In the Supreme Court of the State of California

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

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S OPENING BRIEF ON THE MERITS

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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

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

ISSUES PRESENTED

The petition for review filed by the California Unemployment Insurance Appeals Board presents the following issues:

1. Whether section 1253.3, subdivision (b) of the Unemployment Insurance Code precludes on-call substitute public school teachers and other on-call school workers—who are on call throughout the year and usually paid only for days worked—from collecting unemployment insurance benefits where they are not called during the summer months due to no fault of their own, but only because there is a lack of available work.

2. Whether a provision in federal law, as incorporated in section 1253.3, subdivision (b), that is designed to prevent overcompensation of salaried public school teachers during the summer and other vacation periods was intended to deny benefits to on-call substitute teachers who do not share in the financial stability or the predictable employment enjoyed by salaried teachers.

The petition for review filed by United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA (United Educators or Union) presents the following issues:

1. When determining eligibility for unemployment benefits, does summer school in a K-12 district constitute an "academic term"?

2. Were the School District and Unemployment Insurance Appeals Board collaterally estopped from re-litigating the issue of what constitutes an academic term?

INTRODUCTION

The Court of Appeal erred in holding that substitute teachers and certain other public school employees who do not receive an annual salary, but instead are paid only for days worked, are categorically precluded from obtaining unemployment benefits when they are placed "on call" for a summer school session but are not called in due to a lack of work. These employees, just like their counterparts in the private sector, are entitled to the essential temporary support provided by California's unemployment insurance program when they find themselves without work and without pay through no fault of their own. Nothing in the relevant statute, Unemployment Insurance Code section 1253.3, requires or tolerates a contrary result.[1]

Subdivision (a) of section 1253.3 provides that unemployment benefits are available to persons working for government or non-profit educational institutions, just as they are to persons working in the private sector, subject to specific exceptions. Subdivisions (b) and (c) prohibit benefits for school workers "during the period between two successive academic years or terms" where the employee worked in the first academic year or term and has been given a "reasonable assurance" of work in the second. For ease of reference, the Board will call this the "between-term" exception.

The statutory scheme does not clearly define "between ... terms," but traditional tools of statutory construction establish that this exception is intended to exclude benefits only where a school employee is on a scheduled recess or vacation period, as determined by the individual employee's contract and schedule. The legislative history makes clear that

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

Congress, in enacting the federal provision on which section 1253.3 is based, intended only to ensure that full-time teachers and educational professionals, who are typically paid a salary that covers the entire year while only working for nine months, do not receive a windfall. This specific type of educational employee is thus precluded from receiving unemployment benefits during contractually contemplated recess or vacation periods, including the summer term, for which these employees are already paid. There is no indication, however, that Congress intended to create a blanket exclusion of summer benefits for all educational employees, regardless of the terms of their employment.

Consistent with this legislative intent, the Board and other agencies charged with implementing the between-term exception have consistently construed it to deny benefits only where a school employee is not working due to a recess or vacation reflected in his or her contract or schedule. That interpretation is longstanding, consistent, and based on state and federal agencies' subject-matter expertise, and thus is entitled to great weight. Further, it is consistent with the purpose of the Unemployment Insurance Code, which is to protect those who become unemployed without fault, thereby "reduc[ing] involuntary unemployment and the suffering caused thereby to a minimum." (§ 100.) A categorical exclusion of summer benefits for on-call, non-salaried school employees would directly undermine this statutory purpose, causing hardship for a significant number of the State's most economically vulnerable workers.

This Court should hold that where a non-salaried school employee is placed "on call" by a school district for a summer school session, that employee is not between academic terms during that session. Rather, that employee is scheduled to work, is generally expected to be available to work, and in many cases will forgo other employment during that period. If the employee is not called in to work during this "academic term," he or

she is generally entitled to receive unemployment benefits under the Unemployment Insurance Code, and section 1253.3 should not be read to preclude benefits.

The Board respectfully requests that this Court reverse the Court of Appeal's decision and remand for proper application of the between-term exception.[2]

BACKGROUND

Unemployment insurance is a cooperative venture between the state and federal governments. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1024, citing 26 U.S.C. §§ 3301, et seq.)[3] The Federal Unemployment Tax Act (FUTA) imposes an annual federal tax on affected "'employers'" equal to a specified percentage of the "'total wages'" paid in a calendar year. (*Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 842, quoting 26 U.S.C. § 3301.) Employers may claim a partial credit against the federal tax if they make contributions to a state unemployment compensation program that meets certain minimum requirements set forth in FUTA. (*Ibid.*; see also 26 U.S.C. §§ 3302, 3304.) State programs that conform to the federal criteria receive subsidizing grants from the federal government.

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[2] The Union contends that the District and the Board are collaterally estopped from re-litigating the question of what constitutes an "academic term," and that the law was settled by a 2005 superior court decision in a different case involving the District and the Board. (See Union Question Presented 2.) But this Court has now granted review. In the Board's view, this Court is uniquely positioned to reach and settle the issues presented in this case, which present pure questions of law affecting the public interest.

[3] (See generally *California Dept. of Human Resources Development v. Java* (1971) 402 U.S. 121, 125 [describing the unemployment insurance compensation scheme]; *Campos v. Employment Development Dept.* (1982) 132 Cal.App.3d 961, 966-967 [describing the federal-state structure of unemployment insurance].)

(*Russ v. Unemployment Ins. Appeals Bd.*, *supra*, 125 Cal.App.3d at p. 842, citing 42 U.S.C. §§ 501-503.) California has chosen to participate in the federal unemployment insurance program by "adopting and maintaining an unemployment compensation law which closely conforms to the criteria established in [FUTA]." (*Ibid.*; see also § 101 [California's Unemployment Insurance Code is "part of a national plan of unemployment reserves and social security"].)

In general, FUTA requires unemployment benefits to be paid to public-sector employees "in the same amount, on the same terms, and subject to the same conditions" as private-sector employees. (26 U.S.C. § 3304(a)(6)(A); see also § 1253.3, subd. (a).)[4] But FUTA includes a few exceptions to this equal treatment mandate. Relevant here, FUTA provides that for individuals providing "services in an instructional, research, or principal administrative capacity for an educational institution"—such as teachers—unemployment compensation "shall not be payable"

> for any week commencing during the period *between two successive academic years or terms* (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) ... if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms.

