S250149

In the Supreme Court for the State of California

Tamara Skidgel,
Plaintiff and Appellant,

vs.

California Unemployment Insurance Appeals Board,
Defendant and Respondent.

PETITIONER'S OPENING BRIEF ON THE MERITS

After a Published Opinion
from the First District court of appeal, No. A151224
On Appeal from a Judgment after the Sustaining of a Demurrer
Alameda County Superior Court No. RG16810609
The Honorable Robert Freedman

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

REGULATIONS

I.
ISSUE PRESENTED

Are In-Home Supportive Services workers (Welf. & Inst. Code § 12300 et seq.) who are providers for a spouse or a child, eligible for unemployment insurance benefits?

II.
INTRODUCTION

Unemployment Insurance provides subsistence benefits to Californians who become unemployed through no fault of their own. This includes individuals employed as In-Home Supportive Services (IHSS) providers who furnish services under a state public assistance program that allows disabled persons unable to perform necessary tasks without assistance—such as cooking, housekeeping, feeding, providing personal cleanliness and hygiene—to remain in their own homes instead of being placed in expensive long-term care facilities.

Under the IHSS program, an able-bodied spouse may be an IHSS provider for a disabled spouse, and a parent may be an IHSS provider for a child. The California Unemployment Insurance Appeals Board ("the board") held in *Matter of Caldera*, Precedent Benefit Decision P-B-507 (2015), that IHSS workers who provide needed services for their spouses or children are ineligible for unemployment insurance benefits. In the board's view, these IHSS workers are employees of the recipient—the spouse or child to whom they provide needed services but who does not pay unemployment insurance contributions for the provider spouse or parent. In the present case, Division 5 of the First Appellate District ratified the board's *Caldera* decision, holding that a spouse or parent IHSS provider is

ineligible for unemployment insurance because he or she is an employee of the IHSS recipient spouse or child.

That decision, which carves out approximately 135,000 IHSS workers from eligibility for unemployment insurance benefits, is not supported by, and is contrary to the intent of, applicable statutes. Although IHSS providers are employed by the recipients they serve, various public entities exercise substantial control over who can be an IHSS provider, training of IHSS providers, the exact tasks that an IHSS provider performs, and the amount of time the IHSS provider is allotted for each task. The California Department of Social Service ("CDSS") defines rules for the program and pays unemployment insurance contributions and Worker's Compensation premiums. The counties determine the exact tasks and time per task for each individual recipient and monitor the program for fraud and overtime violations. In counties where public authorities are established, the public authorities have a registry of available providers, train providers, and handle wages. In counties without a public authority the county handles those functions. CDSS, the county and the public authority act as agents for each other in operating the program.

Taken together, these functions give CDSS, the counties and the public authority substantial control over the employment of IHSS providers and their working conditions. As a result, these workers are jointly employed by the public agencies and the IHSS recipient. The Third Appellate District so held over 35 years ago in *In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 731-34. The Third District also held that an eligibility exclusion that applied to employment by the IHSS provider did not apply to joint employment by the public entity. (*Id.* at pp. 737-41.) In this case, the First District incorrectly disagreed with the Third District's analysis in *In-Home Supportive Services.* These workers are, and this Court should confirm, eligible for

Unemployment Insurance benefits based upon their joint employment with a public agency.

III.
THE UNEMPLOYMENT INSURANCE AND IHSS PROGRAMS

A. Unemployment Compensation Insurance

The unemployment compensation insurance ("UI") program reduces the hardship of unemployment by providing benefits to employees who become unemployed through no fault of their own. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (*Medeiros*) (2014) 59 Cal.4th 551, 558.) The program is funded by employer contributions. (Unemp. Ins. Code §§ 13005(b), 13020(a)(1).)[1] Provisions of the Code are interpreted liberally to advance the legislative objective of reducing the hardship of unemployment. (*Robles v. Employment Development Department* (2012) 207 Cal.App.4th 1029, 1035 [citation omitted]; see also § 100.)

B. In-Home Supportive Services

The IHSS program is a state social welfare program that provides service workers to disabled individuals who are at risk of out-of-home placement. (Welf. & Inst. Code § 12300(a); CDSS Manual of Policies and Procedures ["MPP"] § 30-700.1, CT 00236.)[2] IHSS workers may assist these disabled individuals with tasks including housecleaning, preparing meals, laundry, bowel and bladder care, bathing, grooming, ambulation, accompaniment to medical appointments, and, for the mentally impaired, protective supervision. (Welf. & Inst. Code § 12300.) The state

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

[2] The MPP contains CDSS's regulations enacted pursuant to the Administrative Procedures Act. (See MPP § 10-001, CT 00246.)

compensates IHSS workers who provide these services. (*Guerrero v. Superior Court* (*Weber*) (2013) 213 Cal.App.4th 912, 920.) The program also trains and monitors IHSS workers. (*Id.*)[3]

CDSS sets the program rules, which the counties implement and enforce. The counties determine the specific services, the exact time per task, and the maximum hours of service that each recipient receives. (*Guerrero*, *supra*, 213 Cal.App.4th at pp.921, 935-36; Welf. & Inst. Code § 12301.2.) A county may establish a separate entity called a "public authority" to deliver services, maintain a registry of qualified IHSS providers, and perform background checks and training for new providers. (Welf. & Inst. Code § 12301.6(e); MPP § 30-767.2 *et. seq.*) The county oversees operation of the program including enforcing overtime restrictions and performing audits and fraud investigations. (Welf. & Inst. Code § 12305.71; CDSS All-County Letter ("ACL") 16-36 at pp.2-7, CT 00254-00259.)

