Case No. S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA,
Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant, Cross-Defendant and Appellant.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Real Party In Interest and Respondent.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Plaintiff and Respondent.

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant and Appellant.

Court of Appeal of the State of California, 1st District, Division 1
No. A142858/A143428
Superior Court of the State of California, County of San Francisco
The Honorable Richard B. Ulmer, Jr., Judge
Civil Case No. CPF 12-512437

SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S ANSWER BRIEF ON THE MERITS TO UNITED EDUCATORS OF SAN FRANCISCO'S OPENING BRIEF ON THE MERITS

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I.

INTRODUCTION

Petitioner UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA ("UESF") urges this Court to interpret "academic term" in California Unemployment Insurance Code § 1253.3[1] to include the SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S ("DISTRICT's") summer school session, which is voluntary for both students, teachers, and employees of the DISTRICT. The Court of Appeal in the matter below declined to adopt UESF's interpretation:

> Observing neither Congress nor the Legislature makes reference to summer school in the relevant statutes, UESF submits they 'neither intended that summer school be considered an academic term nor that summer session was not an academic term.' UESF asserts it is our task to 'determine how summer session must be treated under the existing statutory structure.' We decline this invitation: 'The role of the courts is not to legislate or to rewrite the law, but to interpret what is before them.' [Citation omitted.] In our view, neither UESF's nor the CUIAB's positions are consistent with the language and purpose of section 1253.3. (*United Educators of San Francisco v. California Unemployment Insurance Appeals Board et al.*, Case Nos. A142858/A143428, Slip Opinion, p. 13 (hereafter "*UESF*, p. 13").))

As the Court of Appeal noted, "[t]reating an intervening summer session as an 'academic term' also renders the reasonable assurance language in section 1253.3 meaningless and inoperable" (*UESF*, p. 15) and UESF's position "turns statutory

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[1] Hereafter ("U.I. Code § 1253.3").

construction and the enforcement of laws on their head" (*UESF*, p. 19). Indeed, UESF's Petition proposes an extreme interpretation of the reasonable assurance rule, under which "claimants are entitled to unemployment benefits from their last day worked until the fall term by operation of law." (UESF Opening Brief, p. 33.) In other words, the UESF interpretation would result in school employees potentially receiving either regular wages, or unemployment benefits, for a full year for 41 weeks of work (*UESF*, p. 20) and entirely negate a 40-year old state statute based on federal law. Any interpretation of a statute that would have the effect of reading that statute out of the law must be rejected. (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038–1039 ("[a]n interpretation that renders statutory language a nullity is obviously to be avoided.").)

II.

SUMMARY OF ARGUMENT

The California unemployment insurance statute, and the federal counterpart on which it was based, is premised upon the traditional academic year, starting in the fall, ending in the spring, with a summer break in between. This intervening period is what U.I. Code § 1253.3 calls "the period between successive academic years."

The California Legislature, in enacting U.I. Code § 1253.3, intended that school-term employees (those whose work schedules coincide with the academic year) who have reasonable assurance of returning the following academic year or term shall not be eligible to receive unemployment benefits for the period between academic years or terms. (U.I. Code § 1253.3(c) ("benefits ... are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms.").)

The underpinning of the reasonable assurance rule is that the end of an academic term or year, for an employee with reasonable assurance of returning in the succeeding academic term or year, is not "unemployment." The court in *Board of Education of the Long Beach Unified School District v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 690 (n. 7) noted that a substitute teacher in between academic years or terms is not "unemployed" in the sense of being "attached to the general labor force which is seeking other employment on a permanent basis."

The California Unemployment Insurance Appeals Board ("CUIAB") issued a November 30, 2012 decision in the matter involving claimant Arthur Calandrelli (CUIAB Case No. AO-278558) ("the 2012 Calandrelli Decision"), which it had agendized to designate as a Precedent Benefit Decision at its January, 2013 meeting. (Court of Appeal Clerk's Transcript, Volume 3, Pages 0805-0806 (hereafter "CT, Vol. 3, 0805-0806").)[2] In the 2012 Calandrelli Decision, the CUIAB recognized that school employees who work during the traditional academic year do not "lose" employment once the academic year ends and the summer begins:

> Congress discussed how to address the summer time period for school employees who work a traditional school year and have a summer recess period. Congress did not intend to provide school employees with paid vacations over the summer, *but wanted to provide protections for those school employees who had lost employment.* [Citation omitted.] According to Congress, teachers who worked during the 9-month academic year are 'really not unemployed during the summer recess' but can choose 'to take other employment' during the summer. [Citation omitted.] The intent of

[2] The item was subsequently taken off calendar and no action taken. (CT, Vol. 2, 0746.)

