Case No. S250149

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TAMARA SKIDGEL,
Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant and Respondent.

First Appellate District, Division Five, Case No. A151224
Alameda County Superior Court, Case No. RG16810609
Hon. Robert B. Freedman, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE BET TZEDEK; CENTER FOR WORKERS' RIGHTS; LEGAL AID AT WORK; NATIONAL EMPLOYMENT LAW PROJECT; UNITED DOMESTIC WORKERS OF AMERICA, AFSCME LOCAL 3930, AFL-CIO; AND WOMEN'S EMPLOYMENT RIGHTS CLINIC OF GOLDEN GATE UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER TAMARA SKIDGEL

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, Bet Tzedek, the Center for Workers' Rights, Legal Aid at Work ("LAAW"), the National Employment Law Project ("NELP"), United Domestic Workers of America, AFSCME Local 3930, AFL-CIO ("UDW"), and the Women's Employment Rights Clinic of Golden Gate University School of Law ("WERC") apply for leave to file the attached *amicus curiae* brief in support of Appellant and Petitioner Tamara Skidgel ("Petitioner"). This brief is timely filed. No party, or counsel for any party, other than counsel for *amici curiae* have authored or funded the preparation of the proposed brief in whole or in part.

INTEREST OF THE AMICI CURIAE

Bet Tzedek was founded in 1974 by a small group of lawyers, rabbis, and community activists who sought to act upon a central tenet of Jewish law and tradition: "Tzedek, tzedek tirdof—Justice, justice you shall pursue." This doctrine establishes an obligation to advocate the just causes of the most vulnerable members of society. Consistent with this mandate, Bet Tzedek provides free legal services and counsel in a comprehensive range of practice areas to all eligible needy residents throughout Los Angeles County, regardless of their racial, religious, or ethnic background. In line with this mission, Bet Tzedek regularly represents low-wage workers before the Labor Commissioner and In-Home Supportive Services

consumers and caregivers at state hearings. Bet Tzedek also provides assistance to these populations through a combination of civil litigation, legislative advocacy, and community education.

The Center for Workers' Rights is a Sacramento-based, non-profit legal services and advocacy organization whose mission is to create a community where workers are respected and treated with dignity and fairness. To bring that vision into reality, the Center for Workers' Rights provides legal representation to low-wage workers, advocates for initiatives to advance workers' rights, and promotes worker education, activism, and leadership in the greater Sacramento area. The Center for Workers' Rights represents claimants in their appeals for unemployment benefits before the California Unemployment Insurance Appeals Board.

LAAW (formerly Legal Aid Society – Employment Law Center) is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented or disadvantaged communities. LAAW represents low-wage clients in cases involving a broad range of issues, including unemployment insurance, wage theft, labor trafficking, retaliation, and discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. LAAW frequently appears in state and federal courts to promote the interests of low-wage workers both as counsel for plaintiffs

and as *amicus curiae*. LAAW has appeared in numerous cases before this Court, including: *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109; *Paratransit v. Cal. Unemployment Insurance Appeals Board* (2014) 59 Cal.4th 551; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833; and *Oman v. Delta Airlines*, request for certification granted July 11, 2018, S248726. In addition to litigating cases, LAAW represents low-income individuals in unemployment insurance administrative hearings and appeals. LAAW has a strong interest in ensuring that the unemployment insurance statutes are construed appropriately and in a way that protects vulnerable workers unemployed through no fault of their own.

NELP is a non-profit organization with 50 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, especially the most vulnerable ones, receive the full protection of labor and employment laws, and that employers are not rewarded by skirting those most basic rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of home care workers to minimum wage and overtime protection, unemployment benefits as well as adequate working conditions. NELP has been an *amicus* in most of the recent unemployment cases before the

California Supreme Court, and has an office in Berkeley, California. NELP assists home care workers and their allies in federal and state campaigns to improve pay and benefits.

UDW is a labor organization and the collective bargaining representative of approximately 110,000 homecare providers in 21 California counties. UDW is affiliated with the American Federation of State, County and Municipal Employees, AFL-CIO, a national labor organization. UDW is committed to improving the working lives of homecare providers and thereby improving the quality and availability of homecare services for consumers.

WERC is an on-campus non-profit that serves the dual purpose of training law students and providing critical legal services to the community. WERC represents low-wage workers, predominately women, through impact litigation, individual representation, policy advocacy and community education. A majority of WERC's clients are immigrants with limited English proficiency or are monolingual Spanish and Tagalog speakers. WERC, through its attorneys and law students, advises, counsels, and represents clients in a variety of employment-related matters including wage and hour violations, discrimination, workplace harassment, retaliation, unemployment benefits and family/medical leave issues. WERC also represents organizations and coalitions in their workplace organizing campaigns.

Amici seek leave to submit the attached brief to complement Petitioners' arguments regarding her eligibility for unemployment insurance benefits. *Amici* seek to show the Court that California wage and hour law, worker's compensation law, and unemployment law all rely on substantially the same definitions of "employment" and generally accept the concept that a worker can have more than one employer. In light of this shared definition of "employment," *amici* contend that the same principles of joint employment that apply in wage and hour and worker's compensation cases should apply here. Further, *amici* seek to show that even when one employer is statutorily exempt from liability, other joint employers remain liable.