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[4] Originally, the unemployment compensation system provided benefits only to private-sector employees. (See, e.g., Social Security Act, Pub.L. No. 74-271, § 903 (Aug. 14, 1935) 49 Stat. 640.) Over time, the system was expanded to include most public-sector employees. (See, e.g., Unemployment Compensation Amendments of 1976, Pub.L. No. 94-566 (Oct. 20, 1976) 90 Stat. 2667 [expanding unemployment benefits to public school employees, among others].)

(26 U.S.C. § 3304(a)(6)(A)(i), italics added.) FUTA similarly provides that for individuals providing other "services … for an educational institution"—such as support staff—compensation "may" be denied between two successive academic years or terms if the employee worked in the first academic year or term and has a reasonable assurance of working in the second. (*Id.*, § 3304(a)(6)(A)(ii).)

The between-term exception was originally added to FUTA as part of the Employment Security Amendments of 1970, which expanded benefits to most employees of "institution[s] of higher education." (Pub.L. No. 91-373, § 104 (Aug. 10, 1970) 84 Stat. 697.) Congress included the exception to address a "distinctive characteristic of the contractual employment relationship between the instructor, researcher, or administrative employee and the institution" of higher education. (Sen.Rep. No. 91-752, 2d Sess., p. 16 (1970).) As Congress concluded, "[i]t is common for faculty and other professional employees of a college or university to be employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months." (*Ibid.*) These annual salaries are "intended to cover the entire year, including the summer periods, a semester break, a sabbatical period or similar nonwork periods during which the employment relationship continues." (*Ibid.*) The exception was adopted to "preclude payment [of unemployment benefits] in such situations." (*Ibid.*)

Six years later, Congress extended unemployment benefits to all remaining educational employees as part of the Unemployment Compensation Amendments of 1976. (Pub.L. No. 94-566, § 115(a) (Oct. 20, 1976) 90 Stat. 2670.) In the Amendments, Congress also broadened the 1970 Act's between-term exception to include instructors, researchers, and principals employed by any educational institution. (*Id.*, § 115(c).) Like college professors and administrators, school teachers are paid an annual salary, but are only expected to be in the classroom for nine months.

(Remarks of Sen. Long, 122 Cong. Rec. 33285 (daily ed. Sept. 29, 1976).) The exception was intended to preclude these types of employees from collecting unemployment benefits during the "summer recess." (*Ibid.*)[5]

In 1978, California adopted a between-term exception for educational employees that closely tracks FUTA, as the State was required to do to participate in the federal program.[6] California's exception for teachers and principal administrators provides that individuals who serve "in an instructional, research, or principal administrative capacity for an educational institution" are not entitled to benefits for (a) "the period between two successive academic years or terms"; (b) the "period between two regular but not successive terms" where the between-term period is contemplated by the employment agreement; or (c) a paid sabbatical provided for by contract

> if the individual performs services in the first of the academic years or terms and if there is a contract or a reasonable assurance

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[5] In 1977, Congress amended the between-term exception to add the words "or terms" after the phrase "[between] two successive academic years." (Emergency Unemployment Compensation Extension Act of 1977, Pub.L. No. 95-19, § 302(c)(1)(B) (Apr. 12, 1977) 91 Stat. 44.) Congress provided little explanation for this amendment, explaining that it was intended to correct an "oversight" in the language added by the 1970 Act, which only precluded awarding benefits "during the period between two successive academic years." (Employment Security Amendments of 1970, Pub.L. No. 91-373, § 104(a) (Aug. 10, 1970) 84 Stat. 697.) Congress added the words "or terms" to ensure that the between-term exception would "provide for the denial of benefits during the period between successive academic terms as well as between successive academic years." (H.R.Rep. No. 95-82, 1st Sess., p. 12 (1977).)

[6] The California Legislature adopted these provisions to comply with the requirements to obtain federal funding under 26 U.S.C. §§ 3302 & 3304(a)(6)(A)(i)-(ii) and 42 U.S.C. §§ 501-503. (See Stats. 1978, ch. 2, § 106 [enactment of act containing between-term exception was "necessary to implement" FUTA].)

> that the individual will perform services for any educational institution in the second of the academic years or terms.

(§ 1253.3, subd. (b).) California adopted a similar provision applying to all other types of educational employees, precluding benefits "during a period between two successive academic years or terms" when the employee worked in the first academic year or term and has a "reasonable assurance" of work in the second. (§ 1253.3, subd. (c).)[7]

STATEMENT OF THE CASE

The 26 claimants in this case were employed by the San Francisco Unified School District during the 2010-2011 school year either as substitute teachers on an on-call or as-needed basis, or as paraprofessional classified employees such as classroom paraprofessionals, instructional aides, custodians, and others who are not paid for the summer months unless they are actually performing services. (CT 10, 719.)[8] Each claimant was informed by the District that he or she had a "reasonable assurance" of employment during the 2011-2012 school year, beginning August 15, 2011. (CT 719-720.)

The spring semester of the District's 2010-2011 school year ended on May 27, 2011, and the fall semester of the 2011-2012 school year began on

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[7] While subdivision (c) closely tracks the language of subdivision (b) with respect to the between-term exception, teachers and principal administrators are treated differently than other school employees in some respects. For example, employees who are denied benefits solely under subdivision (c) may obtain retroactive benefits if they are not offered employment in the next term (§ 1253.3, subd. (c)), while teachers and administrators denied benefits under subdivision (b) are not entitled to such retroactive benefits (§ 1253.3, subd. (b)). These differences are not relevant to the issues before the Court. (Cf. slip opn. at p. 13, fn. 15.)

[8] The facts are undisputed and were stipulated by the parties. (CT 718-725.) Each of the 26 claimants is a member of the Union. (CT 719.)

