In the Supreme Court of the State of California

UNITED EDUCATORS OF SAN FRANCISCO AFT/CFT, AFL-CIO, NEA/CTA, Plaintiff and Appellant, **v.** **CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,** Defendant, Cross-defendant, and Appellant; **SAN FRANCISCO UNIFIED SCHOOL DISTRICT,** Real Party in Interest and Respondent.	Case No. S235903
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent, **v.** **CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,** Defendant and Appellant.	

First Appellate District, Case Nos. A142858 & A143428
San Francisco County Superior Court, Case No. CPF 12-512437
The Honorable Richard B. Ulmer, Jr., Judge

REPLY OF PETITIONER CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD TO ANSWER TO PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
SUSAN M. CARSON
Supervising Deputy Attorney General
BEVERLEY R. MEYERS, SBN 109624
Deputy Attorney General

*GREGORY D. BROWN, SBN 219209
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5461
Fax: (415) 703-5480
Email: Gregory.Brown@doj.ca.gov
Attorneys for California Unemployment Insurance Appeals Board

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In opposing this Court's review, real party in interest and respondent San Francisco Unified School District does not dispute that the Court of Appeal's decision in this case raises an important question of law. It cannot. At issue is whether the State's thousands of on-call substitute teachers—who are usually paid only for days worked—may in certain circumstances be eligible to collect unemployment insurance benefits during the summer months. In *In re Alicia K. Brady* (2013) CUIAB Case No. AO-337099, Precedent Benefit Decision No. P-B-505 at pp. 8-9 (*Brady*), the California Unemployment Insurance Appeals Board determined that benefits may be available where the school district has elected to operate a summer session, the substitute teacher is available and kept on-call by the district for that session, but the substitute teacher is not called by the district due to lack of work.[1] In overturning that precedent decision and holding that section 1253.3, subdivision (b) of the Unemployment Insurance Code operates as a per se bar to these workers ever collecting unemployment benefits during the summer term, the Court of Appeal disrupted the settled practices of the implementing agencies and eliminated important benefits for many of the State's most essential, and most economically vulnerable, public school employees.[2]

Instead, the District contends that the law so clearly demands denial of benefits to these workers that there is nothing for this Court to settle. It argues that the Court of Appeal's decision is required by the "plain language" of section 1253.3, subdivision (b) and, in addition, is consistent with longstanding court of appeal precedent. Those arguments are incorrect.

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[1] *Brady* is attached as Exhibit B to the Board's petition.

[2] All further statutory references in this brief are to the Unemployment Insurance Code unless otherwise noted.

Contrary to the District's assertion, the plain language of section 1253.3, subdivision (b) is ambiguous and does not address whether, or when, a summer school session may constitute an "academic term" within the meaning of the statute. And the principles of statutory construction strongly support the Board's interpretation of the statute: it is consistent with the congressional purpose in passing the parallel federal provision (to avoid a windfall to full-time salaried teachers); it is consistent with the canon applied by courts and federal and state agencies that "denial" exceptions such as section 1253.3 should be read narrowly; and it is consistent with the views of the U.S. Department of Labor and the California Employment Development Department (EDD). The Board's expert and well-reasoned interpretation is entitled to great weight. The District has no rejoinder to these arguments.

The District also contends that the relevant issues are long settled, citing *Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834 (*Russ*) and *Board of Education of the Long Beach Unified School District v. Unemployment Insurance Appeals Board* (1984) 160 Cal.App.3d 674 (*Long Beach*). But those cases, which the Board addressed in its precedent decision, involved a very different issue, namely, what constitutes a "reasonable assurance" of reemployment under section 1253.3, subdivision (b). They did not address the issues presented here, which concern whether section 1253.3, subdivision (b)'s provision precluding benefits "during the period between two successive academic years or terms" bars any benefits during the summer session, regardless of the circumstances.