INTRODUCTION

The In-Home Supportive Services ("IHSS") program "is a state social welfare program designed to avoid institutionalization of incapacitated persons" by "provid[ing] supportive services to aged, blind, or disabled persons who cannot perform the services themselves and who cannot safely remain in their homes unless the services are provided to them." (*Basden v. Wagner* (2010) 181 Cal.App.4th 929, 931.) Because home-based care tends to be significantly cheaper than institution-based care, the IHSS program provides considerable cost savings to the state. (Newcomer et al., California Medicaid Research Institute, Medicaid and Medicare Spending on Acute, Post-Acute and Long-Term Services and

Supports in California (Dec. 2012) pp. 19–20.) <http://www.thescanfoundation.org/sites/thescanfoundation.org/files/camri_medicare_medicaid_spending-12-12-12.pdf> [as of Apr. 3, 2019]; Legislative Analyst's Office, Considering the State Costs and Benefits: In-Home Supportive Services Program (Jan. 21, 2009) < https://lao.ca.gov/reports/2010/ssrv/ihss/ihss_012110.aspx> [as of Apr. 3, 2019].)

The backbone of the IHSS program is the approximately 400,000 individuals who provide IHSS care. (Thomason and Bernhardt, UC Berkeley Center for Labor Research and Education, California's Homecare Crisis: Raising Wages is Key to the Solution (2017), p. 6 (hereafter UC Berkeley Report) <http://laborcenter.berkeley.edu/pdf/2017/Californias-Homecare-Crisis.pdf> [as of Apr. 3, 2019].) The vast majority of IHSS providers are female, people of color, or both. (*Ibid.*) Family members also make up a substantial portion of IHSS providers: By one recent count, 63.5 percent of first-time, Medicare-funded IHSS recipients received their care from a spouse, child, parent, sibling, or other relative. (Ko et al., UCSF Health Workforce Research Center on Long-Term Care, California's Medicaid Personal Care Assistants: Characteristics and Turnover among Family and Non-Family Caregivers (July 15, 2015) p. 15 (hereafter UCSF Report) <https://healthforce.ucsf.edu/sites/healthforce.ucsf.edu/files/publication-pdf/Report-Characteristics_and_Turnover_among_Family_

and_Non-Family_Caregivers.pdf> [as of Apr. 3, 2019].) Of this group, IHSS recipients who identified as Hispanic, Asian, or Other were more likely to receive care from a family member than other ethnic groups. (*Id.* at p. 20.)

Family-member IHSS providers add significant value to the IHSS program. Among the same group of first-time, Medicare-funded IHSS recipients described above, those who received care from family members reported higher levels of satisfaction with their care and experienced similar outcomes as those who received non-family care. (UCSF Report, *supra*, at p. 8.) Moreover, the probability of turnover among family-member IHSS providers tends to be much lower than that of non-family members. (*Id.* at p. 18.) This level of consistency is especially important because turnover among non-family providers disproportionately affects IHSS recipients of color. (*Id.* at p. 21.)

But for many family-member IHSS providers, there are considerable downsides to becoming a caregiver. Many family members who become full or part-time paid caregivers in the IHSS program leave or reduce hours at higher-paying jobs. (UC Berkeley Report, *supra*, at p. 8.) Home care workers, whether family members or not, already face insurmountable economic barriers to financial security. For example, nearly three-quarters of home care workers report having $5,000 or less saved for their retirement. (Banijamali et al., SEIU Healthcare 775NW, Why They Leave:

Turnover Among Washington's Home Care Workers (Feb. 2012) <http://seiu775.org/files/2012/02/Why-They-Leave-Report1.pdf> [as of Apr. 3, 2019].) With hourly wages around $12, it is not surprising that saving for future periods of unemployment is nearly impossible for most IHSS workers. Despite the valuable service they provide, IHSS caregivers receive as little as $12 in hourly pay. (California Department of Social Services, *County IHSS Wage Rates* <https://www.cdss.ca.gov/inforesources/IHSS/County-IHSS-Wage-Rates> [as of Apr. 3, 2019].)

Despite the sacrifices made by IHSS providers and the benefits they provide both to IHSS recipients and to the IHSS program, the California Unemployment Insurance Appeals Board ("CUIAB" or "Board") has determined that certain family-member providers—parents and spouses—are categorically barred from receiving unemployment insurance benefits under Unemployment Insurance Code section 631 (all undesignated statutory references are to this code), which provides that "employment does not include service performed by an individual in the employ of his son, daughter, or spouse." The Board's decision pushes tens of thousands of family-member IHSS providers—an estimated 15 percent of the entire IHSS workforce—beyond the covered scope of unemployment insurance (Lackey, AB 1930: IHSS Social Security Study (Mar. 2016) <http://www.cadomesticworkers.org/wp-content/uploads/2016/03/AB-1930-IHSS-Social-Secuity-Study-Fact-Sheet.pdf> [as of Apr. 3, 2019].) As

a result, and as borne out by *amici*'s experience working with IHSS providers, even providers who have cared for their children or spouses for years as their sole occupation may suddenly find themselves with no source of income should the IHSS recipient be moved to an institutional facility, pass away, or otherwise no longer require IHSS care.