August 15, 2011. (CT 720.) The District operated a summer academic session from June 9, 2011 through July 7, 2011 for elementary school students, and from June 9, 2011 through July 14, 2011 for middle and high school students. (CT 720.) No instruction was offered by the District between May 27, 2011 and June 9, 2011, or between July 14, 2011 and August 15, 2011. (CT 720.)[9]

After the end of the 2010-2011 school year, each of the claimants applied for unemployment benefits for the entire period between May 27, 2011 and August 15, 2011. (CT 720.) The Employment Development Department (EDD) denied each claim. (CT 720.) The claimants appealed to an Administrative Law Judge (ALJ) who, after hearings at which each claimant was represented by the Union, reversed EDD and held that each employee was entitled to benefits for the period of time during the summer of 2011 when that claimant did not work. (CT 720.)

On appeal, the Board reversed the ALJ's decisions as to each of the claimants, either in whole or in part. (CT 720.) The Board concluded that substitute teachers and other employees may collect unemployment benefits for the period during which summer school was in session in 2011 if they had worked during the 2010 summer session and thus had a reasonable expectation of work during the 2011 summer session. (CT 720-722.)

On September 6, 2012, United Educators, which is the exclusive representative of the 26 claimants in this case, filed a first amended petition for writ of administrative mandamus against the Board as respondent and the District as the real party in interest. (CT 7.) United Educators alleged that the claimants were entitled to unemployment benefits for the entire

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[9] In California, each district has discretion to make its own decisions concerning budgetary planning, hiring, and organizational activities for summer sessions.

period between the end of the Spring 2011 semester and the start of the Fall 2011 semester. (CT 15.) On October 26, 2012, the District filed a cross-complaint seeking declaratory relief against both the Board and United Educators, alleging that all of the claimants were ineligible for benefits during the entire period between the Spring 2011 and Fall 2011 semesters. (CT 328-333.)

While the trial court proceedings were ongoing, the Board adopted a precedent benefit decision in *In re Alicia K. Brady* (2013) CUIAB Case No. AO-337099, Precedent Benefit Decision No. P-B-505 (*Brady*). (CT 990-1000.)[10] In *Brady*, the Board held that on-call substitute teachers who are "qualified and eligible" to work during a summer school session are eligible for unemployment benefits. (*Brady*, *supra*, P-B-505 at pp. 10-11.) The Board explained that the phrase "during the period between two successive academic years or terms" in section 1253.3, subdivision (b) is not clear on its face, and thus analyzed Congress's intent in enacting the federal statute on which section 1253.3 is based. (*Id.* at pp. 4, 6.) It noted that in enacting this between-term exception under FUTA, Congress meant to ensure that traditional, "nine-month" teachers who were paid annually—and therefore did not need unemployment benefits during the summer vacation period—were not overcompensated. (*Id.* at pp. 6-7.) The Board also noted that the case law and state and federal agencies have consistently construed statutory denials of unemployment benefits narrowly. (*Id.* at pp. 7-8.) Accordingly, the Board concluded that "when 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," and

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[10] The Board may issue a precedent benefit decision when a case involves a significant legal or policy determination of general application that is likely to recur. (§ 409; Gov. Code, § 11425.60.)

thus that benefits are not precluded under section 1253.3, subdivision (b). (*Id.* at p. 9.)

The District then filed an amended cross-complaint, alleging that *Brady* was wrongly decided. It asked the court, in addition to ruling on the individual claims, to declare the precedent decision invalid under section 409.2. (CT 879-886.)

On July 15, 2014 the trial court issued a decision concluding that none of the claimants were entitled to unemployment benefits for any time between the end of the Spring 2011 semester and the start of the Fall 2011 semester. (CT 1091-1102.) In addition, the court declared the *Brady* decision invalid. (CT 1102.)

The Board and United Educators appealed. (CT 1108, 1131.) After consolidating the appeals, on June 6, 2016 the Court of Appeal affirmed the superior court's ruling in a published decision. (Slip opn. at pp. 1-2.) It held that the term "academic year" in section 1253.3, subdivision (b) means the traditional nine-month period during which school is "regularly in session for all students." (*Id.* at pp. 14-15; see also *id.* at p. 14, fn. 16.) The court also reasoned that treating the summer session as an "academic term" would render the "reasonable assurance" language in section 1253.3 "meaningless and inoperable." (*Id.* at p. 15.) It further determined that the majority of jurisdictions to consider similar statutory provisions had reached the same conclusion. (*Id.* at pp. 15-18.) Based on its statutory analysis, the court held that under section 1253.3, a summer school session can never constitute an "academic term," and always falls "during the period between two successive academic years or terms." (*Id.* at pp. 11-18.)

Both the Board and United Educators petitioned this Court for review. On September 14, 2016, this Court granted both petitions.

STANDARD OF REVIEW

The interpretation of a statute is a question of law that this Court reviews de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) In undertaking its independent review, this Court "consider[s] the interpretation of the agency charged with its implementation" and "afford[s] the agency's interpretation the deference that is appropriate under the circumstances." (*California Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 381, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).) The weight given to the agency's interpretation depends on several factors, including (1) the agency's specialized "'expertise and technical knowledge,'" which is especially relevant "'where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion'"; (2) whether the agency's interpretation is based on "careful consideration by senior agency officials"; (3) whether the agency has "'consistently maintained the interpretation in question, especially if [it] is long-standing'"; and (4) whether the agency's interpretation was "contemporaneous with legislative enactment of the statute being interpreted." (*Yamaha*, *supra*, 19 Cal.4th at pp. 12-13, citations omitted.)

As set out below, these factors weigh in favor of giving significant weight to the Board's longstanding and considered view that section 1253.3 permits an award of unemployment benefits to non-salaried school employees in certain circumstances. But whether or not this Court gives weight to the Board's interpretation, the Court of Appeal's categorical prohibition of any employee from collecting unemployment benefits for a summer school session must be rejected.

ARGUMENT

I. LEGAL STANDARD AND SUMMARY OF ARGUMENT

The Court's "fundamental task" in interpreting statutes "is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.]" (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198, quotation marks omitted.) This analysis "begin[s] with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent. [Citation]." (*Ibid.*, quotation marks omitted.) If there is "'no ambiguity in the statutory language,'" then the "'plain meaning controls.' [Citation.]" (*Ibid.*)

If, however, the statute's text "may reasonably be given more than one interpretation," then the Court "may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. [Citation.]" (*Ibid.*, quotation marks omitted.) The views of the agency charged with implementing the statute may also assist the Court in conducting its independent review. (*California Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.*, *supra*, 62 Cal.4th at p. 381.) Courts "must … give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*In re Reeves* (2005) 35 Cal.4th 765, 771, fn. 9, quoting *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.)