Finally, the District minimizes the potential for the Court of Appeal's decision to have effects beyond the facts and circumstances of this case. But the decision creates a risk of disrupting more than 30 years of Board precedent, and has the potential to preclude any on-call school workers

from collecting unemployment benefits for the summer months, regardless of the reason for their unemployment.

Review is necessary to correct the mistaken path taken by the Court of Appeal's decision; to ensure that state law remains in alignment with federal law and congressional intent; to avoid harm to a significant number of the State's most economically vulnerable public school employees; and to prevent other unintended consequences that may flow from this significant change in unemployment insurance benefits law.

ARGUMENT

I. REVIEW IS NECESSARY TO ENSURE THAT STATE LAW REMAINS ALIGNED WITH CONGRESSIONAL INTENT, WHICH WAS LIMITED TO PREVENTING A WINDFALL TO SALARIED TEACHERS

As the Board argued in its petition, review is necessary to ensure that section 1253.3, subdivision (b) is interpreted consistently with Congress's intent in enacting the federal counterpart, 26 U.S.C. § 3304(a)(6)(A)(i), which was limited to preventing a windfall to salaried teachers during recess or vacation periods. (CUIAB Petn., pp. 8-11.) In interpreting section 1253.3, subdivision (b) in its 2013 precedent decision at issue here, the Board appropriately looked to familiar tools of statutory construction in holding that this provision is not intended to deny benefits to substitute teachers who are on-call during a summer session but are not called due to no fault of their own, but only because there is a lack of available work. (*Brady*, *supra*, P-B-505 at pp. 8-9.) The Board's interpretation effectuated the clear legislative intent behind both the California and federal statutes, while the Court of Appeal's decision undercuts this legislative purpose, with potentially severe and far-reaching consequences for substitute teachers throughout the State. (CUIAB Petn., pp. 8-11.)

In response, the District contends that the plain language of section 1253.3, subdivision (b) does not support the Board's interpretation, but instead categorically precludes the payment of benefits to all teachers, including substitutes, during the summer term when they have a "reasonable assurance" of reemployment in the fall. (Answer, pp. 5-7.) But the plain language of the statute does not preclude such benefits. Indeed, the statute is silent on the key questions of whether, and when, summer school may constitute an "academic term" within the meaning of section 1253.3, subdivision (b). Given this textual silence and ambiguity, these questions cannot be resolved based on a "plain meaning" analysis, but instead require the Board, and the courts, to look to familiar tools of statutory interpretation to ascertain and effectuate the Legislature's intent.

Here, the traditional rules of statutory construction strongly support the Board's interpretation of section 1253.3's "denial" provision as not categorically precluding benefits for substitute teachers who are on-call, but not called in to work, during a district's summer session. Notably, the Board's interpretation is:

- Well reasoned and based on the Board's subject-matter expertise, and accordingly is entitled to great weight (CUIAB Petn., p. 11);
- Consistent with the congressional purpose in passing the parallel provisions of the Federal Unemployment Tax Act (FUTA), which was to prevent salaried teachers from receiving unemployment benefits during vacation periods, while also providing protections for school employees who lose employment through no fault of their own (CUIAB Petn., pp. 3, 9);
- Consistent with the canon, applied by courts and federal and state agencies alike, that "denial" exceptions like section 1253.3 should be construed narrowly (CUIAB Petn., p. 9; see also § 100

[purpose of unemployment insurance system is to provide "benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum"]);

- Consistent with the U.S. Department of Labor's view that summer school may constitute an "academic term" under appropriate circumstances (CUIAB Petn., p. 10); and
- Consistent with EDD's standard practice and expert view that a public school worker who is on-call during the district's summer school session, but does not get called to work, is not on recess but rather is unemployed due to a lack of work (*id.* at pp. 10-11).

The District has not responded to any of these arguments.