In support of its position, the Board urges this Court to ignore long-standing tenets of statutory interpretation and rules of liberal construction, and instead rely on an ambiguous legislative history to infer that IHSS workers are excluded from coverage under section 631. (See, e.g., Reply Brief on the Merits (RBM) at p. 42.) The Board argues that section 631 creates a blanket exclusion; therefore, joint employment is irrelevant to determining whether family-member IHSS providers may nevertheless be eligible for unemployment insurance. (*Id.* at p. 45.) But nothing in section 631 expressly excludes work performed in the employ of another employer, and the legislative history similarly shows no clear intent to limit coverage as the Board suggests. On the contrary, other statutes and state case law support finding that IHSS workers are jointly employed by the recipient and public entities such as the state or local county, and thus, eligible for benefits. (See §§ 621, 683; *In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720 (*IHSS*); *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912 (*Guerrero*).) *Amici* urge this Court to refuse to infer an exclusion from coverage, and, applying the

common law definition of employment, to find that the public entity and recipient are joint employers for purposes of unemployment insurance.

ARGUMENT

California's unemployment insurance program provides a crucial safety net for IHSS providers and other California workers by keeping them out of poverty during periods of involuntary unemployment. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 558 (*Paratransit*) ["The fundamental purpose of California's Unemployment Insurance Code is to reduce the hardship of unemployment by 'providing benefits for persons unemployed through no fault of their own.' "], citing § 100.) Provisions of the Unemployment Insurance Code are interpreted liberally "to advance the legislative objective of reducing the hardship of unemployment." (*Robles v. Employment Development Dept.* (2012) 207 Cal.App.4th 1029, 1034.) Given the Unemployment Insurance Code's broad remedial purpose, courts may not infer an exclusion from coverage absent express statutory language or clear legislative intent. (See, e.g., *IHSS, supra*, 152 Cal.App.3d at p. 733.)

I. JOINT EMPLOYMENT IS RELEVANT TO DETERMINING COVERAGE UNDER THE UNEMPLOYMENT INSURANCE CODE.

The Unemployment Insurance Code uses the common law definition of employment to determine eligibility for benefits. (§ 621, subd. (b) [defining an employee as any individual who "under the usual common law

rules" has the status of an employee]; *id.*, § 606.5, subd. (a) ["in general whether an individual or entity is an employer shall be determined under common law rules"].) This definition of employment is applied broadly in light of the remedial purpose of the Unemployment Insurance Code. (See, e.g., *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 930 (*Dymamex*) ["The nature of the work and the overall arrangement between the parties must be examined to determine if they come within the 'history and fundamental purposes' of the statute."]; *Paratransit*, *supra*, 59 Cal.4th at p. 558.)

Historically, in the context of worker's compensation, wage and hour law, and unemployment insurance, courts have developed and used similar multi-factor tests to determine if an employment relationship exists. (See, e.g., *Empire Star Mines v. California Unemployment Commission* (1946) 23 Cal.2d 33, 43–44; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350–351; *Martinez v. Combs* (2010) 49 Cal.4th 35, 69–71 (*Martinez*); see also *Dynamex*, *supra*, 4 Cal.5th at pp. 913–914, 916–917 [noting that a different test applies "in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*"].) While the specific factors vary from case to case, the ability to control how work is performed is the key, but not the sole, factor; and it is the power to exercise this control, not its actual exercise, that is crucial. at its core, each

test examines whether the potential employer has the right to control the manner and means of accomplishing the work—whether that right is exercised. Applying these similar tests, courts have repeatedly recognized joint employment in wage and hour and worker's compensation cases.[1] (See *Martinez*, at pp. 68–78; *IHSS*, at p. 732.)

A. Under the Common Law Definition, Both the Public Entity and Recipient are Employers.

Joint employment occurs when two or more persons engage the services of an employee in an enterprise in which the employee is subject to the control of both. (See, e.g., *Martinez, supra*, 49 Cal.4th at p. 59.) Each entity or individual must be examined separately to determine if it meets the definition of employer. (See *id.* at pp. 69–77.) The determination that one entity is an employer is not a barrier to finding that another entity also meets that definition. (*IHSS, supra,* 152 Cal.App.3d at p. 732.)

The IHSS worker's relationship with the recipient and entity exemplifies a joint employment relationship. Both the public entity and recipient have the ability to exercise significant control over the IHSS worker with each controlling various aspects of the employment relationship. (See Opening Brief on the Merits (OBM) at pp. 12–16.)

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[1] The right to control the manner and means of accomplishing the work is only one factor to be considered and various others have been developed to analyze the existence of an employment relationship. Of particular relevance to IHSS workers, the ability to hire and discipline a worker are also factors that weigh in favor of finding an employment relationship.

Recognizing the reality of the relationship between the public entity, recipient and IHSS worker, courts have found the public entity to be a joint employer for purposes of worker's compensation and wage and hour law. (*See Guerrero, supra*, 213 Cal.App.4th at p. 922; *IHSS, supra,* 152 Cal.App.3d at p. 732.)