Counties may provide IHSS services by hiring IHSS workers as civil service employees, by contracting with a third party such as another public entity, nonprofit or proprietary agency or an individual, or by making direct payments to the IHSS recipient to purchase the services. (Welf. & Inst. Code § 12302; MPP § 30-767.1 *et. seq.*, CT 00238-00240.) A county may also contract with a nonprofit consortium or a public authority it has

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[3] According to amici curiae in the court of appeal, IHSS is low-wage work. It pays only $10.72 per hour. (Amicus Brief in Support of Petitioner Tamara Skidgel from National Employment Law Project, United Domestic Workers of America, AFSCME Local 3930, AFL-CIO, and Service Employees International Union, Local 2015 at p.16.) Often providers for their family members leave higher paying jobs and have little retirement savings. (*Id.* at pp.15-16.) IHSS providers also save substantial money for the state—and the taxpaying public—because it is three times more expensive to provide care in a nursing home. (*Id.* at p.17.)

established "to provide for the delivery of in-home supportive services." (Welf. & Inst. Code § 12301.6, 12301.6(a)(2); MPP § 30-767.2 *et. seq.*, CT 00240-00244.)

The public authority is a separate entity from the county, and it provides for the delivery of services pursuant to agreement with the county. (Welf. & Inst. Code § 12301.6(a)(1)(A) and (2); MPP § 30-767.2, .214, .215.) Unless the county itself delivers IHSS services, all workers employed as IHSS providers must be referred to the public authority for wages, benefits and other terms and conditions of employment. (*Guerrero, supra*, 213 Cal.App.4th at p.930; Welf. & Inst. Code § 12301.6(h).) The county or the public authority investigates the qualifications and background of all prospective IHSS providers and trains all providers. (*Id.* at p.935; Welf. & Inst. Code § 12301.6(e)(2),(4); see also CDSS All County Information Notice (ACIN) I-69-09, CT 00191-00199 [requirements for fingerprinting, background checks, provider orientation and provider agreement with the county or public authority].)

Counties must either act as an employer of IHSS workers for collective bargaining purposes or designate another agency as the IHSS employer for collective bargaining purposes. (Welf. & Inst. Code § 12302.25(a).) In a county that has established a public authority, the public authority is the IHSS workers' employer for purposes of collective bargaining. (Welf. & Inst. Code § 12301.6(c)(1); *Guerrero, supra*, 213 Cal. App. 4th at p.924.) The public authority is also the employer for purposes of obtaining fingerprints of applicants for IHSS provider positions. (Welf. & Inst. Code § 15660(a)(1).) The public authority establishes a registry of qualified IHSS workers to assist recipients in finding providers, a referral system for caregivers to providers, and performs "any other functions related to the delivery of" IHSS. (Welf. & Inst. Code § 12301.6(e); MPP § 30-767.2 *et seq.*)

The county does a background check of all providers in counties without a public authority and for providers not listed on the public authority registry, and enforces various exclusions from eligibility to work as an IHSS provider. (Welf. & Inst. Code §§ 12305.86, .81.) The county gives written notice to the IHSS recipient when his or her chosen provider is excluded. (Welf. & Inst. Code § 12305.87.) The recipient may request a waiver of exclusion, which the county decides.

All prospective providers must attend an in-person orientation that covers all aspects of the IHSS program. (Welf. & Inst. Code § 12301.24.) The county ensures that all prospective providers attend the orientation prior to beginning work. (ACL 09-54 at p.3, CT 00250.)[4]

CDSS limits overtime and travel time that an IHSS provider can earn. (Welf. & Inst. Code § 12300.4.) Counties enforce the overtime rules by issuing violations. (ACL 16-36 at pp. 2-7, CT 00254-00259.) These violations can result in the county suspending a provider from work for as long as a year. (*Id.* at pp.3-4.) The county decides appeals of alleged violations. (*Id.* at p.4.) Subject to CDSS review, the county also decides requests for exceptions from the overtime rules. (ACL 16-22 at pp.5-7, CT 00270-00272.)

The county determines the exact amount of time the provider works and the exact tasks done to the tenth of an hour. (*Guerrero*, *supra*, 213 Cal.App.4th at pp.935-36.) CDSS defines the amount of time per task that IHSS providers perform that can only be modified based on a special circumstances request to the county. (*Id.* at p.921; Welf. & Inst. Code § 12301.2.)

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[4] ACLs, although not promulgated under the Administrative Procedures Act, are CDSS official pronouncements. (*In Re Social Services Cases* (2008) 166 Cal.App.4th 1249, 1271-72.)

The county and the state maintain all employment records and handle payroll for all providers. (*Guerrero*, *supra*, 213 Cal.App.4th 912 at pp.934-5; MPP § 30-769 *et. seq.*, CT 0069-0076.) CDSS pays contributions, premiums and taxes for unemployment insurance, workers' compensation, and Social Security on behalf of IHSS providers. (Welf. & Inst. Code §§ 12301.6(i)(1), 12302.2(a)(1), (3); Unemp. Ins. Code § 683(a), MPP § 30-769.8 *et. seq.*, CT 0075-0076.) Nothing in the establishment of a public authority changes the state's responsibility for payment of unemployment insurance contributions, workers' compensation, payroll or Social Security taxes. (Welf. & Inst. Code § 12301.6(i)(1); ACL 98-20 at p.3.)

IV.
STATEMENT OF FACTS

Tamara Skidgel provides IHSS services for her severely disabled daughter, Briannah. (CT 002.) Ms. Skidgel expected when she agreed to be an IHSS provider that she would be eligible for and receive UI when her employment as Briannah's IHSS provider ultimately ends. (*Id.*) However, because of the board's *Caldera* decision, Ms. Skidgel will be ineligible for UI. (Clerk's Transcript [CT] 005.)

In *Caldera*, the board held that IHSS workers who provide services for their spouses or children are categorically ineligible for UI benefits under section 631, which provides:

> "Employment" does not include service performed by a child under the age of 18 years in the employ of his father or mother, or service performed by an individual in the employ of his son, daughter, or spouse, except to the extent that the employer and the employee have,

pursuant to Section 702.5, elected to make
contributions to the Unemployment
Compensation Disability Fund.

In the board's view, the recipient spouse or child is the IHSS worker's employer and, as a result, Section 631 bars eligibility for unemployment insurance, regardless of whether IHSS providers are jointly employed. (*Id.* at p.1.)