Section 1253.3 precludes benefits "during the period between two successive academic years or terms" where an educational employee

worked during the first academic year or term and has a "reasonable assurance" of work in the second. (§ 1253.3, subds. (b), (c).) The text of this provision does not clearly delineate whether, and under what circumstances, a summer school session constitutes an "academic term" during which benefits are generally payable, or instead constitutes a "period between two successive academic years or terms," during which benefits are precluded.

While the text is ambiguous, the legislative history, longstanding agency interpretation, statutory purpose, and relevant case law all demonstrate that this provision is intended to preclude benefits only when an educational employee is on a contractually contemplated recess—that period when, according to the employee's contract and schedule, he or she is not expected to perform services on campus. This provision is not intended to deny benefits when an employee experiences unemployment due to the loss of contractually contemplated work.[11] Accordingly, where a non-salaried substitute teacher or classified employee is placed "on call" for a summer session but is not called in to work, that employee is not on recess, but instead is unemployed due to a lack of work, and thus is not precluded from benefits under section 1253.3.

II. THE TEXT OF THE BETWEEN-TERM EXCEPTION DOES NOT COMPEL CATEGORICAL DENIAL OF SUMMER SESSION UNEMPLOYMENT INSURANCE BENEFITS

While the Court of Appeal held that the text of the between-term exception, section 1253.3, "unambiguously" precludes all summer benefits for all types of school employees (slip opn. at pp. 11-15), that holding is unsupported. The statutory text does not clearly define whether, or under

[11] Employment contracts may be written or oral, and express or implied. (§ 601.)

what circumstances, a summer school session constitutes an "academic term" during which benefits may be available, or instead constitutes a "period between two successive academic years or terms," during which benefits are excluded. (§ 1253.3, subds. (b), (c).)

Neither the Unemployment Insurance Code nor the federal statutory scheme governing unemployment benefits provides a definition of the terms "academic year" or "academic term." Further afield, the Education Code does not define "academic term," and it provides several different definitions of the term "academic year." For example, for certain financial aid purposes, the Education Code defines an "academic year" as "July 1, to June 30, inclusive," and provides that "[t]he start date of a session shall determine the academic year in which it is included." (Ed. Code, § 70032, subd. (a).) The Education Code similarly defines a "school year" as "begin[ning] on the first day of July and end[ing] on the last day of June." (*Id.*, § 37200.) By contrast, for purposes of community college faculty contracts, an "[a]cademic year" is defined as the "period between the first day of a fall semester or quarter and the last day of the following spring semester or quarter," excluding any "intersession term" agreed to in a collective bargaining contract. (*Id.*, § 87601, subd. (a).)

Likewise, there is no common understanding or "ordinary meaning" of these terms. Black's Law Dictionary does not define either term. Nor does the American Heritage Dictionary. And two different versions of Merriam-Webster's Dictionary furnish two different definitions of "academic year": Merriam-Webster's Advanced Learner's English Dictionary (2008) defines it as "the time during a year when a school has classes" (*id.* at p. 7), while Merriam-Webster's Collegiate Dictionary (11th ed. 2004) defines it as "the annual period of sessions of an educational institution usually beginning in September and ending in June" (*id.* at p. 6). Neither version of Merriam-Webster's Dictionary defines "academic term."

Including a summer session in an academic year does not "render the phrase 'period between two successive academic years' meaningless." (See slip opn. at p. 15.) An "academic year" can consist of fall, spring, and summer terms, with the period between academic years occurring between the end of the summer term and the beginning of the fall term. There is nothing in the statutory language that requires an academic year to include only fall and spring semesters, and to categorically exclude any summer academic session a district may choose to offer. The Court must therefore look beyond the plain language to determine the legislative intent.

III. THE INTENT OF THE BETWEEN-TERM EXCEPTION IS TO PRECLUDE BENEFITS ONLY WHERE AN EDUCATIONAL EMPLOYEE IS ON A CONTRACTUALLY CONTEMPLATED RECESS

While the text of the between-term exception is ambiguous, traditional tools of statutory construction establish that the Legislature intended to preclude benefits only when a school employee is not working due to a contractually contemplated recess—defined as a period when, according to the individual employee's contract and schedule, that employee is not expected to perform services for the employing district.

A. The legislative history shows that Congress intended to preclude benefits only during recess periods

The California Legislature enacted section 1253.3's between-term exception in order to comply with federal law and receive federal funds. (See pp. 7-8, *supra*; *Russ v. Unemployment Ins. Appeals Bd.*, *supra*, 125 Cal.App.3d at p. 844.) Accordingly, the intent of Congress in enacting FUTA and that law's between-term exception is directly relevant to determining the Legislature's intent in enacting section 1253.3. (*Ibid.*) The legislative history shows that Congress intended FUTA's exception to

preclude educational employees from collecting unemployment benefits only during contractually contemplated recesses.

In enacting the exception, Congress recognized that many instructors are "employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months," and that these annual salaries are "intended to cover the entire year, including the summer periods, a semester break, a sabbatical period or similar nonwork periods during which the employment relationships continues." (Sen.Rep. No. 91-752, 2d Sess., p. 16 (1970).) Congress added the between-term exception to address this "distinctive characteristic of the contractual employment relationship between the instructor, research, or administrative employee" and his or her employer. (*Ibid.*) The exception was necessary "to make it plain that such personnel are not regarded as unemployed during those periods of academic recess when they, paid on an annual basis, remain on the roll of a college or university, but are not necessarily required to perform services on the employer's premises." (Hearings before Sen. Com. on Finance on H.R. No. 14705, 91st Cong., 2d Sess., at p. 210 (1970), testimony of Dr. Arthur Ross of the American Council on Education.)