In *IHSS, supra*, 152 Cal.App.3d 720, the court evaluated the state and county's right to control the work of the IHSS provider and concluded that the "scheme of engagement of individuals, by the state . . . to perform IHSS services for recipients required by state regulations establishes an employment relationship" with the state for the purposes of worker's compensation. (*Id.* at p. 731.) The court explained that the individual [chore provider] must do the chores listed in the county's assessment of need and payment for these services is made by the state. The court observed that under this scheme, the local county "has the right to [exercise] sufficient control over the IHSS provider to make the state chargeable, by virtue of the agency relationship with the state, as *an* employer. (*Ibid.*) The court further noted that "[t]he fact that the county did not . . . choose to exercise [its right to terminate the employment relationship] , or to directly supervise [the IHSS provider] in the conduct of her tasks, is not a barrier to the conclusion the right of control is sufficient to establish an employment relationship." (*Ibid.*)

Similarly, in *Guerrero*, *supra*, 213 Cal.App.4th 912, the court found the public entity to be a joint employer for purposes of the Fair Labor Standards Act (FLSA). Although the *Guerrero* court applied the FLSA's broader "economic reality" test, its examination of the public entity's ability to control is relevant. (*Id.* at p. 929.) The court found it to be undisputed that the public entity controlled the rate and method of payment, maintained employment records, and exercised considerable control over the structure and conditions of employment by making the final determination of the number of hours each chore worker would work and exactly what tasks would be performed. (*Id.* at pp. 933–937.) The court observed that the public entity's control and supervision over the chore worker is "inherent in the structure of the program and standards governing the delivery of its services. (*Id.* at p. 935.) The court further noted that the provider would only be paid for those hours and services authorized by the public entity, even if the provider could perform whatever tasks the recipient assigned and for whatever length the recipient and provider agreed upon. (*Id.* at p. 936.) Regarding the ability of the recipient to hire and fire the IHSS provider, the *Guerrero* court stated that " '[r]egardless of whether the [agencies] are viewed as having had the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial." (*Id.* at p. 939.)

The public entity's ability to exert significant control—regardless of whether it exerts such control—over the provider does not change depending on the statutory scheme at issue. Thus, the public entity should be treated as a joint employer for the purposes of unemployment insurance just as it is for the purposes of worker's compensation and wage and hour laws.

B. The Liability of the Public Entity and Recipient Must Be Analyzed Separately.

Once a joint employment relationship is established, liability is assessed separately for each individual employer. (See, e.g., *Martinez, supra*, 49 Cal.4th at pp. 69–77.) One employer may not claim the defense of another. Similarly, as is the case here, a statutory exclusion that applies to one employer may not be applicable to another. (See *IHSS, supra*, 152 Cal.App.3d at p. 729.) The proper inquiry is whether the exclusion applies to each entity that meets the definition of employer.

The court in *IHSS, supra*, 152 Cal.App.3d 720, used this reasoning to conclude that the IHSS provider was eligible for worker's compensation despite the fact that her work in the employ of a sole recipient did not meet the minimum earnings and hours requirement under Labor Code section 3352, subdivision (h). (*Id.* at p. 732.) The court found the IHSS provider to be eligible despite the statutory exclusion based on her employment with the state. The court, thus, essentially determined that the state could not

claim the recipient's defense under the applicable statute. The Board itself applied this reasoning in *Matter of Lembo* (1971) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-111 to find for a claimant who worked for a partnership jointly owned by the claimant's father and the claimant's uncle. While the claimant's work in the employ of his father was excluded under section 631, the Board found the claimant to be eligible for benefits based on his employment by his uncle's corporation, a joint, non-excluded employer. (*Id.* at p. 2.)

Likewise here, the public entity's liability must be examined separately to determine if the close-family member exclusion under section 631 applies. The application of section 631 turns explicitly on the identity of the employer, and nothing in the plain language of the statute excludes work performed in the employ of a joint employer. IHSS workers are, thus, eligible for benefits based on their employment with the public entity.

II. THE COURT OF APPEAL IGNORED WELL-ESTABLISHED TENETS OF STATUTORY INTERPRETATION TO HOLD THAT IHSS RECIPIENTS ARE THE SOLE EMPLOYERS OF PROVIDERS.

A. The Plain Language of Sections 621 and 683 Make the IHSS Recipient an Additional Employer.

The search for statutory meaning begins, as always, with the text. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (*Murphy*).) Courts presume when the language is unambiguous that the Legislature meant what it said. (*Ibid.*) Words must be given their usual

and ordinary meanings in context. (*Ibid.*; *Martinez, supra,* 49 Cal.4th at p. 51.) Whenever possible courts will harmonize the portions of a statutory scheme to give effect to all. (*Messenger Courier Assn. of Americas v. California Unemp. Insurance App. Bd.* (2009) 175 Cal.App.4th 1074, 1095, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387.) "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.) Courts may rely on extrinsic aides such as legislative history, public policy and statutory scheme only when the language is ambiguous or susceptible to more than one reasonable interpretation. (*Martinez,* at p. 51.)

Under section 621, subdivision (b), "employee" includes "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." In turn, section 606.5, subdivision (a) states that "in general whether an individual or entity is an employer shall be determined under common law rules." Coverage is presumed under these expansive definitions. (See, e.g., *IHSS, supra,* 152 Cal.App.3d at p. 733.) Other definitions throughout the statutory scheme provide guidance in analyzing the existence of an employment relationship to establish coverage. For the purposes of IHSS workers, section 683 provides that " '[e]mployer' *also* means" the IHSS recipient." (§ 683, italics added.)