Just a year before deciding *Caldera*, an overlapping panel of the board held exactly the opposite in a non-precedent decision, *Matter of Ostapenko*, CUIAB No. AO-336919 (2014). (CT 00137-00150.) Nellia Ostapenko was the IHSS provider for her disabled son from age four until he died at 23. (CT 00138.) Ms. Ostapenko filed for unemployment insurance benefits after his death. (*Ibid.*) The board held that IHSS workers serving their spouses or children are eligible for unemployment insurance because IHSS workers are employed jointly by the recipient of services *and* the public authority. (*Id.*) Those workers, therefore, were eligible through their employment with the public authority. (*Id.*)

Ms. Skidgel filed a Complaint for Declaratory Relief under Section 409.2, requesting that the court invalidate *Caldera*. (CT 001.) Ms. Skidgel made two primary arguments. First, she contended that an IHSS worker providing services to a spouse or child is jointly employed by both the service recipient and the public agency. Therefore, the section 631 bar on unemployment insurance eligibility for persons employed by their spouses or children does not apply to bar eligibility for UI based on employment by the joint, public agency employer. (CT 00358-60, 00365-68.)

Second, Ms. Skidgel contended that, notwithstanding section 631, under section 683, in the IHSS program, "[e]mployer *also* means any employing unit which employs individuals to perform domestic service." (Emphasis added.) Section 683, she argued, adds to the definition of

"employer" for unemployment insurance purposes and affords coverage for all IHSS workers, including those serving family members. (CT 00360, 363, 411.)

Subject to exceptions that do not apply here, "[w]hether an individual or entity is the employer of specific employees shall be determined under common law rules applicable in determining the employer-employee relationship. . . ." (§ 606.5(a).) Likewise, § 621(b) defines "employee" as: "Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."

Under common law, an employee may be employed by joint employers. (*National Labor Relations Board v. Town & Country Electric* (1995) 516 U.S. 85, 94; *State ex. rel. Dept. of Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1008.) Joint employment exists when an employee is subject to the control of two or more employers. (*In-Home Supportive Services*, *supra*, at p.732; *Guerrero, supra*, at pp.947-948 [citing *Martinez v. Combs* (2010) 49 Cal.4th 35][both cases involving IHSS workers].)

The trial court rejected Ms. Skidgel's argument and, accepting the board's analysis and decision in *Caldera* in full, the court held that she was ineligible for unemployment insurance because her employer was the IHSS recipient she served, her daughter. (CT 506-511, 516-17.) The trial court based its holding on Section 683(a), which it construed to mean that an IHSS provider is employed by the IHSS recipient. (*Id.*)

The First Appellate District, Division 5, affirmed. The court held that, in the case of an IHSS worker serving a spouse or child, the service recipient is the worker's only employer and, as a result, IHSS providers for their spouses or children are ineligible for UI benefits under Section 631. (Slip opn. at pp.12, 16-18.) The court of appeal did not reach the issue

whether the IHSS workers are jointly employed. (*Id.* at p.8 fn.7, p.22.) The court of appeal also did not reach the issue held to be dispositive in *Caldera*: whether a second, joint employer not excluded by section 631 can support unemployment insurance eligibility. (*Id.* at p.12 fn.11.)

The court acknowledged Ms. Skidgel's argument that "also" in Section 683 means that the definition of "employer" in that section is in addition to any other definition of "employer" for unemployment insurance purposes. (*Id.* at p.12.) But, the court held, the legislative intent of the section was to define the recipient as the *sole* employer for unemployment insurance purposes. (*Id.*)

The court also acknowledged that its reading of the legislative history was inconsistent with *In-Home Supportive Services*, *supra*, 152 Cal.App.3d at pp.736-740.) There, the Third Appellate District held that the Legislature did not intend in the relevant statutes to make the IHSS recipient the provider's sole employer for workers' compensation purposes. The state is also an employer of the IHSS worker. Consequently, although an IHSS recipient does not provide unemployment insurance coverage for his or her IHSS worker, the worker is covered by his or her joint employment by the state for job-related injuries. (*Id.*at pp.736 fn.18, 738, 740.)

In the present case, however, the First Appellate District disagreed, holding that the Third District erred in misreading the legislative history. (Slip opn. at pp.21-22.)

Ms. Skidgel petitioned for rehearing. The court modified its opinion without changing the judgment and denied rehearing. The court added footnote 5 to the opinion, acknowledging that Welfare and Institutions Code Section 12302.2(a)(1) says that the IHSS recipient is "*an* employer." But, the court held, that language reveals little about legislative intent to

make the state an IHSS worker's joint employer because the section also refers to the IHSS recipient as "*the* employer." (*Id.* at p.4 fn. 5.)

V.
STANDARD OF REVIEW

The standard of review is de novo.

This action is a complaint for declaratory relief under Section 409.2, which allows persons affected by board precedent decisions judicial recourse similar to that available to challenge the validity of regulations. (*Pacific Legal Foundation v. CUIAB* (1981) 29 Cal.3d 101, 109 [*PLF II*].) The issue is purely a question of statutory construction, which is a matter of law for the courts. (*Id.* at p.111.) This court's review, therefore, is de novo. (*People ex. rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

Although an administrative agency's construction of a statute it administers is ordinarily entitled to deference, if the agency's construction has been inconsistent, it does not receive deference. '[A] vacillating position ... is entitled to no deference.'" (*Yamaha v. State Board of Equalization* (1998) 19 Cal.4th 1, 13.)

The board has been inconsistent in construing sections 631 and 683 to determine whether IHSS providers for their spouses or children are eligible for unemployment insurance benefits. As noted in the statement of facts above, a year prior to *Caldera*, two of the three board members who signed *Caldera* reached the opposite conclusion in *Ostapenko*. (CT 00136-00156.) *Caldera* acknowledged that the board has been inconsistent about the issue. (*Caldera* at p.3, CT 0011.) The board's inconsistent, vacillating position means that *Caldera* is not entitled to deference. (*Yamaha, supra*, 19 Cal.4th at p.13.)

VI.
ARGUMENT

A. The Court Of Appeal Erred In Holding That IHSS Recipients Are The Only Employers Of Workers Who Provide Supportive Services.