The limited purpose of the exception—to avoid conferring a windfall to salaried, full-time educational professionals, whose compensation is designed to cover contemplated recess periods—is clear throughout the legislative history. For example, the joint report from the Senate Finance and House Ways and Means Committee explained that the exception was adopted to ensure that benefits would be "denied during *vacation periods* between academic terms (or years)." (Joint Report of Sen. Com. on Finance and House Com. on Ways and Means on H.R. No. 10210, 94th Cong., 2d Sess., at p. 2 (1976), italics added.) Similarly, a Senate Finance Committee Report provides that the committee modified this provision to ensure that "a teacher or professional employee would not qualify for

unemployment compensation *during vacation periods* when there is a reasonable assurance that a job will be available for the post-vacation term." (Sen.Rep. No. 94-1265, 2d Sess., p. 9 (1976), italics added.) Representative Corman reported to his colleagues that the between-term exception would "prohibit[] payment of [unemployment compensation] benefits during *recess periods* to permanently employed teachers and other professional school employees." (Remarks of Rep. Corman, 122 Cong. Rec. H7411 (daily ed. July 20, 1976), italics added.) And Senator Long explained that the provision was intended to preclude teachers and administrators who are paid an annual salary, but are only expected to be in the classroom for nine months, from collecting unemployment benefits during the "summer recess." (Remarks of Sen. Long, 122 Cong. Rec. 33285 (daily ed. Sept. 29, 1976).)

There is no indication that Congress intended this provision to exclude benefits when an on-call school worker who is paid by the day is not called to work, or to create a blanket exclusion of all benefits during the summer months, regardless of an individual employee's contract and circumstances. Accordingly, the between-term exception should be interpreted to preclude benefits only when a school employee is on a planned recess or vacation period as set out in that employee's contract and schedule.

B. The Board and other agencies charged with enforcing and interpreting the exception have construed it to exclude benefits only during recess periods, as defined by the employee's contract and schedule

For more than 30 years, the Board has consistently rejected any interpretation of the between-term exception that would categorically preclude unemployment benefits during the summer months, instead interpreting it to preclude benefits only during contemplated recess or

vacation periods, as determined by the individual employee's contract and schedule. In *In re Vincent J. Furriel* (1980) CUIAB Case No. 79-6650, Precedent Benefit Decision No. P-B-412 (*Furriel*), for example, the Board held that a community college assistant professor was not precluded from collecting unemployment benefits for a summer session. (*Id.* at p. 4.)[12] In reaching its decision, the Board construed section 1253.3, subdivision (b) as only denying benefits "during summer recess or summer vacation periods." (*Id.* at p. 3.) And it concluded that the professor was not on a recess during the summer in question because the college had given him reassurances that he would probably be working during those months, only to have that work taken away "due to budgetary restrictions." (*Id.* at p. 1.) Thus, because "the cause of his unemployment was not a normal summer recess or vacation period but the loss of customary summer work," the between-term exception did not preclude the professor from collecting benefits. (*Id.* at p. 4.)

The Board re-affirmed this interpretation *In re Dorothy C. Rowe* (1981) CUIAB Case No. 79-6736, Precedent Benefit Decision No. P-B-417 (*Rowe*).[13] There, the Board concluded that the between-term exception did not preclude a clerical school worker from collecting benefits during a summer session. (*Id.* at p. 4.) As in *Furriel*, the Board in *Rowe* interpreted the exception to preclude benefits only during "recess" or "vacation"

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[12] (<http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb412.pdf> [as of Dec. 2, 2016].)

[13] (<http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb417.pdf> [as of Dec. 2, 2016].) The employee in *Rowe* did not render "instructional, research, or principal administrative services"; thus, her claim was governed by section 1253.3, subdivision (c). That provision is materially identical to section 1253.3, subdivision (b), except that it applies to educational employees who render services in "any capacity" other than those specified in subdivision (b).

periods. (*Ibid.*) And it held that the worker was not on recess during the summer session because—like the professor in *Furriel*—"the cause of [the worker's] unemployment was not a normal summer recess or vacation period but the loss of customary summer work." (*Ibid.*)

The Board acted consistent with this longstanding interpretation in *Brady*. As in *Furriel* and *Rowe*, in *Brady* the Board read the between-term exception as only precluding benefits during "recess" periods. (*Brady*, *supra*, P-B-505 at p. 9.) And it concluded that a substitute teacher who had been placed "on call" for the 2013 summer school session was not on a contemplated recess during the weeks when summer school was in session, because her lack of employment during those weeks was "due to [the] loss of scheduled work." (*Ibid.*) *Brady* also held, however, that the substitute was on recess—and thus ineligible for benefits—during the weeks between the end of summer school and the start of the fall semester, because there was no school in session during those weeks. (*Id.* at p. 11.)[14]

The Board's interpretation of section 1253.3 is entitled to great weight. It is longstanding and reflects the Board's "specialized knowledge and expertise." (*California Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.*, *supra*, 62 Cal.4th at p. 381.) As this Court has observed, "in light of the [California Unemployment Insurance Appeals] Board's expertise, its interpretation of a statute it routinely enforces is entitled to great weight and will be accepted unless its application of legislative intent is clearly unauthorized or erroneous." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.*, *supra*, 13 Cal.4th at p. 1027.) Indeed, the Board's long experience with the unemployment program makes it

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[14] In *Brady*, the summer school session began immediately after the end of the spring term (*Brady*, *supra*, P-B-505 at pp. 2-3), and thus there was no recess period between the spring and summer terms.

particularly "sensitive to the practical implications of one interpretation over another." (*Yamaha*, *supra*, 19 Cal.4th at p. 12.) It is based on the careful consideration of the most senior agency officials. (*Id.* at p. 13.) It is set forth in precedent benefit decisions (including *Brady*, *supra*, P-B-505), a designation that requires approval by the Board itself, "acting as a whole." (§ 409.) And it is reflected in decisions that are roughly contemporaneous with the 1978 enactment of section 1253.3, and thus are likely to provide insight into the Legislature's intent at the time of enactment. (*Yamaha*, *supra*, 19 Cal.4th at p. 13; see also *Cannon v. Industrial Accident Com.* (1959) 53 Cal.2d 17, 22 ["The contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation, while not necessarily controlling, is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized"]; Hickman & Krueger, *In Search of the Modern Skidmore Standard* (2007) 107 Colum.L.Rev. 1235, 1288 [a contemporaneous interpretation "suggests that the interpretation benefited from special insight into Congress's wishes"].)