> Congress was to 'prohibit payment of unemployment benefits during the summer, and other vacation periods, to permanently employed teachers and *other professional school employees*. [Citation omitted.] (CT, Vol. 3, 811.) (Emphasis provided.)

In accordance, U.I. Code § 1253.3 harmonizes with state law, specifically Education Code § 37620's definition of the "academic year" as the 175-day regular school year, and excluding the summer session:

> The teaching sessions and vacation periods established pursuant to Section 37618 shall be established without reference to the school year as defined in Section 37200. *The schools and classes shall be conducted for a total of no fewer than 175 days during the academic year.* (Emphasis provided.)

In 1977, Congress amended the federal unemployment status to expand the denial provisions to the period between academic terms, in addition to the period between academic years. Congress's intent was to "expand the *denial* provision to include periods of time between academic terms as well as years" so that school employees "will not be able to obtain benefits in periods between terms *as well as periods between years.*" 123 CR 8204 (March 21, 1977). (CT, Vol. 3, 1099-1100.) [Emphasis original.] As stated in House of Representatives Report No. 95-82, 1st Sess. (1977):

> The intent of that provision, as reflected in the relevant congressional reports was to provide for denial of benefits during the period between successive terms as well as between successive academic years if the individual had a contract to perform services during both terms. The language has been interpreted as requiring denial (under the conditions specified) during the period between successive terms and most State laws

> now contain such a prohibition. Section 302(c)(2) clarifies that the denial provisions apply between two successive terms well as between two successive academic years and between two regular but not successive terms. (CUIAB Request for Judicial Notice in Support of Opening Brief on Merits ("CUIAB RJN"), Exh. J, p. 149; *See also*, CUIAB RJN, Exh. I, p. 135; Exh. D, pp. 56, 77.)

Therefore, it is unmistakable that Congress intended that "academic terms" be a subset of the "academic year." The United States Department of Labor (DOL), in a memorandum to states explaining the amendments, stated that:

> The period between two regular and successive terms is the short period of weeks between regular semesters or quarters, whether the institution operates on a two or three semester or a four-quarter basis. The suspension of classes during that short period in which services are not required is not a compensable period. (CT, Vol. 3, 812.)

More recently, the DOL issued a written advisory on December 22, 2016, titled "Interpretation of 'Contract' and 'Reasonable Assurance' in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act" in which it addressed the eligibility of a college instructor for between-term benefits where the college maintained an academic year consisting of four quarters (fall, winter, spring, summer). The DOL rejected the argument advanced by UESF here, and concluded that a summer term could only be treated as an "academic term" if "the college has a 12-month academic year, consisting of four quarters." (SAN FRANCSICO UNIFIED SCHOOL DISTRICT Request for Judicial Notice in Support of Answer Brief on Merits ("DISTRICT RJN"), Exh. A, pp. 10-11.) Here, the DISTRICT's summer school session is voluntary, and falls outside of the

academic year, and therefore is a period of ineligibility because it falls between academic years.

This interpretation harmonizes with Education Code § 37620, which clearly identifies the "academic year" as that occurring when "teaching sessions" are occurring, and to be conterminous with the regular school year of no less than 175 days. "Academic terms," such as "regular semesters or quarters," fall within the academic year. Summer school cannot be an "academic term" because it falls outside of the academic year. A summer session, the court of appeal noted, is not required for "compulsory education laws that mandate public schools to provide instruction," and does not "allow certificated employees to receive credit toward permanent status. (See, e.g., Ed.Code, §§ 37620, 41420, 48200, 44913.)" (UESF, pp. 14-15.)

Therefore, there is no indication in the plain language or legislative history behind the California U.I. Code, or the federal legislation, that a school district's voluntary summer school program, falling in the period between academic years, is an "academic term," with the consequence of invalidating the reasonable assurance rule. The DISTRICT clearly maintains an "academic year," in which two "academic terms" (fall and spring) are subsumed. The voluntary summer session it not an "academic term," and instead occurs during the period of ineligibility between academic years. UESF's interpretation would have the effect of flipping the period between academic years from a period of ineligibility to a period of eligibility – the polar opposite of what Congress intended.[3]

[3] The plain and unambiguous language trumps UESF's contention that the broad policy set forth in U.I. Code § 100 (UESF Opening Brief, p. 15) should prevail.