1. Under section 683, the recipient of IHSS services is "also" an employer, not the sole employer, of an IHSS worker.

Section 683 provides that, for purposes of IHSS worker eligibility for unemployment insurance, "'Employer' *also* means" the IHSS recipient. [Emphasis added.] The word "also" means "as well" and "in addition to." (*Schilling v. Central California Traction Corp.* (1931) 115 Cal.App. 30, 35.) Dictionaries define "also" as "in addition." (Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/also, accessed October 10, 2018; Oxford English Dictionary, https://en.oxforddictionaries.com/definition/also, accessed October 10, 2018.)[5] "Also . . . indicate(s) an intention to include something not therefore included." (*Henne v. Summers* (1911) 16 Cal.App. 67, 71.) Section 683, in short, is a basis for UI eligibility *in addition to* any other bases.

The court of appeal acknowledged that under Section 683, the IHSS recipient is "also" an employer, but the court held that the "apparent purpose" of the statute was to designate only the recipient as the employer. (Slip opn. at p.11) This reading makes "also" in Section 683 meaningless. "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 719 [citations omitted].) Statutes are to be

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[5] Courts rely on dictionaries for the usual meaning of words. (*Marriage of Bonds* (2000) 24 Cal.4th 1, 15.)

harmonized and read together to give effect to all provisions whenever possible. (*State Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.)

The court of appeal also held that Section 621, the general definition of "employee" for unemployment insurance purposes—i.e., "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee"—does not apply to IHSS workers because Section 683 is the more specific statute. (Slip opn. at p.13.) This assumes that there is a conflict between Sections 621 and Section 683. The rule that specific statutes govern over general statutes applies only when statutes cannot be reconciled. (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634 [citations omitted].)

Sections 621 and 683 are not irreconcilable. They are simultaneously and equally operative and effective. Section 683 simply broadens the definition of "employer" beyond the general definition in Section 621.

Section 683 does not exclude joint employment for IHSS providers under the general definition of employee in Section 621.

2. Section 13005 makes the state an employer of IHSS providers because it pays their wages.

Section 13005(a) defines "employer" for unemployment insurance purposes generally as any entity, including the state or any political subdivision of the state, "making payment of wages to employees for services performed within this state." In the IHSS program, the state provides the funds to the county or public authority to make payment for the work of IHSS providers. The state and the county or public authority

are, thus, employers of the IHSS provider. (See also *Guerrero, supra*, 213 Cal.App.4th at 930-937.)

The court of appeal ignored this point.

Both the state and the county or public authority are intricately involved in paying IHSS providers for their work. The county handles the actual payment of wages. (MPP §§ 30-767.13, 30-769.23, .24.) The state handles payroll deductions, which includes deducting for UI. (Welf. & Inst. Code § 12302.2.)

The court of appeal described the State's role as performing merely a "payroll function on behalf of the recipient . . . ." (Slip opn. at p.12.) What the court missed is that under Section 13005(a), this "payroll function" makes the county and the state employers for UI purposes.

IHSS providers' employment by the county and state renders them eligible for unemployment insurance benefits.

3. The legislative history does not demonstrate an intent to limit unemployment insurance coverage for IHSS providers.

The court of appeal held that the legislative intent of Section 683 and Welfare and Institutions Code Section 12302.2 was to relieve counties of the burdens of being employers of IHSS workers, burdens such as social security coverage, collection and payment of taxes and workers' compensation, and UI contributions. (Slip opn. at p.16.) The court acknowledged that its reading of the legislative history conflicts with the Third Appellate District's reading of the legislative history in *In-Home Supportive Services*, *supra.* There, the court held that the intent of the statutes was to relieve *recipients* of in-home supportive services of the burdens of being deemed the employer of IHSS workers. (*In-home Supportive Services*, *supra*, 152 Cal.App.3d at pp.736, 738.]

The court of appeal did not discuss the ultimate conclusion of *In-Home Supportive Services* that the legislative history does not show an intent to limit coverage. (*Id.* at pp. 736 fn.18, 738, 740.) *In-Home Supportive Services* held that if the legislature had intended to restrict coverage, it could have clearly done so, but it did not. (*Id.* at p.738.) In the present case, the court of appeal gave no reason why an intent to assist counties necessarily includes an intent to exclude a large class of IHSS providers from UI coverage. Even if the court were correct that the legislative purpose of sections 683 and 12302.2 was to relieve the counties of various obligations as employers, that does not translate to an intent to preclude unemployment insurance coverage to any class of IHSS workers.

In fact, the legislative history shows the Legislature's concern was about potential costs that counties might face from actions by state and federal labor law enforcement agencies if counties were found to be employers of IHSS providers. (CT 00174-5 [Assembly Ways and Means Committee analysis], 00178 [Department of Finance Enrolled Bill Report], 00181 [Employment Development Department Enrolled Bill Report].)[6] Counties could avoid those costs by providing IHSS with civil service employees, but that would have cost the state $103 million. (CT 00174, 00178, 00181-82.)

So, the court of appeal's focus on whether section 12302.2 was intended to benefit the counties or the recipients is beside the point. The Legislature's primary concern was not assisting counties or benefitting recipients. Its concern, and the overall purpose of the statute, was to relieve the state of the $103 million burden it would face if the counties could not employ IHSS workers outside the civil service system.

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[6] The court of appeal judicially noticed these and other documents from the legislative history. (See Slip opn. at p.16.)

Perhaps most significantly, the Legislature relieved the counties of one particular burden of employers by requiring the state to pay UI contributions for all IHSS providers. (Welf. & Inst. Code § 12302.2(a).)

It defies reason that the Legislature would require the state to make UI contributions for all IHSS workers and at the same time make a large class of those workers ineligible to receive UI benefits for which those contributions are made.