The reasonableness of the Board's interpretation is further evidenced by the fact that it is shared by EDD and the U.S. Department of Labor. Like the Board, EDD has interpreted section 1253.3, subdivision (b) as precluding benefits only during "school recess" periods. (Employment Development Dept., Benefit Determination Guide, Miscellaneous MI 65 School Employee Claims, ¶ IV.F (MI-65).)[15] And EDD has specifically concluded that

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[15] EDD's Benefit Determination Guide is an eight-volume guide published by EDD to provide guidelines for EDD personnel "to make proper decisions about eligibility for unemployment insurance benefits." (Benefit Determination Guide Index, available at <http://www.edd.ca.gov/UIBDG/> [as of Dec. 2, 2016].) MI-65 is a chapter of the "Miscellaneous" (continued...)

> if the claimant is scheduled to work "on call" during the summer recess period, but does not get called to work, the claimant is not in a recess period. The reason the claimant did not work is not due to the recess period, but due to lack of work during the summer school session.

(*Id.*, § IV.F.10.) Similarly, the U.S. Department of Labor has set forth its view that an "academic term" under FUTA, 26 U.S.C. § 3304(a)(6)(A), is a period "*within an academic year* when classes are held," which may include "nontraditional periods of time when classes are held, *such as summer sessions*." (U.S. Dept. of Labor, Employment & Training Admin., *Benefit Standards of Conformity Requirements for State UC Laws, Between/Within Terms Denial* (2015 update) (*Benefit Standards*), italics added; see also *Russ v. Unemployment Ins. Appeals Bd.*, *supra*, 125 Cal.App.3d at p. 843 [recognizing that 26 U.S.C. § 3304(a)(6)(A) is intended "to provide in effect that public school employees might be eligible for benefits 'except' in certain instances involving their unemployment during periods of *summer recess* at the employing schools" (italics added)]; *Board of Education v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 690 (*Long Beach*) [between-term exception concerns teachers' eligibility for "*summer recess* unemployment benefits during *summer vacation periods*" (italics added)].)[16] The Court of Appeal's categorical prohibition is at odds with the views of these expert agencies.

(...continued)
volume of the Benefit Determination Guide. (*Ibid.*) MI-65 is available at <http://www.edd.ca.gov/uibdg/Miscellaneous_MI_65.htm> [as of Dec. 2, 2016].

[16] *Benefit Standards* is available at <http://workforcesecurity.doleta.gov/unemploy/conformity-benefits.asp> [as of Dec. 2, 2016]. The Department of Labor is charged with assuring that states conform to congressional intent in administering the program. (See U.S. Dept. of Labor, Employment & Training Admin., *Conformity Requirements for*
(continued...)

C. The exception should be narrowly construed in accordance with the Unemployment Insurance Code's purpose of reducing the hardship of unemployment

The Board's interpretation, which allows for benefits during a summer academic term for some employees in some circumstances, is also consistent with the Unemployment Insurance Code's "fundamental purpose" of "reduc[ing] the hardship of unemployment." (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 558.) Unemployment compensation is intended to "'provid[e] benefits for persons unemployed through no fault of their own,'" and is "designed to 'reduce involuntary unemployment and the suffering caused thereby to a minimum.'" (*Gilles v. Department of Human Resources* (1974) 11 Cal.3d 313, 316, quoting § 100.) Such benefits "provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." (*California Dept. of Human Resources Development v. Java*, *supra*, 402 U.S. at pp. 131-132.) They also "prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services." (*Ibid.*) And they "cushion the impact of such impersonal industrial blights as seasonal, cyclical and technological idleness." (*Chrysler Corp. v. California Employment Stabilization Com.* (1953) 116 Cal.App.2d 8, 16; see also § 100 [recognizing that "large numbers of the population of California do not enjoy permanent employment by reason of which their purchasing power is unstable," which is "is detrimental to the interests of the people of California as a whole"].)

(...continued)
State UC Laws (2015 update), <http://workforcesecurity.doleta.gov/unemploy/conformity.asp> [as of Dec. 2, 2016].)

This Court has long recognized that "[t]he provisions of the Unemployment Insurance Code must be liberally construed" to further these objectives. (*Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 584, citing *Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499.) And the United States Supreme Court has similarly stated that a "constricted interpretation" of statutes conferring unemployment benefits "would not comport with [the statutory] purpose" of federal social security legislation. (*United States v. Silk* (1947) 331 U.S. 704, 711-712, abrogated on other grounds as recognized in *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324-325.) Likewise, the Board and the U.S. Department of Labor have both recognized that exceptions that serve to deny benefits, such as section 1253.3, subdivisions (b) and (c), are to be construed narrowly. (*Brady*, *supra*, P-B-505 at p. 7 ["Both the United States Department of Labor and state agencies, as well as case law, have consistently construed the 'denial' exceptions narrowly"]; U.S. Dept. of Labor, Unemployment Insurance Program Letter (UIPL) 43-93 (Sept. 30, 1994) ["Social legislation such as the FUTA is to be construed broadly with respect to coverage and benefits. Exceptions to its statutory remedies are to be narrowly construed"].)[17]

The Board's interpretation—which precludes benefits only when a school employee is not working due to a contractually contemplated recess or vacation period, but not when such an employee is unemployed due to the loss of contractually contemplated work—is consistent with the Unemployment Insurance Code's purpose: to reduce the hardship of unemployment. The availability of such benefits is particularly important to substitute teachers and non-salaried classified employees, who are often

[17] UIPL 43-93 is available at <https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=194> [as of Dec. 2, 2016].

among the most economically vulnerable public school employees. Unemployment benefits will often be essential for them to maintain their subsistence levels during times of unemployment. (See *California Dept. of Human Resources Development v. Java*, *supra*, 402 U.S. at pp. 131-132; § 100.) An interpretation that would categorically preclude all benefits for all educational employees during the summer months, regardless of their individual contracts and circumstances, is contrary to that fundamental statutory purpose.

D. The Board's interpretation is consistent with out-of-state authorities addressing similar provisions

The Court of Appeal appeared to give great weight to the views of select out-of-state courts, concluding that these authorities supported its holding. (Slip opn. at pp. 15-18.) Out-of-state authorities, while not binding, may have persuasive value to the extent that they are well reasoned and on point. (*People v. Wade* (2016) 63 Cal.4th 137, 141; *In re Joyner* (1989) 48 Cal.3d 487, 492.) The cases cited by the court are neither.