III.

PROCEDURAL BACKGROUND

The cases at issue in this appeal address whether the Claimants are eligible for unemployment benefits during the summer of 2011.

A. The Unemployment Claims Process

When a claimant submits an application for unemployment benefits, the local Employment Development Department ("EDD") office makes the initial determination of whether the claimant is eligible for benefits. (U.I. Code § 1328.) (*See, e.g.,* Administrative Record filed with Court of Appeal (hereafter "AR"), Vol. 1, P0078-P0079.) Either the claimant or employee can appeal the EDD's determination to an Administrative Law Judge ("ALJ"). (U.I. Code §§ 404, 1328.) (*See, e.g.,* AR, Vol. 1, P0083-P0085.) Here, the ALJs were assigned to the San Francisco Unemployment Appeals Board ("SFUAB"), and rendered the initial administrative decision in the 26 cases at issue in this matter after hearings were conducted in October and November of 2011.

Each party has the right to appeal a decision of the ALJ to the CUIAB. (U.I. Code §§ 401, 1336.) Here, the CUIAB issued its decisions primarily in March, 2012. An aggrieved party can challenge the decision of the CUIAB in Superior Court by filing a Petition for Writ of Mandate. (U.I. Code § 410.)

B. UESF's Petition For Writ Of Mandate

UESF filed its First Amended Petition for Writ of Mandate with the Trial Court on or about September 6, 2012, naming CUIAB as Respondent and the DISTRICT as Real Party in Interest. (CT, Vol. 1, 0007-0016.) The DISTRICT filed a Cross Complaint for Declaratory Relief against CUIAB and UESF on or about October 26, 2012, challenging

CUIAB's citation of P-B-412 and P-B-417 as authority for finding employees unable to obtain a summer school assignment eligible for summer benefits. (CT, Vol. 1, 0328-0335.)

UESF filed a Second Amended Petition for Writ of Mandate ("Second Amended Petition") on or about April 11, 2013, to include allegations challenging the 2012 Calandrelli Decision. (CT, Vol. 2, 0360-0369.) The matter was set for hearing on December 13, 2013 before the Trial Court.

C. 2005 Superior Court Order

In 2005, the DISTRICT filed a Petition for Writ of Mandate against the CUIAB, naming a number of employee claimants (none involved in the current matter) as Real Parties in Interest. (San Francisco Superior Court Case No. CPF 05-504939.) The Court, the Honorable James L. Warren, issued an "Order Denying Petitioner's Petition for Writ of Mandate" ("2005 Order") (CT, Vol. 2, 0689-0690) and "Statement of Decision" (CT, Vol. 2, 0691-0697). Judgment for the CUIAB was entered on November 16, 2005. (CT, Vol. 2, 0688.)

The 2005 Order ruled that, for the purposes of U.I. Code § 1253.3, the "academic year" was defined as July 1 to June 30 under Education Code § 37200:

> Real parties' period of unemployment did not begin 'between two successive academic years' because, in California, there is no gap between successive academic years. The legislature did not define the term 'academic year' as it is used in §1253.3(b). 'Year,' of course, has a common sense meaning of 365 days. Consistent with this common sense meaning, the Legislature has defined a 'school year' as running from July 1

to June 30, as petition acknowledges. [Citation Omitted.] .... (CT, Vol. 2, 0694-0695.)

The 2005 Order also stated the view that that the DISTRICT's summer school session was in fact an academic term for the purposes of U.I. § 1253.3:

> 'Real parties' period of unemployment also did not begin 'between two successive academic terms.' The CUIAB held that real parties potentially were eligible for benefits during the summer term, which ran from June 19, 2013 through July 25, 2003 ... To conclude that SFUSD's six-week summer school was an academic term for purposes of §1253.3, it suffices that during that period educational instruction was provided to students, and that at least some teachers were employed to provide that instruction (which is not in dispute.) (CT, Vol. 2, 0695.)

No appeal was filed from the Judgment arising out of the 2005 Order.