4. The court of appeal's analysis is contrary to the rule of liberal construction of the Unemployment Insurance Code.

The Unemployment Insurance Code is liberally construed to further the objective of reducing the hardship of unemployment. (*Sanchez v. CUIAB* (1984) 36 Cal.3d 575, 584.) The court of appeal mentioned the liberal construction rule in passing but did not follow it. The court acknowledged that "the relevant statutes are not patently clear . . . ." (Slip opn. at p.12.) Section 683, the court said, is "ambiguous as to whether the recipient is intended to be the sole employer or possibly one of multiple joint employers." (*Id.* at p.20 fn.21.) Under the rule of liberal construction, that ambiguity should support finding eligibility for unemployment insurance benefits. The liberal construction rule should not be used to restrict UI eligibility.

Welfare and Institutions Code Section 12302.2 refers to the IHSS recipient as both "*an* employer" and "*the* employer." (Emphasis added.) The use of the word "an" means that the statute contemplates more than one employer. (*In-home Supportive Services*, *id.* at pp.734, 738; *accord Guerrero*, *supra*, at p.955.) The court of appeal, however, held that the use of both "an employer" and "the employer" means that the language of the statute "reveals little about the Legislature's intent." (Slip opn. at p.4 fn.5.)

But that is exactly the point, and exactly the flaw in the court's decision. As this uncertainty is not otherwise resolved, under the rule of liberal construction, sections 683 and 12302.2 should be construed to support UI eligibility.

B. Section 631 Does Not Exclude Unemployment Insurance Eligibility For IHSS Workers Who Provide Services For Their Spouses Or Children.

Under section 631, employment generally does not include "service performed by an individual in the employ of his [or her] son, daughter or spouse . . . ." The board, in *Caldera*, and the trial court held that because the IHSS recipient is an employer under section 683, the spouse or parent provider is barred from UI eligibility, even if there is a joint employer. (CT 00012, 00508.)

The court of appeal did not reach the issue of whether such IHSS workers are jointly employed by the recipient and the county, the state or both. (Slip opn. at pp.8 fn.7, 22.) The court, therefore, did not reach the further question whether a family member excluded from UI eligibility under section 631 is still eligible based on simultaneous, joint employment by a second, non-excluded employer. (*Id.* at p.12 fn.11.)

In holding that section 631 precludes UI coverage for an IHSS worker providing services to his or her spouse or child, *Caldera* and the trial court are wrong. Nothing in Section 631 prevents UI coverage through a separate, joint employer.

1. "In the employ of" in Section 631 does not preclude eligibility through a joint employer.

Section 631 excludes only IHSS services performed "in the employ of" the employee's spouse or child. The operative phrase, "in the employ of," can include joint employment relationships. In fact, courts have used

the phrase to hold that an employee was employed by multiple employers. (*San Francisco-Oakland Terminal Rys. v. Industrial Accident Commission* (1919) 180 Cal. 121, 123; *Pierson v. Industrial Accident Commission* (1950) 98 Cal.App.2d 598, 602.)

Courts use "in the employ of" interchangeably with "employed" or "employment." (*See Lockheed Aircraft Corporation v. Industrial Accident Commission* (1946) 28 Cal.2d 756, 757 [injured employee "was and had been in the employ of Lockheed in Los Angeles County. . . ."]; *Wright v. State* (2015, review denied April 29, 2015) 223 Cal.App.4th 1218, 1232 [under circumstances in which employer placed employee, "the workman must be considered in the employ of the employer all of the time. . .'"][citations omitted]; *Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834 fn.1 [governing statute includes the phrase "in the employ of," but decision itself "employed" interchangeably].) Other UI statutes demonstrate that "in the employ of" means "employment" by a particular employer. (§§ 608 ["'Employment'. . . includes service excluded from "employment" under the Federal Unemployment Tax Act. . . because it is service performed in the employ of a religious, charitable, educational, or other nonprofit organization"], 610 ["'Employment' shall include the service of an individual who is a citizen of the United States, performed outside the United States . . . in the employ of an American employer].) The board itself has held that "in the employ of" means "employment." (*Matter of Nation Flight Services, Inc.* (1977) P-T-358 at p.5 [deciding whether someone was "in the employ of" using the definition of "employment"], CT 00436.)

Thus, whether a person is "in the employ of" another turns on whether that person is an "employee" of the other. The common law definitions of "employee" and "employer" are used for unemployment insurance purposes. (§§ 621(b), 606.5(a).) The common law definition of

"employment" includes joint employment. (See *National Labor Relations Board v. Town & Country Electric* (1995) 516 U.S. 85, 94; *Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324; *State ex. rel. Dept. of Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1008; *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494.)

Moreover, Section 631 only excludes "*service performed . . .* in the employ of" the IHSS worker's spouse or child [emphasis added]. Section 631, thus, allows for services performed in the employ of another employer to provide UI coverage. The IHSS worker provides a valuable service to the public entity. Were it not for IHSS workers providing services to their disabled spouses or children, the spouses and children would have to be served by civil service employees, employees in institutions or employees of third-party contractors at substantially higher cost. (*In-Home Supportive Services*, *supra*, at p.731 n.11; see also Amicus at p.17 [nursing home care costs three times as much as in-home care].)

2. Unemployment Insurance includes joint employment.

Joint employment in the UI context is an issue of first impression for the Court. However, joint employment is well settled in the common law, the Restatement of Agency, and Worker's Compensation law, all of which are consistently relied upon in UI cases. Further, as demonstrated below, the situation of IHSS workers epitomizes the joint employment concept: they are, in fact, jointly controlled by the recipient and one or more public agencies.

a. The common law, which is incorporated into unemployment insurance law, includes joint employment.

The common law definition of employment includes joint employment. (*National Labor Relations Board v. Town & Country Electric* (1995) 516 U.S. 85, 94; *Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324; *State ex. rel. Dept. of Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1008; *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494.) In *Caldera*, the board dismissed case law in other employment contexts affirming joint employment of IHSS workers by the recipient and the state and county or public authority. (See CT 00375.) The board ignored the fact that unemployment insurance statutes and regulations incorporate the common law definitions of both "employee" and "employer." (§§ 621(b), 606.5(a); 22 Cal. Code Regs. § 4304-1.)

b. Under the Restatement of Agency, on which unemployment insurance cases rely, employment includes joint employment.