Several decisions cited by the Court of Appeal are inapposite because they concerned full-time salaried teachers, or otherwise involved circumstances very different from those of the on-call substitutes and classified employees at issue here. (See, e.g., *In re Lintz* (N.Y.App.Div. 1982) 89 A.D.2d 1038, 1039 ["regularly employed teacher"]; *DeLuca v. Commonwealth of Pennsylvania* (Pa.Commw.Ct. 1983) 459 A.2d 62, 63-65 & fn. 2 [regular salaried teacher]; *Friedlander v. Employment Div.* (Or.Ct.App. 1984) 676 P.2d 314, 316 [college instructor, not a day-to-day on-call employee]; *Campbell v. Department of Employment Security* (Ill.App. 1991) 570 N.E.2d 812, 818-819 [part-time college teacher employed semester-to-semester, not a day-to-day on-call employee]; *Herrera v. Industrial Claim Appeals Office of the State of Colorado* (Colo.Ct.App. 2000) 18 P.3d 819, 820 [employee "did not seek, and was

not offered, employment" during the summer session]; *Doran v. Department of Labor* (Ill.App. 1983) 452 N.E.2d 118, 119-120 [school did not offer summer school, and thus there was no summer term].) And other out-of-state decisions cited by the court are not persuasive because they explained only why *full-time salaried teachers* are generally precluded from collecting summer benefits, and then simply extended that rule to non-salaried, per-diem substitutes and other employees without addressing or analyzing the material differences between the two types of workers. (See, e.g., *Harker v. Shamoto* (Hawaii Ct.App. 2004) 92 P.3d 1046, 1053-1055; *In re Alexander* (N.Y.App.Div. 1988) 136 A.D.2d 788, 789.)

Further, several of the cases cited by the Court of Appeal interpreted state statutes that contain materially different terms than FUTA or section 1253.3, prohibiting benefits during the period between two "*regular* terms." (See, e.g., *Harker v. Shamoto*, *supra*, 92 P.3d at pp. 1048; *Friedlander v. Employment Div.*, *supra*, 676 P.2d at p. 316; *Doran v. Department of Labor*, *supra*, 452 N.E.2d at p. 119, fn. 1; *Campbell v. Department of Employment Security*, *supra*, 570 N.E.2d at pp. 818-819; *DeLuca v. Commonwealth of Pennsylvania*, *supra*, 459 A.2d at pp. 63-65; *School Dist. No. 21 v. Ochoa* (Neb. 1984) 342 N.W.2d 665, 667-668.) FUTA and section 1253.3 refer not to "regular" terms but to "*academic* . . . terms." (26 U.S.C. § 3304(a)(6)(A)(i); § 1253.3, subds. (b) & (c), italics added.) Out-of-state cases holding that summer is not a *regular* term under those states' statutes do not speak to whether summer may be an *academic* term under FUTA and California law. In sum, there is no case that provides a reasonable, much less persuasive, explanation for why section 1253.3's between-term exception should be read to create a blanket exclusion of summer benefits, regardless of circumstances.

Other out-of-state cases, only one of which was cited by the court, are generally consistent with the Board's interpretation. For example, in *Evans*

v. Employment Security Department (Wash.Ct.App. 1994) 866 P.2d 687, a Washington appellate court held that a community college teacher was not precluded from collecting benefits when she was not given her anticipated summer teaching position, concluding under the facts of that case, "summer is an academic term." (*Id.* at pp. 688-689.)[18] Similarly, a Pennsylvania appellate court upheld summer benefits where a school employee was laid off prior to the end of the spring term, explaining that the purpose of the between-term exception is to "eliminate the payment of benefits to employees who were unemployed for predetermined periods of time, but not to employees who become unemployed due to an unanticipated cause." (*Chester Community Charter School v. Unemployment Comp. Bd. of Review* (Pa.Commw.Ct. 2013) 74 A.3d 1143, 1145.) In another case, a Pennsylvania appellate court allowed benefits where teachers were unemployed due to a lockout that pushed back the start of the fall semester, explaining that "[t]he period of unemployment involved here did not occur between two regular periods; in fact, the period of unemployment arose suddenly and virtually without warning." (*McKeesport Area School Dist. v. Commonwealth of Pennsylvania* (Pa.Commw.Ct. 1979) 397 A.2d 458, 462.)

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[18] After *Evans*, the Washington Legislature amended its statute to define "academic year" as "'[f]all, winter, spring, *and summer* quarters or comparable semesters unless, based on objective criteria including enrollment and staffing, the quarter or comparable semester is not in fact a part of the academic year for the particular institution.'" (*Thomas v. State Dept. of Employment Security* (Wash.Ct.App. 2013) 309 P.3d 761, 765 & fn. 3, quoting Wash. Laws of 1998, ch. 233, § 2, italics added, original italics omitted.) In *Thomas*, while the court concluded that the summer session in that particular case was not part of the academic year, it affirmed that—consistent with the Board's view here—a summer session may, under certain circumstances, constitute an academic term or part of an academic year during which benefits are payable. (*Id.* at p. 765.)

Similarly, the Seventh Circuit held that FUTA's between-term exception did not apply where a district unexpectedly ended its spring term early, explaining that "the three-week period of separation from work was a period of unemployment and not a period Congress intended to exclude." (*Chicago Teachers Union v. Johnson* (7th Cir. 1980) 639 F.2d 353, 356.) The court noted that "the reasonable expectation of teachers of continuous employment was frustrated because funds ran out. We cannot believe that Congress could have intended a period which, from the workers' standpoint, was so obviously a time of unemployment to be excluded from benefits as 'between two successive academic years.'" (*Id.* at p. 357.)

And the Rhode Island Supreme Court has explained that Rhode Island's between-term exception is intended to "distinguish between school employees who meet the criteria for classification as 'unemployed' and those that are on summer or holiday recess." (*Baker v. Department of Employment & Training Bd. of Review* (R.I. 1994) 637 A.2d 360, 363.) "The rationale for this limitation is that school employees can plan for those periods of unemployment [during a holiday or summer recess] and thus are not experiencing the suffering from unanticipated layoffs that the employment-security law was intended to alleviate." (*Ibid.*)

Consistent with the Board's view here, these out-of-state courts have recognized that the between-term exception precludes benefits only where the reason for the unemployment is a contractually contemplated recess period, and not where an employee experiences a loss of contractually contemplated work.