D. Trial Court Hearing

Hearing took place on June 13, 2014, before the Honorable Richard Ulmer. (CT, Vol. 3, 1144-1168.) The Trial Court issued its Statement of Decision on July 14, 2014, denying UESF's Second Amended Petition, and in favor of the DISTRICT's FACC (CT, Vol. 3, 1091-1103), and entered Judgment in favor of the DISTRICT on August 15, 2014. (CT, Vol. 3, 1104-1107.) UESF filed its Notice of Appeal on September 4, 2015 (Case No. A142858) (CT, Vol. 3, 1108-1110), and CUIAB filed a Notice of Appeal on October 31, 2014 (Case No. A143428) (CT, Vol. 3, 1131-1133). The two cases were thereafter consolidated on appeal by stipulation between the parties.

IV.

FACTUAL BACKGROUND

The parties reached a stipulation of facts at the Trial Court (CT, Vol. 2, 0718-0725), including the following material facts: In the spring of the academic year 2010-2011, the DISTRICT employed employees in the position of substitute teachers for the purpose of replacing individuals who were temporarily absent or on leave. (Education Code § 44920). (CT, Vol. 2, 0719, ¶ 3.) During the academic year 2010-2011, the DISTRICT employed individuals in the capacity of para-professional classified employees who were not paid during summer months unless they were actually employed for a summer session during which instruction was provided or were paid to perform special projects during the summer such as custodial services. (CT, Vol. 2, 0719, ¶ 5.) Each of the substitute teachers and classified employee claimants who are identified in the paragraphs above received a "reasonable assurance" letter during the spring of the 2010-2011 school year advising him or her that he or she had a reasonable assurance of employment during the 2011-2012 school year. (CT, Vol. 2, 0719, ¶ 7.)

The last date that the DISTRICT's schools operated during the "regular" session of the 2010-2011 school year was May 27, 2011. (CT, Vol. 2, 0719, ¶ 8.) The first day of instruction for the 2011-2012 school year was August 15, 2011. (CT, Vol. 2, 0719, ¶ 9.)

The DISTRICT also operated a summer session during which instruction was given to students. The summer session began on June 9, 2011 and ended on July 7, 2011 for elementary school students, and began on June 9, 2011 and ended on July 14, 2011 for middle and high school students. (CT, Vol. 2, 0720, ¶ 10.) 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, Vol. 2, 0720, ¶ 11.)

Each of the claimants, including the substitute teacher claimants and the classified employee claimants, applied for unemployment benefits for the period of time between May 27, 2011 and August 15, 2011. (CT, Vol. 2, 0720, ¶ 12.) The EDD denied benefits to each named claimant. The claimants appealed to an ALJ, who after hearings at which each claimant was represented by the Union, reversed the EDD's decision and held that each claimant was entitled to benefits for the period of time during the summer of 2011 that the claimant did not work. (CT, Vol. 2, 0720, ¶ 1 3.)

The CUIAB reversed all of the decisions of the ALJ as to each of the substitute teacher and the classified employee claimants, either in whole or in part. (CT, Vol. 2, 0720, ¶ 14.) The CUIAB, in each case involving the substitute teacher and the classified employee claimants, held that the entire summer session was a recess period as defined in U.I. Code § 1253.3(b). *(Id.)* However, it also held that if an individual claimant was employed during the summer of 2010, he or she generally had a reasonable expectation of employment during the 2011 summer session. *(Id.)* Thus, the CUIAB generally held that all individual substitute teacher and classified employee claimants who were employed during the summer of 2010 were eligible for unemployment benefits during the period of summer session 2011 but ineligible for unemployment benefits thereafter. *(Id.)* The CUIAB also held that those individual claimants who had worked in the preceding summer were generally eligible for benefits during the summer session of 2011. (CT, Vol. 2, 0720, ¶ 14.)

Following are additional material facts elicited elsewhere in the record: Employment during the school term does not guarantee employment during the separate

summer school session. Employees have to apply separately to work during the summer session (AR Vol. 7, P1537), as there are fewer positions available than during the school year. (AR Vol. 9, P2160.) Substitute teachers indicate their availability for summer school work on a form sent by the DISTRICT providing them reasonable assurance of returning for the following school year. (*See, e.g.,* AR Vol. 10, P2390, P2415; AR Vol. 1, P0090; AR Vol. 6., P1348.)

V.