The Restatement of Agency contemplates joint employment relationships. (Restatement (Third) of Agency §§ 3.14(b), 3.16, 7.03 comment d, CT 00201, 00213, 00222; Restatement (Second) of Agency § 226 comment b, CT 00223-00224; see *State ex.rel. Dept. of Highway Patrol, supra*, 60 Cal.4th at p. 1013 and n.5 [citing *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 460].) California unemployment insurance cases utilize the Restatement when determining employment relationships. (See, e.g., *Messenger Courier Association of the Americas v. California Unemployment Insurance Appeals Board* (2009) 175 Cal.App.4th 1074, 1089; *Santa Cruz Transportation Inc. v. CUIAB* (1991) 235 Cal.App.4th 1363, 1371.) In fact, the board itself utilizes the Restatement in determining employment

relationships. (See., e.g., *Matter of Armstrong* (1963, adopted as precedent 1979) P-T-404 at p.8 [citing *Empire Star Mines v. California Unemployment Commission* (1946) 23 Cal.2d 33, 43], CT 00292; *Matter of Mother's Kohl, Inc.* (1971) P-T-100 at p.4, CT 00307.)

The board did not mention the Restatement in *Caldera*, despite case law and the board's own precedent decisions holding that the Restatement applies in determining unemployment insurance issues.

c. Unemployment insurance cases also rely on workers' compensation law which includes joint employment.

Courts have utilized workers' compensation law in determining employment relationships for purposes of unemployment insurance for over 70 years. (*Messenger Courier*, *supra*, 175 Cal.App.4th at p.1089 [following *S.G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d 341]; *Santa Cruz Transportation Inc.*, *supra*, 235 Cal.App.3d at p.1371 [following *Borello*]; *Garrison v. California Employment Stabilization Com.* (1944) 64 Cal.App.2d 820, 826-7 [citing *Hillen v. Industrial Acc. Com.* (1926) 199 Cal. 577]; *Armstrong*, *supra*, at p.14 [same].) Thus, an IHSS worker injured while providing services to an IHSS recipient is entitled to workers' compensation by virtue of the employment relationship between the worker and the state and county. (*In-Home Supportive Services*, *supra*, at p.732.)

The board's holding in *Caldera* that workers' compensation cases are irrelevant is wrong for two reasons. In the board's view, workers' compensation authorities do not apply because the workers' compensation program does not have a family-member exclusion similar to Section 631. (CT 00375.) That view is misguided. The proper focus is whether there is joint employment. The specific eligibility exclusion at issue has no bearing on that question.

Caldera is also wrong because workers' compensation does have a family exclusion similar to section 631. Labor Code section 3351 defines "employee" to include "any person employed by the owner or occupant of a residential dwelling whose duties . . . include[d] the care and supervision of children. . . ." Section 3352(a)(1), however, expressly excludes "[a] person defined in subdivision (d) of Section 3351 who is employed by his or her parent, spouse or child."

And, courts have expressly rejected the board's untenable view in *Caldera* that workers' compensation law is irrelevant to determining employment issues in UI cases. (*Messenger Courier, supra*, 175 Cal.App.4th at p.1089; *Air Couriers Intern. v. Employment Development Department* (2007) 150 Cal.App.4th 923.) In both cases, plaintiffs asserted that board precedent decisions improperly relied on workers' compensation law in construing section 621(b) to establish standards for determining whether workers are employees or independent contractors for purposes of unemployment insurance. The courts squarely rejected the argument. (*Messenger Courier, supra*, at pp. 1085, 1088, 1091-92; *Air Couriers, supra*, at pp. 932, 936-37.)

Indeed, in *Messenger Courier*, the board itself held that, despite differences between the two bodies of law, workers' compensation authority "'has strong applicability to cases arising under the Unemployment Insurance Code'" where the question is whether workers are employees and the court of appeal affirmed that holding. (*Id.* at p.1083, quoting *NCM Direct Delivery v. Employment Development Department,* Precedent Tax Decision No. P–T–495 (2007) at p.7.)

d. The Attorney General's opinion on which the board relied in Caldera cannot support the board's erroneous view that joint employment does not exist in the UI context.

In *Caldera*, the board relied on 68 Ops.Cal.Atty.Gen. 194 (1985) to support its conclusion that UI does not include joint employment. (CT 0015.) The trial court did not address this aspect of *Caldera*, and the court of appeal expressed "no view of the persuasiveness of the Attorney General's opinion." (Slip opn. at p.8, fn.8.) The Attorney General's opinion should be rejected for several reasons.

First, Attorney General opinions are only advisory and do not carry the weight of law. (*Jimmy Swigert Ministries v. State Board of Equalization* (1988) 204 Cal.App.3d 1269, 1285 fn.14; *People v. Vallerga* (1977) 67 Cal.App.3d 847, 870.)

Second, the Attorney General's opinion fails to consider common law, relying instead on code sections and cases that do not discuss joint employment. (*See B.P. Schulberg Prod. v. Cal. Emp. Com.* (1944) 66 Cal.App.2d 831; §§ 926, 976, 1251, 1252; Lab. Code §§ 3351, 3352.) In *B.P. Schulberg*, the court of appeal stated that common law was not incorporated into the definitions of employer and employee for purposes of unemployment insurance. (*Id.*, 66 Cal.App.2d at pp. 834-35.) But, as the board has recognized, that changed 27 years later when the Legislature amended section 621 to expressly use the common law to define "employee." (*See Matter of Mission Furniture Manufacturing Co.* (1976) P-T-329 at p.2, CT 00312, 00313.) Nevertheless, the Attorney General opinion wrongly continued to rely on the *B.P. Schulberg* despite the fact that the case had been superseded by statute years earlier.