Instead, the District contends that the Court of Appeal's decision merely affirmed the "longstanding interpretation" of section 1253.3 evidenced by two court of appeal decisions, *Russ* and *Long Beach.* (Answer, pp. 1, 7-13.) But neither *Russ* nor *Long Beach* addresses the issues presented here—which are questions of first impression in the California appellate courts—concerning whether, and when, a summer school session may constitute an "academic term" within the meaning of section 1253.3. (See *Brady*, *supra*, P-B-505 at pp. 4-5.)

In *Russ*, the sole issue was whether a teacher's aide had been given a "reasonable assurance," within the meaning of section 1253.3, that she would be reemployed in the fall. (*Russ*, *supra*, 125 Cal.App.3d at p. 841.) The aide had argued that the district's memorandum notifying her that the district expected to rehire her in the fall, but that there would be "no work until funds for the next school year have been approved," did not constitute a "reasonable assurance" of reemployment within the meaning of section 1253.3. (*Russ*, *supra*, at pp. 838, 841-842.) The aide did not seek benefits based on a summer academic term (indeed, the opinion does not mention

summer school), and thus the aide did not dispute that, for her purposes, the summer was a recess period between academic years or terms. (*Id.* at pp. 841-842.) Thus, the Court of Appeal did not have occasion to address whether or when a summer school session could constitute an "academic term" within the meaning of section 1253.3. (*Russ*, *supra*, at pp. 841-848.)

Similarly, in *Long Beach* the only issue was whether a substitute teacher had received a "reasonable assurance" of reemployment for the fall semester. (*Long Beach*, *supra*, 160 Cal.App.3d at p. 680.) The teacher did not seek benefits based on a summer academic session (the decision does not mention summer school), but solely on the ground that the district's letter offering the opportunity to serve in the fall was too indefinite to constitute a "reasonable assurance" of reemployment under section 1253.3. (*Long Beach*, *supra*, at pp. 678-681.) Thus, as in *Russ*, the Court of Appeal did not address, or have occasion to address, whether or when a summer school term could constitute an "academic term" within the meaning of section 1253.3. (*Long Beach*, *supra*, at pp. 680-690.)

The District also asserts that *Long Beach* held that all of section 1253.3's denial provisions apply with equal force to permanent, probationary, and substitute teachers. (Answer, pp. 10-13.) That too is incorrect. As discussed above, *Long Beach* addressed only the limited question of what constitutes a "reasonable assurance" of further employment during the next academic year or term. On that particular issue, the Court of Appeal held that the "tenuous impermanent" nature of substitute work did not by itself render insufficient the district's offer of continuing employment as a substitute teacher in the fall. (*Long Beach*, *supra*, 160 Cal.App.3d at pp. 682-683.) But *Long Beach* neither holds nor implies that substitute teachers must be treated identically to full-time salaried teachers for all purposes.

Indeed, summer sessions present a very different set of questions, where the distinctions between full-time salaried teachers and on-call substitutes are directly relevant to the purposes of section 1253.3, subdivision (b)'s denial provision. This provision is intended to prevent salaried teachers from obtaining windfall unemployment benefits during their recess or vacation periods, while still allowing public school employees to obtain unemployment when they are laid off due to a lack of work and through no fault of their own. This Court should grant review to clarify that substitute teachers who are kept on-call by their districts during the district's summer session, but not actually called in, are not absolutely barred from benefits by section 1253.3, subdivision (b) because their unemployment is not caused by a recess or vacation period, but rather by a lack of available work.