The plain language of section 683 is thus clear: An IHSS recipient is an additional employer of the provider. (See Merriam-Webster, *Also | Definition of Also by Merriam-Webster* (2019) [defining "also" as "in addition"] <https://www.merriam-webster.com/dictionary/also> [as of Apr. 3, 2019].) As the Court of Appeal acknowledged, nothing in section 683 unambiguously excludes joint employment. (*Skidgel v. California Unemployment Ins. Appeals Board* (2018) 24 Cal.App.5th 574, 586 (*Skidgel*).) Nevertheless, contrary to the plain language of the statute, the Court of Appeal held that the common law definition of section 621 does not apply to IHSS workers and that the Legislature has "clearly designated IHSS recipients as the sole employers of IHSS providers" for purposes of unemployment insurance. (*Id.* at p. 594.)

To reach this conclusion, the Court of Appeal erroneously found a conflict between section 683 and section 621, ignored the word "also" in section 683, and misconstrued other statutory language indicating that both the recipient and the public entity are employers.[2] (*Skidgel*, *supra*, 24 Cal.App.5th at p. 587; see, e.g., § 13005, subd. (a) [defining an employer as "any entity, including the state . . . making payment of wages to employees"]; *id.*, § 12302.2 [simultaneously referring to a recipient as "an

[2] The Court of Appeal describes the state as only providing a payroll function "on behalf of the recipient as the sole employer." (*Skidgel*, *supra*, 24 Cal.App.5th at p. 586.) However, paying wages is precisely what makes the state an employer of the IHSS provider under section 13005. (See OBM at pp. 22–23.)

employer" and "the employer"].) But, contrary to the appeals court decision and the Board's contention, the most natural reading of section 621, section 683, and the other applicable statutes supports a finding that both the recipient and the public entity jointly employ the IHSS provider. There is no conflict between sections 621 and 683; section 683 simply states that a recipient is also an employer of the IHSS provider. No statute explicitly excludes the public entity as an employer of the IHSS provider and no statute explicitly states that employment by one entity or individual excludes employment by another for the purposes of determining eligibility for unemployment. Thus, the plain language does not support the Court of Appeal's holding.

B. The Rule of Liberal Construction Resolves Any Ambiguity in the Plain Language.

As this Court has long recognized, the "provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of reducing the hardship of unemployment." (*Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499.) In cases involving such remedial statutes, "if there are two reasonable interpretations of an ambiguous statute, one providing for coverage and one not, [the court] must decide for coverage." (*IHSS, supra*, 152 Cal.App.3d at p. 733.) Construing a statute liberally does not grant a court license to contradict clear and unambiguous legislative intent, but neither is a court

permitted to ignore this fundamental principle of statutory construction when it determines the statutory scheme to be ambiguous—yet that is exactly what the Court of Appeal did here.

The Court of Appeal found no clear statutory expression of exclusion. Instead, it found the applicable statues to be "patently unclear" and section 683 to be "ambiguous as to whether the recipient is intended to be the sole employer or possibly one of multiple joint employers." (*Skidgel*, *supra*, 24 Cal.App.5th at p. 592, fn. 22.) Despite finding such ambiguity, the Court failed to apply the rule of liberal construction, instead holding that the Legislature intended to only designate the named entities or individuals as employers and not "silently include others as well." (*Id.* at pp. 586–587.)

Inferring an exclusion from statutory silence violates the rule of liberal construction. Like the court in *IHSS*, *supra*, 152 Cal.App.3d 720, this Court should refuse to do so. In *IHSS*, the State similarly implied that because the IHSS worker was an employee of the recipient she could not also be an employee of the state. (*Id.* at p. 734.) The court refused to infer that the employment relationship with the state was excluded from coverage simply because the recipient was also considered an employer of the provider. (*Id.* at p. 732 ["we are thus asked to draw a negative implication from this language, that the inclusion of one employment relationship requires the exclusion of all others . . . we reject the

inference"].) No statute expressly stated that the IHSS provider's employment with the state was excluded from coverage or that the IHSS provider's employment relationship with the recipient was the only one upon which coverage may be predicated. (*Ibid.*) Applying the rule of liberal construction, the court opted for coverage. (*Id.* at p. 741.)

Likewise here, any ambiguity in the statutory scheme must result in a finding of coverage.

C. Section 631 Does Not Exclude Employment by the Public Entity.

Again, in light of the remedial purpose of the Unemployment Insurance Code, exclusions from coverage must be narrowly construed. (See, e.g., *IHSS, supra*, 152 Cal.App.3d at p. 733.) The proper inquiry is whether the employment is unmistakably excluded from coverage; if not then the court must find for coverage. (*Ibid.*, citing *Lacoe v. Industrial Acc. Com.* (1930) 211 Cal. 82, 86.) Courts must assume that the Legislature knew how to create an exception if it wished to do so. (*Apple v. Superior Court* (2013) 56 Cal.4th 128, 158.) This Court has made clear that absent express statutory language, a court may not limit statutory protections. (See, e.g., *Mendiola v. CPS Security Solutions* (2015) 60 Cal.4th 833, 846.)

Under section 631, employment for purposes of benefits coverage does not include "service performed by an individual in the employ of his [or her] son, daughter or spouse." The Board asks the Court to infer that

section 631 categorically excludes a worker in the employ of a child or spouse from coverage despite the existence of a joint employer. (RBM at p. 31.) Nothing in the plain language of section 631 excludes services performed in the employ of a joint employer. Courts have repeatedly held that "in the employ of" includes multiple employers and that services may be simultaneously performed for more than one employer. (See, e.g., *San Francisco-Oakland Terminal Rys. v. Industrial Accident Commission* (1919) 180 Cal. 121, 123). And, as explained *ante*, the common law definition of employment recognizes joint employment.