LEGAL ARGUMENT

A. The Standard Of Review

Questions of statutory interpretation are subject to de novo review. (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1228.) In deciding whether the CUIAB's application of governing law should be upheld, the Court is bound to apply settled standards and review whether the CUIAB's interpretation was contrary to statutory intent. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111.) While it is true that "a court will give great weight to an agency's view of a statute or regulation, the reviewing court construes the statutes as a matter of law and will reject administrative interpretations where they are contrary to statutory intent." (*Messenger Courier Ass'n of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1086-87 quoting *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal.App.4th 51, 58; *See also, Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal. App.4th 168, 176.)

B. Pertinent Sections Of The California Unemployment Insurance Code

U.I. Code § 1253.3, subsection (b), governs instructional personnel (the substitute teachers in this matter):

> [B]enefits ... are not payable to any individual with respect to any week which begins 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 that period, or during a period of paid sabbatical leave provided for in the individual's 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 that the individual will perform services for any educational institution in the second of the academic years or terms....

U.I. Code § 1253.3, subsection (c), applies to those employees not serving in an "instructional, research, or principal administrative capacity" (the classified [noncredentialed] employees in this matter):

> Benefits specified by subdivision (a) based on service performed in the employ of a nonprofit organization, or of any entity as defined by Section 605, with respect to service in any other capacity than specified in subdivision (b) for an educational institution shall not be payable to any individual with respect to any week which commences during a period between two successive academic years or terms if the individual performs the service in the first of the academic years or terms and there is a reasonable assurance that the individual will perform the service in the second of the academic years or terms.

It is well established that the reasonable assurance rule applies equally to substitute teachers. The court in *Board of Education (Long Beach) v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674 ("*Long Beach*") rejected the argument that the

"tenuous impermanent" nature of substitute employment precluded reasonable assurance, stating that:

> The superior court concluded that the Board's reliance on the tenuous impermanent nature of substitute teacher Smith's employment, e.g., that he 'acquired no vested or protected right to continuous employment' and that he 'was not subject to termination since his job ended at the conclusion of each school day,' are irrelevant to the 'reasonable assurance' issue within the meaning of section 1253.3. We agree. [¶] Consideration of such tenuous aspects are extrinsic to clear legislative language and sources and therefore cannot be a basis for resolving the 'reasonable assurance' issue [citation omitted]. (*Id.* at 682)

The court explained that "[t]here is nothing in § 1253.3 which sets as a criteria the tenuous nature of a substitute teacher's position as a basis for determining the 'reasonable assurance' issue." (*Id.* at 683.) The court further concluded that the restrictions on the receipt of summer unemployment insurance benefits by school-term employees applied regardless of whether or not the employee in question had a vested right in his or her employment:

> The exclusion of benefits under section 1253.3 applies to instructional educational employees regardless of whether their employment status is vested or nonvested. If there is a contract or a reasonable assurance that a teacher, who has taught for the District during the pre recess period, will perform teaching services for the employer in the academic year or term during the postrecess period, then the teacher must be denied unemployment benefits during the summer recess regardless of whether he

or she is a tenured or nontenured teacher or whether his or her employment is vested or non-vested. (*Id.* at 682-683.)

The court affirmed the application of the reasonable assurance rule to non-instructional employees in *Russ v. California Unemployment Appeals Board* (1982) 125 Cal.App.3d 834, in which the court ruled that a teacher's aide was ineligible for summer unemployment insurance benefits. The *Russ* court interpreted the term "reasonable assurance" to mean that an employee did not need to have a contractual right to return to work to have "reasonable assurance" for the purposes of U.I. Code § 1253.3.

Therefore, school-term employees with reasonable assurance of returning to work during the next academic year or term are not eligible for benefits. There does not need to be a contractual guarantee to return to constitute "reasonable assurance," and California courts have found that that term already embeds the day-to-day nature of substitute teaching.

UESF contends that the DISTRICT's summer school session must be considered an "academic term" under U.I. Code § 1253.3(c). As will be demonstrated below, this argument runs afoul of the federal legislation that gave rise to U.I. Code § 1253.3(c), ignores the definition of "academic year" as established by California law under Education Code § 37620, and also violates the at-will and voluntary nature of summer school employment as set forth in the California Education Code and cases interpreting it. Employment during the school term does not guarantee employment during the separate summer school session, and employees have to apply separately to work during the summer session. (AR Vol. 7, P1537.) Therefore, it makes no sense to treat the DISTRICT's summer session as an "academic term" conferring the same rights of eligibility as employment during the DISTRICT's regular school year.