II. REVIEW IS NECESSARY TO AVOID THE POTENTIAL FOR UNINTENDED, ADVERSE EFFECTS ON OTHER AREAS OF UNEMPLOYMENT INSURANCE BENEFITS LAW

Review also is warranted because the effects of the Court of Appeal's error may extend well beyond this case, potentially preventing other school workers from collecting unemployment benefits if they are laid off for the summer months, and potentially calling into question more than 30 years of Board precedent. (CUIAB Petn., pp. 11-13, citing *In re Dorothy C. Rowe* (1981) CUIAB Case No. 79-6736, Precedent Benefit Decision No. P-B-417 (*Rowe*), and *In re Vincent J. Furriel* (1980) CUIAB Case No. 79-6640, Precedent Benefit Decision No. P-B-412 (*Furriel*).)[3]

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[3] *Rowe* is available at <http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb417.pdf> (as of August 22, 2016), and *Furriel* is available at <http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb412.pdf> (as of August 22, 2016).

In response, the District contends that there is "no risk" that the Court of Appeal's decision will affect any precedent decisions other than *Brady*. (Answer, p. 13.) Specifically, the District argues that both *Rowe* and *Furriel* are distinguishable on the ground that in those cases it was "'clear that the *cause* of [the claimant's] unemployment was not a normal summer recess or vacation period but the loss of customary summer work.'" (Answer, p. 13, quoting *Furriel*, *supra*, P-B-412 at p. 4, italics added.) But the causation analysis is the same in this case. Here, the cause of the substitute teachers' summer unemployment was not a normal summer recess or vacation period—indeed, the District's summer term was in session and these substitute teachers, who are not salaried but are instead usually paid only for each day that they work, were on call for that term. (*Brady*, *supra*, P-B-505 at pp. 8-9 [discussing and following *Rowe* and *Furriel*].) The cause of these teachers' unemployment was the fact that, through no fault of their own, the District was unable to give them work despite keeping them on call for its summer term. (*Id.* at p. 9 ["[W]hen a substitute teacher is 'on-call' during a summer school session, and is not called to work, the claimant is not on recess, but is unemployed due to a lack of work"].) Yet the Court of Appeal's decision precludes this causation analysis when a teacher seeks unemployment during the summer months, holding that section 1253.3, subdivision (b) operates as a per se bar.

The Court of Appeal's decision here sweeps broadly, and may cast doubt on the Board's longstanding precedents such as *Rowe* and *Furriel*. Districts opposed to paying benefits may well argue that, by extension all public school employees who are employed in the spring term, and given a "reasonable assurance" of reemployment for the following fall term, are categorically ineligible for unemployment benefits during the intervening summer, regardless of the circumstances. (Slip opn., p. 12.) If such arguments are made and accepted, the effects could extend beyond

substitute teachers to preclude many more of the most essential, but economically vulnerable, employees—including clerical workers, community college professors, and many other individuals employed by schools on a year-round basis—from collecting unemployment benefits if they are temporarily laid off during the summer months. Review is necessary to prevent this result, which neither Congress nor the state Legislature intended.

CONCLUSION

This Court should grant the Board's petition for review.

Dated: August 22, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
SUSAN M. CARSON
Supervising Deputy Attorney General
BEVERLEY R. MEYERS
Deputy Attorney General

GREGORY D. BROWN
Deputy Attorney General
Attorneys for California Unemployment Insurance Appeals Board

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY OF PETITIONER CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD TO ANSWER TO PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,429 words.

Dated: August 22, 2016

KAMALA D. HARRIS
Attorney General of California

S McCarson for

GREGORY D. BROWN
Deputy Attorney General
Attorneys for California Unemployment Insurance Appeals Board

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **United Educators of San Francisco, et al. v. CUIAB**

No.: **A142858**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On August 22, 2016, I served the attached **REPLY OF PETITIONER CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD TO ANSWER TO PETITION FOR REVIEW**by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

John R. Yeh
Burke Williams & Sorenson, LLP
1503 Grant Road, Suite 200
Mountain View, CA 94040-3270

Stewart Weinberg
Weinberg, Roger & Rosenfeld - Oakland
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091

San Francisco Superior Court Clerk
400 McAllister Street
San Francisco CA 94102

Ist District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 22, 2016, at San Francisco, California.

Anh Ho
Declarant

Signature

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