Because section 631 does not explicitly exclude services performed in the employ of an employer other than the close family member, coverage may be established through the provider's employment with the public entity.

D. The Legislative History Does Not Support the Board's Exclusion of Close-Family IHSS Caregivers from Unemployment Insurance.

The Board also urges this Court to affirm the Court of Appeal's erroneous interpretation of the legislative history. (Answer Brief on the Merits (ABM) at pp. 41–44.) This Court should decline to do so. First, because the plain language of the statutes is not ambiguous or in conflict with each other, there is no need to rely on extrinsic aide such as the legislative history. (*Martinez*, *supra*, 49 Cal.4th at p. 51; *Murphy*, *supra*, 40 Cal.4th at p. 1103.) Furthermore, the legislative history is at best

ambiguous and unclear; it certainly cannot sustain the weight both the Board and the Court of Appeal place upon it.

Among the piecemeal scraps of legislative history on which the Board relies is the fact that nearly all states exclude close-family employees from unemployment insurance coverage. (ABM at pp. 41–42.) According to the Board, this evinces the Legislature's intent to exclude close-family IHSS caregivers from unemployment insurance in this state. (*Ibid.*) This is wholly unpersuasive. Significantly, California was one of the first two states to allow payments to spousal caregivers, and one of the first four states to permit payments to family caregivers. (Newcomer, et al., *Allowing Spouses to Be Paid Personal Care Providers: Spouse Availability and Effects on Medicaid-Funded Service Use and Expenditures* (Aug. 2012) 52 Gerontologist 517, 518 (hereafter Newcomer, et al. Study).) It is irrelevant whether other states allow close-family unemployment insurance. That California paid close-family IHSS caregivers decades before other states began doing so is just one of countless examples of this state being on the forefront of progressive legislative achievements in a host of areas, particularly when it comes to protecting workers and the vulnerable.

Furthermore, despite the Court of Appeal's and Board's insistence to the contrary, the legislative history is devoid of any clear indication that the Legislature's motive for enacting Section 631 was indeed to protect against collusion. The court below relied upon the following language from *Miller*

v. Dept. of Human Resources Dev. (1974) 39 Cal.App.3d 168 (*Miller*) to conclude that collusion was the impetus for the enactment of Section 631:

> [The exceptions to unemployment insurance coverage] fall into three general categories. (1) Those in which administration and accounting would be difficult, (2) those in which governmental employees or maritime employees are involved, and (3) those in which depletions of the fund could result from a lack of or inability to control eligibility. Section 631 is in this latter category.

(*Id.* at p. 172) *Miller*, however, cited no authority of any kind for its conclusions—neither legislative history nor case law. (*Ibid.*) This is perhaps unsurprising, given the absence of clear legislative history on this issue. The Court of Appeal nonetheless took *Miller*'s unsupported conclusion and ran with it, turning *Miller*'s vague, mild language into an emphatic and definitive assertion of anti-collusive intent. (*Skidgel, supra*, 24 Cal.App.4th at pp. 588–589.)

The Board also leans heavily on the legislative history for 2016's Assembly Bill No. 1930 (AB 1930). (ABM at pp. 43–44.) According to the Board, the Senate Floor Analysis for AB 1930 "confirms that the Legislature understands and intends that close-family IHSS providers are not eligible for unemployment insurance benefits." (*Id.* at p. 43.) It does not. The Senate floor analysis states that AB 1930 would have created an advisory committee to study and provide "a report on employment-based supports and protections for IHSS providers." (Respondent's MJN 13, p. 1.) Notably, the floor analysis does *not* list the exclusion of close-family

IHSS caregivers from unemployment insurance as one of the provisions of existing law. (*Id.* at pp. 1–2.) Rather, the analysis later cites California Department of Social Services ("DPSS") materials as stating that close-family caregivers are excluded from unemployment insurance (*id.* at p. 4),[3] and concludes that for IHSS workers to have access to benefits including Social Security, Medicaid, and unemployment insurance, legislative change is "likely"—not definitively—necessary. (*Id.* at p. 5.)[4][5] What the floor analysis "confirms," then, is merely that the *Board* interprets the statutory scheme to exclude close-family IHSS caregivers—not that the Legislature intended the same. (Cf. *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161 ["the analyses or opinions of particular offices within the executive

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[3] As noted in Appellant's reply brief, the reliance on materials from an agency—CDSS—not responsible for administering the unemployment insurance program makes this piece of legislative history even less persuasive. (RBM at p. 24; cf. *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 396 [noting that enrolled bill reports relevant only "when prepared *by a responsible agency* contemporaneously with passage," italics added].)

[4] It is also unclear whether the Senate floor analysis's conclusion that legislative change is "likely necessary" for IHSS workers to have access to the benefits at issue referred to each of the three types of benefits at issue, or only some. (Respondent's MJN 13, p. 5.) And to the extent the "likely necessary" language applied to unemployment insurance for close-family IHSS caregivers, this is presumably attributable to the Board's *Caldera* decision at issue here.