Third, 68 Ops.Cal.Atty.Gen. 194 rejects the holdings in *In-Home Supportive Services*, *supra*, and *Bonnette v. California Health and Welfare*

Agency (9th Cir. 1983) 704 F.2d 1465, on the ground that they involved a different statutory schemes, workers' compensation and the Fair Labor Standards Act. As shown in the previous section, however, courts—and the board itself—use workers' compensation authority to determine employment status for UI purposes.[7]

3. Both the Reality of IHSS Caregiving and Case Law Compel Holding That IHSS Providers are Jointly Employed.

Ms. Skidgel agrees that the IHSS recipient is an employer of his or her IHSS provider. But the recipient is not the sole employer. The IHSS worker is also the employee of a public entity.

Dual employment "has long been recognized." (*In-Home Supportive Services*, *supra*, at p.732; see also, *Guerrero*, *supra*, at pp.949-950.)[8] Joint employment exists when an employee is subject to the control of two or more employers. (*In-Home Supportive Services*, *supra*, at p.732; *Guerrero, supra*, at pp.947-948 [citing *Martinez v. Combs* (2010) 49 Cal.4th 35.[9]]) An IHSS worker is subject to the control of two employers, the recipient and the public entities—the county or the public authority and the state—

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[7] 68 Ops.Cal.Atty.Gen. 194 also ignores cases decided before its publication, including *Garrison*, *supra* and *Armstrong, supra*, which held that UI follows the workers' compensation definition of employee.

[8] The term "public entities" is used here because the county and public authority act as agents of the state in administering the IHSS program including for purposes of paying wages to IHSS providers. (*Guerrero*, *supra*, at pp. 933-34 [citing *In-home Supportive Services*, *supra*, at p. 731].)

[9] *Martinez* addresses a California wage order, but states that its definition of employment is consistent with unemployment insurance law. (*Martinez*, *supra*, 49 Cal.4th at p.76 [citing *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946].)

that have direct control over the manner and payment of work. IHSS providers are jointly employed. (*In-Home Supportive Services*, *supra*, at p. 732; *Guerrero*, *supra*, at pp.949-950.)

In *In-Home Supportive Services*, *supra*, an IHSS worker providing services for one recipient began providing services to a second recipient, also. She was injured while helping the second recipient. But she had not worked for the second recipient 52 hours, the minimum required to be covered by workers' compensation under the IHSS program. (See Lab. Code § 3352.) Nevertheless, the court of appeal held that she was entitled to workers' compensation.

Under the IHSS provisions of the Welfare and Institutions Code and regulations in the MPP, the state, acting through the county as its agent, had sufficient immediate control and direction of the worker to make the state her joint employer. (*In-Home Supportive Services*, *supra*, at pp.731-732.) Therefore, she was entitled to workers' compensation as the state's employee. (*Ibid.*; see also *Ruiz v. State of California Department of Social Services* (Cal. W.C.A.B. 2014) 2014 WL 4087470 at *1-2, CT 00337 [following *In-Home Supportive Services*, CDSS agreeing that IHSS providers are jointly employed]; see also summary of relevant statutes and regulations under which the state, through counties and public authorities, controls every aspect of IHSS workers' employment, *supra*, at pp.4-6.) Courts have also ruled that IHSS workers are jointly employed for the purposes of the Fair Labor Standards Act. (*Guerrero*, *supra*, 213 Cal.App.4th at pp.926-40; *Bonnette*, *supra*, 704 F.2d at p.1470.)[10]

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[10] One court disagreed with the holdings of *In-Home Supportive Services* and *Bonnette* that IHSS workers are employed by the state or the county and the state. (*Service Employees International Union, Local 434 v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 767-768.) There, the

Ms. Skidgel is as much jointly employed by the state and the recipient she serves as was the IHSS worker in *In-Home Supportive Services*. She is, therefore, entitled to unemployment insurance benefits on the same basis that the IHSS worker in that case was entitled to workers' compensation.[11]

4. Exceptions That Apply to One Joint Employer Do Not Apply to Another Joint Employer.

When multiple parties are employers, an exclusion from unemployment insurance eligibility should be evaluated separately for each employer. A single exclusion should not necessarily apply to all employers. In *In-Home Supportive Services*, the court held that the exclusion from workers' compensation that applied to her IHSS recipient employer did not extend to her joint employer, the state, from which she was entitled to workers' compensation. (*Id.*, 152 Cal.App.3d at pp.720, 733-34.)

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court held that the county was not the employer of IHSS workers for purposes of collective bargaining under the Meyers–Milias–Brown Act ("MMBA"). The Legislature, however, superseded that decision two years later when it enacted Welfare and Institutions Code section 12301.6. (Stats. 1992, ch. 772, § 54.) Subdivisions (c)(1) and (2) of section 12301.6 expressly provide that a public authority created for IHSS purposes or a nonprofit consortium contracting with a county to provide IHSS services "shall be deemed to be the employer of in-home supportive services personnel referred to recipients" within the meaning of the MMBA. (See also, *Guerrero*, *supra*, 213 Cal.App.4th at p.951.)

[11] At least one county that has established and contracts with an IHSS public authority, Sacramento County, designates the public authority as the "'employer of record' for individual providers serving the IHSS recipients." (Interagency Agreement, Section 2, ¶ 2a, CT 00160.) The San Francisco IHSS Public Authority itself acknowledges that it "is **one** of the actual employers of the IHSS workers . . . ." (CT 00110 [emphasis in original].)

This is consistent with the common law rule that joint employers are both liable for torts involving joint employment. (*Societa Per Azioni de Navigazion Italia*, *supra*, 31 Cal.3d 446 at pp. 461-62; *Marsh*, *supra*, 26 Cal.3d 486 at pp. 494-95 [citations omitted]; see also *Martinez*, *supra*, 49 Cal.4th 35, 68-78 [analyzing each of multiple joint employers separately to determine liability for unpaid wages].) These cases support the rule that legal claims against joint employers must be analyzed separately for each employer. An exclusion from liability of one joint employer does not excuse the other employer from liability.

5. Unemployment Insurance Eligibility Through Joint Employment Is Not An Additional Exception To Section 631.

Section 631, which generally excludes service performed by a person for his or her child or spouse from the definition of "employment," includes an exception under which a person employed by a spouse or child is eligible for state disability insurance benefits if the spouse or child makes state disability insurance contributions. *Caldera* and the court of appeal in the present case held that allowing UI eligibility based on joint employment would create an additional exception not provided in the statute or contemplated by the Legislature. (CT 00367-77, CT 00509-10, *Skidgel*, *supra*, at pp.13-14.) Not so.