C. Legislative History

1. The Federal Statute Was Based On The Traditional School Year Commencing In The Fall, And A Summer Recess Period

U.I. Code § 1253.3 is based upon the Federal Unemployment Tax Act ("FUTA") (26 U.S.C.A. §§ 3301-3331). In states operating unemployment insurance programs in conformity with FUTA, employers receive tax credits against taxes imposed by the federal government:

> California's "unemployment compensation program ... is approved by the Secretary of Labor upon review for conformity with qualifying criteria established in the federal Act. [Citation Omitted.] State programs thus approved by the Secretary of Labor are subsidized with federal grants paid to the conforming states pursuant to the Social Security Act. [Citation Omitted.] The California Legislature has qualified the employers of this state for the tax credits, and its program for the subsidies, by adopting and maintaining an unemployment compensation law which closely conforms to the criteria established in the federal Act. (*Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 842.)

Where the California statutes "... are, in substance, exact counterparts of the federal rules. ... the Legislature must have intended that they should have the same meaning, force and effect as have been given the federal rules by the federal courts." (*Long Beach, supra*, 160 Cal.App.3d at 686.) Therefore, the legislative intent behind the federal statute is relevant to interpreting California's statute.

The legislative intent behind the federal statute clearly contemplates that the academic year should exclude the summer, which was considered a period between

academic years, after which employees would be given reasonable assurance of returning for "reemployment in the fall." As the court stated in *Russ, supra*, 125 Cal.App.3d 834 at 843:

> [The federal statute] was thus amended 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. Subparagraph (i) of the amended subsection requires in effect that a conforming state must deny eligibility for summertime benefits to a professional school employee (such as a teacher), at any grade level, if there is "a contract" providing for his or her reemployment *in the fall* or "reasonable assurance" of such reemployment. Subparagraph (ii) of the amended subsection provides in effect that a conforming state may deny eligibility for summertime benefits to a nonprofessional school employee at a subcollegiate grade level (such as appellant) if there is "reasonable assurance" (only) of his or her reemployment *in the fall*. (*Id.* at 843.) [Footnote omitted.] (Emphasis provided.)

The following excerpts from the Congressional Record show that school-term employees were not intended to be eligible for unemployment benefits during the summer period between academic years:

- "The bill prohibits payment of unemployment compensation benefits during the summer, and other vacation periods, to permanently employed teachers and other professional school employees. It allows States to deny benefits during vacation periods to employed

nonprofessional schoolworkers." (Congressional Record, Vol. 122, Part 27, 35132.) (CT, Vol. 3, 0755.)

- "The conference bill also prohibits payment of SUA benefits during recess periods to nonprofessional school employees with reasonable assurance of returning to their previous jobs at the end of the recess period. A similar provision pertaining to professional school employees – teachers, researchers, and administrators – is contained in present law." (*Id.*)

It is clear, then, that the legislative intent behind the statute was to recognize one traditional academic year, with a period between academic years during the summer, and with employees returning in the fall.

2. <u>The Federal Statute Only Contemplated Eligibility Between Academic Years Under One Circumstance: If An Employee Lost His/Her Job For The Following Fall</u>

The Congressional Record also recognized that the statute allowed for a school-term employee receiving reasonable assurance to become retroactively eligible for benefits should he/she in fact lose his/her assignment for the following year:

> If, at the end of that vacation period, [an employee] actually finds that he/[she] had no reasonable assurance of employment by the school agency, and indeed, is not employed then retroactively, he/[she] may have his/[her] benefits redetermined. He/[she] does not get them until that determination is made. (Congressional Record, Vol. 122, Part 26, 33285.) (CT, Vol. 3, 0759.)

The legislative history shows the intent that an employee who loses the right to return during the following school year be considered "legitimately unemployed." (*Id.*) This rule was incorporated into California's unemployment statutes in U.I. Code § 1253.3(i)(4).[4] Therefore, there is no basis for finding eligibility during the summer based upon the incorrect characterization of the summer school session as an "academic term." As a period between academic years, it is a period of ineligibility. U.I. Code § 1253.3(i)(4) provides the only exception: if the employee loses his/her job and does not return in the following academic year. This interpretation is consistent with the intent of unemployment insurance: to compensate employees who are unemployed in the sense of being "attached to the general labor force which is seeking other employment on a permanent basis." (*Long Beach, supra,* 160 Cal.App.3d 674, 690, fn. 7.)