[5] Although no inferences can be drawn from vetoed legislation (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1003 fn. 4), it is perhaps worth noting that AB 1930 passed unanimously in both the Assembly and Senate.

branch should not be considered in determining the intent of the legislative branch"].)[6]

III. THE STRUCTURE OF THE IHSS PROGRAM ELIMINATES ANY RISK OF POTENTIAL COLLUSION WITH CLOSE-FAMILY CAREGIVERS.

As explained *ante*, the best reading of the statutory scheme allows for close-family IHSS caregivers to receive unemployment benefits. In addition to being correct as a matter of statutory interpretation and prior precedent, this interpretation also promotes important public policy considerations, including the liberal construction of remedial statutes and supporting effective and cost-efficient close-family caregiving. Just as significantly, however, this interpretation comports with the Legislature's purported anti-collusion motive in enacting Section 631. Given the unique attributes of the IHSS program and the employment relationship between counties and providers, no meaningful risk of collusion exists.

As noted *ante*, the Court of Appeal placed great weight on the supposed anti-collusion motive underlying Section 631, as does the Board here. (See *Skidgel*, *supra*, 24 Cal.App.4th at pp. 588–589; ABM at pp. 40–42.) Although the legislative history is scant and ambiguous on this issue, the court below nonetheless assumed that this was in fact the Legislature's

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[6] Of course, *McDowell*'s holding that enrolled bill reports are *never* relevant legislative history materials was abrogated, at least in part, by *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19.

purpose, and made collusion concerns a focal point of its opinion. (See *Skidgel,* at pp. 588–589.) After citing to a New Jersey intermediate court opinion from the 1960s with wholly inapposite facts to any conceivable IHSS provider situation (*id.* at p. 588, citing *Lazar v. Bd. of Review* (1962) 77 N.J. Super. 251 (*Lazar*)), the Court of Appeal proceeded to note a litany of fraud protections and accountability measures built into the IHSS system. (*Ibid.*) Inexplicably, however, the Court of Appeal did not interpret such protections as mitigating or eliminating the risk of collusion in the IHSS context. (*Ibid.*) Rather, the court found its way to a contrary interpretation, reasoning that the existence of the wide array of fraud protections indicates the Legislature's "significant concern about fraud and collusion in the IHSS program"—thus justifying interpreting the statutory scheme to exclude close-family IHSS providers from unemployment insurance. (*Id.* at p. 590.)

The decision below places the most logical inference on its head. Far from supporting the Board's interpretation of the statutory scheme, the existence of comprehensive fraud protections within IHSS and the joint employment relationship for IHSS providers differentiates close-family IHSS caregivers from other types of family employees who work solely for their close family members. Unlike the collusive situation between a husband and wife who ran a small store in *Lazar*, *supra*, 77 N.J. Super. at pp. 255–258, IHSS providers are subjected to stringent regulations and

reporting measures that would make such collusion a virtual impossibility. IHSS recipients only become eligible for services after an extensive process entailing, among other steps, an in-home assessment by county workers and a certification by a licensed healthcare professional. (See CDSS Manual of Policies and Procedures, §§ 30-754–757.) These safeguards dramatically reduce, if not eliminate entirely, the risk of a recipient fraudulently obtaining IHSS services, let alone from a close-family caregiver. But IHSS safeguards and regulations do not merely apply to the screening of recipients; rather, as described *ante*, they also apply to the screening of and ongoing control over IHSS providers—with additional protections in place for close-family caregivers. These protections, of course, are in addition to the fraud protection measures EDD already employs for every unemployment application. These measures include interviewing the applicant's former employer; in the experience of *amici*, EDD interviews the county for former IHSS providers, rather than the individual IHSS recipient.

Unlike a mom-and-pop shop where no external entity monitors and controls the commencement and termination of an employment relationship, in the IHSS context, counties are both aware of and able to control hiring and firing of IHSS providers. Frequently, close-family IHSS caregivers must terminate their employment because their loved one has passed away or has progressed to a stage where they require inpatient care.

In such cases—and in any case involving a change to eligibility or level of need—the administering county must be informed of the change within 10 days. (CDSS Manual of Policies and Procedures, § 30-760.1(.14–.15).) Any changes trigger a reassessment of need for services, and such assessments are well-documented by the county. As a result, during the unemployment insurance eligibility verification process, the county would easily be able to verify that the employment relationship had indeed terminated (from its own payment and employment records), and could also confirm the close-family caregiver's stated reason for termination of employment (e.g., death or hospitalization of the IHSS recipient for whom they cared, or that the recipient opted to switch to a different IHSS caregiver)—facts relevant to the separation analysis EDD conducts in evaluating all applications for unemployment benefits. In short, the existence of a joint employment relationship and the extensive regulation of the IHSS program virtually eliminates the risk of collusion. As a result, interpreting the statutory scheme to allow unemployment insurance for close-family IHSS providers in no way undermines any legislative purpose to combat collusion.

IV. COUNTERVAILING PUBLIC POLICY CONSIDERATIONS WEIGH IN FAVOR OF APPELLANT'S INTERPRETATION OF THE STATUTORY SCHEME.

Although the risk of collusion is nearly nonexistent with close-family IHSS providers for the reasons described *ante*, Section 631's alleged

anti-collusion purpose must also be weighed against several countervailing public policy considerations. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 663, 668–669 [courts should consider impact of a particular interpretation on public policy where statutory text and legislative history do not prove definitive].)

