for labor. If the legal landscape that serves as the backdrop for collective bargaining and school district employment is to be changed, it should be done through a deliberative and reasoned process, not through ad hoc and arbitrary administrative action or through the judicial process.

The interpretation urged by CUIAB and UESF also does not take

into consideration the realities of a summer session. To hold that summer session is an "academic term" on equal footing with the fall and spring academic terms defies logic and is inconsistent with the school districts' operational, programmatic and fiscal realities. Summer session is generally remedial in nature, and it is beyond dispute that they serve far fewer students than during the regular academic year; that the average daily attendance during summer school is thus far lower; that staffing levels are a fraction of the spring and fall staffing; that facility usage is lower; and that the financial resources available to run summer sessions are limited. These factors are all relevant to thoughtfully determining how unemployment benefits might be available to some school employees, in some school districts, for some portion of the summer period.

These factors have yet to be considered—and the negative consequences are apparent. For example, CUIAB would award benefits in situations where it is unreasonable to believe that an employee has a "reasonable expectation" of employment or a loss of "customary work." It is unreasonable for CUIAB to determine that an on-call employee who works a single day in the summer session has an expectation of employment for the entire summer session. That would exceed even an on-call employee's expectation of employment in the fall and spring terms. On-call employees are called to work as needed, not guaranteed employment for the entire term. Similarly, an employee who works one day during the summer session does not acquire a reasonable expectation of employment in the *following* summer. Finally, just because an employee is placed on an on-call list, or indicates a willingness to accept work, does not create a reasonable expectation of employment for the entire summer session. Based on the limited employment in the summer, for most

employees, these assignments are add-on assignments that provide supplemental income. In many school districts, an employee will check a box indicating his or her willingness to accept summer session assignments. CUIAB's interpretation would likely lead to fewer assignments for these employees and could result in school districts only offering summer assignments to full-time employees.[8] CUIAB's interpretation of section 1532.3 also implicates the potential availability of summer school itself. Here again, the broader operational impacts of CUIAB's proposed approach signals the necessity for thoughtful vetting through the legislative and/or formal rulemaking processes. ELA is concerned that an unintended consequence of overturning the trial court and Court of Appeal will be that, in the face of the resulting confusion and uncertainty, school districts may opt to curtail summer school. Districts will be concerned about the potential, significant increased costs through additional unemployment insurance expenditures. This may deter school districts from operating a summer session, especially under UESF's interpretation, which would render a school district's reasonable assurance notices invalid for many employees.

In sum, CUIAB proceeding outside of the formal rulemaking process has created uncertainty, inconsistency, and confusion regarding its position and has denied stakeholders and the public the opportunity to provide meaningful comment. Its interpretation should be rejected and

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[8] However, CUIAB's briefing in the Court of Appeal raises questions regarding whether benefits would even be denied to full-time employees. (CUIAB Consolidating Opening Brief, p. 22, fn. 12.) It is unclear whether CUIAB only applies the extension to *Brady*, and why.

CUIAB should be required to proceed through the formal rulemaking channels, and in accordance with the statutory framework.

3. CUIAB cannot rely on *Brady* or its nonprecedent decisions to assert that it has complied with its formal rulemaking obligations

The trial court and Court of Appeal properly invalidated *Brady* and CUIAB should not be permitted to rely on it or the nonprecedent decisions at issue in this matter. CUIAB's decision in *Brady* and the nonprecedent decisions at issue in this litigation do not follow from previous CUIAB precedent decisions.

First, the CUIAB cites *Vincent J. Furriel* (1980) Precedent Benefit Decision No. P-B-412. In that decision, CUIAB was analyzing a traditional year-round employee who was laid off during the summer due to budget cuts. The CUIAB determined that the employee was laid off from regularly scheduled work and was entitled to benefits. Similarly in *Dorothy C. Rowe* (1981) Precedent Decision No. P-B-417, CUIAB found a year-round employee who had a 12-month assignment for 18 years eligible for unemployment insurance benefits when the school district reduced her assignment to 10 months due to lack of work. Both worked without regard for summer recess. *Brady*, which was properly invalidated, did not follow from *Furriel* or *Rowe*.

Brady held that if a claimant was "on-call" during the summer session, the employee was entitled to benefits for the entire summer session. Thus, *Brady* created a new legal test that extends far beyond *Furriel* and *Rowe* and is not grounded in statute. Accordingly, it was properly invalidated.

Moreover, the nonprecedent decisions at issue here seek to extend

Brady and apply section 1253.3 in the context of summer school through two underground rules: 1) "reasonable expectation" of summer school employment; and 2) "loss of customary work." According to CUIAB, where an employee has a "reasonable expectation" of employment, summer school constitutes an "academic term." In contrast, where an employee does not have a "reasonable expectation," summer school apparently is not an "academic term." Where an employee works one day in one summer session, the employee has apparently gained a "reasonable expectation" of employment in the entirety of the following summer session, such that the employee suffers a "loss of customary work" if they are not employed in the following summer session. Even assuming that a "loss of customary work" is a basis for benefits, CUIAB's interpretation of the internally manufactured phrase is irrational and constitutes an abuse of discretion. Moreover, in creating legal tests, the CUIAB is required to proceed through formal rulemaking, or, at the very least, issue a precedent decision.

Further, now CUIAB takes the position that its interpretation is limited to "on-call" employees. In the Court of Appeal, CUIAB did not advance the position that *Brady* or its nonprecedent decisions were limited only to "on-call" employees. (CUIAB Consolidated Opening Brief, pp. 1-2; 22, fn. 12.) However, according to CUIAB's brief in the Court of Appeal in this matter, "*Brady* focused on substitute teachers, but the reasoning in *Brady* permitting benefits for teachers who are not truly on recess-particularly when they are on a district's on-call list, *is equally applicable to all teachers*." (CUIAB Consolidated Opening Brief, p. 22, fn. 12, emphasis added.) CUIAB's statement should give the Court pause concerning CUIAB's position before this Court. For example, it is not clear how CUIAB can take the position that *Brady* is generally applicable to all

employees, but that the rationale from the nonprecedent decision in this matter is not "equally applicable" to other employees. Thus, not only is CUIAB engaging in improper rulemaking, it is unclear what rules are being articulated.

Accordingly, *Brady* was properly invalidated because CUIAB exceeded its rulemaking authority, and it cannot be relied on in these proceedings. Moreover, even assuming that *Brady* constituted a proper exercise of CUIAB's authority, the nonprecedent decisions at issue here go even further and constitute invalid underground rulemaking that exceeds CUIAB's authority.

III. CONCLUSION

For the foregoing reasons, ELA requests that the Court affirm the decision of the Court of Appeal.

Dated: April 24, 2017 LIEBERT CASSIDY WHITMORE

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed Brief of *Amicus Curiae* is produced using 13-point Roman type including footnotes and contains approximately 9,437 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 24, 2017 LIEBERT CASSIDY WHITMORE

By:/s/ Laura Schulkind
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