Ms. Skidgel does not ask for an exception not provided in Section 631. Ms. Skidgel agrees that section 631's exclusion for employment by a spouse or child remains. But that has nothing to do with eligibility for UI benefits based on employment by another, joint employer that is not subject to the close-family exclusion.

No statute, regulation or policy consideration precludes IHSS workers from having UI coverage from these additional, non-familial employers.

6. Minimizing the risk of fraud does not justify denying unemployment insurance to IHSS workers serving their spouses or children.

The court of appeal also invoked the anti-fraud purpose of Section 631 — to prevent collusion between family members to obtain unemployment insurance — as a reason for holding that IHSS workers cannot obtain unemployment insurance through joint employment by the state. (Slip opn. at pp. 15-16.) That rationale does not withstand minimal scrutiny.

Section 631 does, indeed, guard against collusive, fraudulent UI claims from individuals employed by close family members. (*Ibid.* [citing *Miller v. Dept. of Human Resources Dev.* (1974) 39 Cal.App.3d 168, 173].) And, as the court noted, the IHSS statutes include a number of anti-fraud provisions. (Slip opn. at pp. 15-16.) These include:

- conducting criminal background checks on prospective providers (Welf. & Inst. Code §§ 12301.6, subd. (e)(2)(A)(i), 12305.86, 12306.5);
- barring providers, recipients, and recipients' authorized representatives from the program if they are convicted of particular types of government fraud (Welf. & Inst. Code §§ 12300.3, subd. (f)(1), 12301.6, subd. (e)(2)(A)(ii)–(iii), (m)(1)(C), 12305.81; 12305.87);
- requiring prospective IHSS providers to attend program orientations that include relevant rules, regulations, processes and procedures and the consequences of committing fraud in the program (Welf. & Inst. Code § 12301.24(a)(3) and (4));

- requiring providers and recipients to verify that information in providers' timesheets is true and correct (Welf. & Inst. Code § 12301.25(a)(1)); and,
- auditing providers' IHSS records to identify fraud and recover overpayments. (Welf. & Inst. Code §§ 12305.7–12305.83.)

But these measures apply to *all* IHSS providers, not just those who serve their spouses or children. That the Legislature has provided these means for the county or public authority to prevent and detect collusive fraud in *all* IHSS cases does not justify a rule that singles out family-member IHSS providers and, in Draconian fashion, wholly excludes them from unemployment insurance.

The court of appeal also pointed to limitations on the eligibility of parents to be IHSS providers for their minor children, and for able and available spouses to be providers for their disabled spouses. (Slip opn. at pp.15-16.) In the court's view, these limitations are further evidence that Section 631 must be construed to prohibit unemployment insurance to these familial IHSS providers to prevent fraud. (*Ibid.*)

But these limitations do not reflect a concern about a potential for fraud. The limitation on parent providers reflects the fact that parents have a pre-existing legal duty to care for their children. (Fam. Code § 150; Welf. & Inst. Code § 12300(e).) Likewise, the limitation on spousal IHSS providers reflects the legal duty of spouses to provide care for one another. (Fam. Code § 720; MPP § 30-763.41, CT 00425-26.)[12]

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[12] Wholly precluding a spouse from acting as an IHSS provider for his or her disabled spouse based on the statutory duty of care is unconstitutional. (See *Vincent v. State of California* (1971) 22 Cal.App.3d 566 [regulation prohibiting payment for "attendant services" (now in-home supportive services) of able-bodied spouse residing in home with disabled spouse denied equal protection].)

Given the high level of control exercised by the public agency employer, which applies equally to all IHSS providers, Section 631's core purpose of preventing fraud does not justify the exclusion of family-member IHSS providers from unemployment insurance.

VII.
CONCLUSION

IHSS providers for their spouses or children are eligible for UI through their joint employment by the county or public authority and the state. Neither section 683 nor section 631 precludes eligibility. The rule that the Unemployment Insurance Code is to be liberally construed to provide eligibility requires that these workers be held eligible for unemployment compensation benefits when they are deprived of employment through no fault of their own.

Dated: October 26, 2018 Respectfully Submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

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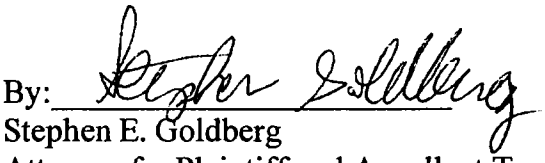
WORD COUNT CERTIFICATION

I certify pursuant to California Rule of Court 8.204(c)(1) that this Petitioner's Opening Brief on the Merits contains 8063 words, as measured by the word court of the computer program used to prepare this brief.

Dated: October 26, 2018

By: 
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PROOF OF SERVICE
(CCP Sections 1013a, 2015.5)

I, Karen Gould, declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 621 Capitol Mall | 18th Floor, Sacramento, CA 95814.

On October 26, 2018, I served the within Petitioner's Opening Brief on the Merits as follows:

Via e-Submission 1 electronic copy	Supreme Court of California 350 McAllister Street, Room 1295 San Francisco, CA 94102-4797
Via FedEx Overnight Delivery (Orig. + 16 copies, w/ return S.A.S.E.)	Supreme Court of California 350 McAllister Street, Room 1295 San Francisco, CA 94102-4797
Via FedEx Overnight Delivery	Hadara Stanton, Deputy Attorney General 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102-004 Attorneys for Respondent, California Unemployment Insurance Appeals Board
Via FedEx On CD - Per CRC rules 8.70–8.79	1st District Court of Appeal 350 McAllister Street San Francisco, CA 94102
Via FedEx Overnight Delivery	Hon. Judge Robert B. Freedman Alameda County Superior Court Clerk Rene C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 26, 2018 at Sacramento, California.

By: Karen Gould
Karen Gould