The remedial nature of the unemployment statutes is not the only policy consideration weighing against the interpretation advanced by the Board. As noted *ante*, empirical research demonstrates that close-family IHSS caregivers are superior to non-family caregivers on numerous measures and result in fewer Medicaid and Medicare expenditures. Adopting a construction that incentivizes close-family caregivers thus furthers the public policy goals of improved health outcomes for California's most vulnerable residents and decreased costs for California's healthcare systems.

To the extent the Legislature is concerned about "depletions" of public funds (*Miller*, *supra*, 39 Cal.App.3d at p. 172), research shows that IHSS recipients cared for by family members, rather than by non-family providers, incur lower Medicaid expenditures, are less likely to be admitted to nursing homes, and have lower risk of serious hospital admissions. (Newcomer, et al. Study, *supra*, at pp. 517–530 [analyzing Medicaid expenditures and quality of care outcomes for California IHSS recipients, and concluding that family caregivers—including spouses, parents, and

other relatives—are associated with lower Medicaid costs and have equal or better care outcomes on multiple measures].) Family caregivers also have turnover rates less than half of non-family caregivers; turnover in caregiving is associated with higher costs and greater risk of hospital admissions, injuries, and bed sores. (UCSF Report, *supra*, at pp. 6, 8–9.) Numerous other studies show similar outcomes. (See *ibid.*) Likewise, in striking down a DSS regulation denying payment for certain services to caregivers living in the same home as the recipient, the Fourth District Court of Appeal observed:

> The regulation poses Hobson's dilemma. *Recipients needing 24-hour protective supervision—and other services—are more likely to receive better continuous care from relatives living with them whose care is more than contractual.* This regulation forces housemate providers to render services for less compensation than other providers by denying them payment for protective supervision. These relatives, unless they have independent funds, must subsist on the reduced IHSS grant. If the housemate is required to work outside the home as a result of the reduced grant, the aged or disabled relative may have to be institutionalized.

(*Miller v. Woods* (1983) 148 Cal.App.3d 862, 870 (*Woods*), italics added.) As noted by the *Woods* court, disincentivizing family caregivers harms recipients by decreasing quality of care and increasing the likelihood of hospitalization or institutionalization. Yet the Board's interpretation here does just that: by interpreting the statutory scheme to exclude close-family caregivers, family members are less likely to become caregivers at all. Those who do become caregivers are more likely to attempt to hold at least

an outside part-time job—thereby decreasing the time spent caregiving—in order to ease the difficulty of returning to the workforce if and when the recipient no longer needs care. And these effects are not minor or narrowly-applicable; as discussed *ante*, the vast majority of IHSS caregivers (approximately 64%) are family members. Faced with a muddled legislative history, this Court should choose the interpretation that promotes the policy goals of more effective and lower-cost caregiving for IHSS recipients. (Cf. *id.* at pp. 876–877 [noting utility of looking at general principles and policies underlying statutory scheme as third step after analyzing legislative text and history].)

CONCLUSION

Consistent with other remedial statutory schemes, nothing in the Unemployment Insurance Code precludes Petitioner from obtaining unemployment insurance benefits merely because she is employed by a

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family member. Under settled principles, Petitioner is jointly employed by a public entity, and Petitioner is eligible for unemployment insurance benefits as a result of this relationship.

Dated: April 3, 2019

Respectfully submitted,

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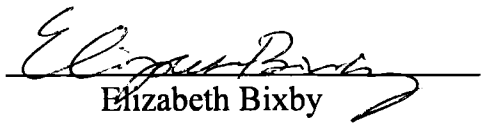
CERTIFICATE OF COMPLIANCE AND WORD COUNT

I, Elizabeth Bixby, as the attorney of record for *Amicus Curiae* Legal Aid at Work, hereby certify that, pursuant to California Rule of Court, rules, this brief was prepared with 13-point, proportionally spaced Times New Roman typeface including footnotes, and that the actual word count, per the computer program used to prepare the brief, is 7,332 words, excluding the cover, the tables, the signature block and this certificate.

I certify under penalty of perjury that the foregoing is true and correct and that this certification was executed on April 3, 2019, at San Francisco, California.



Elizabeth Bixby

PROOF OF SERVICE

Skidgel v. California Unemployment Insurance Appeals Board,
Cal. Supreme Court Case No. S250149
(Court of Appeal Case No. A151224)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 180 Montgomery Street, Suite 600, San Francisco, CA 94104.

On April 3, 2019, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE BET TZEDEK; CENTER FOR WORKERS' RIGHTS; LEGAL AID AT WORK; NATIONAL EMPLOYMENT LAW PROJECT; UNITED DOMESTIC WORKERS OF AMERICA, AFSCME LOCAL 3930, AFL-CIO; AND WOMEN'S EMPLOYMENT RIGHTS CLINIC OF GOLDEN GATE UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER TAMARA SKIDGEL** on the interested parties in the manner described below:

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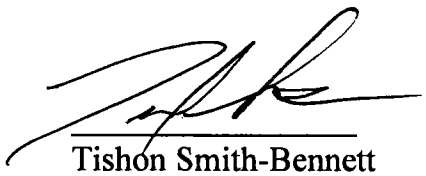

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