IV. NON-SALARIED EMPLOYEES WHO ARE PLACED "ON CALL" DURING A SUMMER ACADEMIC SESSION BUT NOT CALLED IN TO WORK ARE NOT ON RECESS, BUT INSTEAD ARE UNEMPLOYED

To determine whether a school employee is on recess, the Board and the courts must look to the employee's contract and schedule. Different

employees in the same school may be on "recess" at different times, depending on their particular circumstances.[19]

For example, teachers and other employees who are paid a salary for the fall and spring terms are typically on recess during the entire summer, as their salaries are deemed to pay them for the entire year even though they may only perform services for nine months. (Sen.Rep. No. 91-752, 2d Sess., p. 16 (1970); MJN, Exh. K at p. 156, Exh. L at p. 168.) For those employees, summer is always a paid recess or vacation period. And while such salaried employees may choose to take on additional work during the summer—for example, by teaching summer school—they are not eligible for unemployment benefits if that additional summer work falls through, because they are already being paid for the summer.[20]

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[19] Individual employees' contracts and work schedules can vary significantly, even within the same district or school. For example, a full-time high school teacher in San Francisco Unified School District in 2016-2017 is expected to perform 184 days of service on campus between August 9, 2016 and May 26, 2017. (Motion for Judicial Notice (MJN), Exh. K at p. 156, Exh. L at p. 168.) In that same district, an elementary school principal is expected to render services on campus for 208 days, starting earlier (July 22, 2016) and ending later (June 4, 2017) than the teachers, and serving seven additional work days on a schedule of his or her choosing. (MJN, Exh. L at p. 168, Exh. M at p. 171.) And a substitute teacher is paid a daily rate for days worked, and may refuse assignments, but is expected to work no fewer than 36 assignments per fiscal year and 12 per semester to remain on active status. (MJN, Exh. K at pp. 160-162.) Meanwhile, some school districts have year-round calendars with staggered tracks, meaning that at virtually all times during the school year some teachers in the district will be on a scheduled recess or vacation track, while others will be in the middle of an academic term. (MJN, Exh. N at p. 181, Exh. O at p. 182.)

[20] Once this Court clarifies the operation of the between-term exception, facts relevant to whether each claimant was on a contractually contemplated recess—such as whether the claimant was paid an annual

(continued...)

Substitute teachers and other non-salaried, on-call employees are different. They are "not paid an annual salary and are not permanent employees." (*Brady*, *supra*, P-B-505 at p. 7.) Instead, substitutes are typically paid only for the days on which they work. (See MJN, Exh. K at pp. 160-162.) Thus, when they are not working, they are not automatically on "recess"; instead, whether they are on recess depends upon their particular contract and schedule. When school is not in session, substitute teachers are on a scheduled "recess," which they can plan for in advance. But when summer school is in session and a substitute is placed "on call" by the school district, that teacher is not on a planned recess, but is generally expected to be available for work. Indeed, many substitutes forgo other employment opportunities during these weeks so that they can make themselves available during the days when they are on call. And during weeks when they are not called in, or not given enough work to surpass the threshold to preclude unemployment benefits, they are "unemployed through no fault of their own." (§ 100.)

Summer school is no different than any other term for substitutes who are placed "on call." They are expected to be ready to work when needed, and may forgo other employment opportunities during those weeks to make themselves available. When they are not called in or not given sufficient work, they are—as they would be during the spring and fall semesters—genuinely unemployed through no fault of their own. By contrast, during those weeks in which school is not in session, and during which they are not "on-call," substitute teachers are not expected to work, and they have the ability to plan for those periods in advance, including seeking other

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(...continued)
salary, and whether the claimant was placed on-call for the 2011 summer session by the District—may need to be further developed on remand.

employment opportunities. The Board's interpretation accounts for these practical realities and provides a sensible, uniform standard that is consistent with Congress's intent.

Allowing substitute teachers and non-salaried classified employees to collect benefits during weeks when they are on-call ensures that they are treated like similarly situated employees in other fields. Employees in other labor fields may also work pursuant to "on-call" agreements. And they are generally eligible for benefits during weeks when they are not called in to work, because, during those weeks, their inability to get work is not their fault. (§§ 100, 1251, 1252, 1256; see also *In re Linda A. Johnson* (1977) CUIAB Case No. 77-5385, Precedent Benefit Decision P-B-373 (*Johnson*); § 1253.3, subd. (a) [unless an exception applies, "unemployment compensation benefits ... are payable" to education employees "in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of service" in other fields of work].)[21] Substitutes and non-salaried classified employees who are on-call are materially indistinguishable from these employees, and there is no indication that Congress intended to treat them differently.

[21] *Johnson* is available at <http://cuiab.ca.gov/Board/precedentDecisions/docs/pb373.pdf> [as of Dec. 2, 2016].

CONCLUSION

This Court should reverse the Court of Appeal's decision and hold that section 1253.3, subdivisions (b) and (c) do not preclude non-salaried, on-call substitute teachers and other non-salaried, on-call classified employees from being eligible for unemployment benefits during a summer term, where such employees are placed on call for that term but are not called in to work.

Dated: December 5, 2016

Respectfully submitted,

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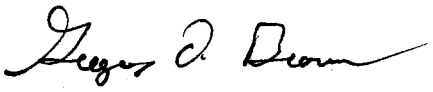

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CERTIFICATE OF COMPLIANCE

I certify that the attached CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,146 words.

Dated: December 5, 2016

KAMALA D. HARRIS
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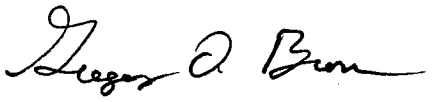

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **United Educators of San Francisco, et al. v. CUIAB**
No.: **S235903**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 5, 2016, I served the attached:

1. **California Unemployment Insurance Appeals Board's Opening Brief on the Merits**
2. **Motion for Judicial Notice**

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 December 5, 2016, at San Francisco, California.

Anh Ho
Declarant

Signature

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