3. The Federal Legislative Intent Is Corroborated By The Definition Of "Academic Year" Under State Law: Education Code § 37620 Creates Only One "Academic Year"

The California Education Code demonstrates a strong statutory intent to distinguish the mandatory regular school year from the permissive summer school term. Education Codes §§ 37618 through 37620 provide as follows:

§ 37618.

The governing board of any school district operating pursuant to the provisions of this chapter shall establish a school calendar whereby the

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[4] "If it is stated that the individual has reasonable assurance of reemployment, that the individual shall be entitled to a retroactive payment of benefits if the individual is not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms, if the individual is otherwise eligible and he or she filed a claim for each week benefits are claimed, and if a claim for retroactive benefits is made no later than 30 days following the commencement of the second academic year or term."

teaching sessions and vacation period during the school year are on a rotating basis.

§ 37619.

Each selected school shall be closed for all students and employees on regular school holidays specified in Article 3 (commencing with Section 37220) of Chapter 2.

§ 37620.

The teaching sessions and vacation periods established pursuant to Section 37618 shall be established without reference to the school year as defined in Section 37200. *The schools and classes shall be conducted for a total of no fewer than 175 days during the academic year.* (Emphasis provided.)

Education Code § 37620 clearly identifies the "academic year" as that occurring when "teaching sessions" are occurring, and to be conterminous with the regular school year of no less than 175 days. Likewise, Education Code § 41420(a) provides that "[n]o school district, other than one newly formed, shall, except as otherwise provided in this article, receive any apportionment based upon average daily attendance from the State School Fund unless it has maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year."

By contrast, summer sessions were never intended to be part of the school year. In *California Teachers Association v. Board of Education of Glendale* (1980) 109 Cal.App.3d 738, the court of appeal, in affirming the lower court's rejection of a teacher union's challenge to the district's contract with a university to provide summer school services, stated:

"... [T]he governing body of a district may establish and maintain such summer schools. *No mandatory requirement of summer school is found in any of these sections, and it must therefore be concluded that the establishment and maintenance of summer school classes and programs is only permissive rather than mandatory."* (*Id.* at 744-45.) (Emphasis added.)

Likewise, in the context of employee rights, the Education Code recognizes that it would be unfair to treat employment during the summer school term in accordance with the same rights as employment during the regular school year. Education Code § 44913 provides as follows:

> Nothing in Sections 44882 to 44887, inclusive, Sections 44890, 44891, Sections 44893 to 44906, inclusive, and Sections 44908 to 44919, inclusive, shall be construed as permitting a certificated employee to acquire permanent classification with respect to employment in a summer school maintained by a school district, and service in connection with any such employment shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of the district. The provisions of this section do not constitute a change in, but are declaratory of, the preexisting law.

Education Code § 44913 recognizes that it would be unfair to grant credit towards permanent status for service during summer school since not all employees work during summer school. Likewise, there is no statutory right to summer school employment that flows from employment during the regular school year. While school-term employees generally have the right to return the following school year unless released under a

temporary or short-term contract (Education Code §§ 44954, 45103(d)(2)); laid off (§§ 44949, 45117); or dismissed for cause (§§ 44932, *et seq.*, 45113), there is no guarantee of summer employment from year to year. (AR Vol. 7, P1537.)

4. An "Academic Term" Falls Within The "Academic Year"

UESF's opening brief centers around the definition of "academic term." As the Trial Court noted in its Statement of Decision, the legislative intent was to define "academic term" as a term falling within, as a subset of, the "academic year," as "[t]he statute's text evinces an unmistakable plain meaning," and the legislative history also confirms this result:

> If more proof of legislative intent were needed, in 1977 Congress added references to 'academic terms' to the statute's already-existing references to 'academic years.' In doing so, Congress stated its intention to 'expand the *denial* provision to include periods of time between academic terms as well as years' so that school employees 'will not be able to obtain benefits in periods between terms *as well as periods between years.*' 123 CR 8204 (March 21, 1977). (CT, Vol. 3, 1099-1100.) [Emphasis original.]

Therefore, it is unmistakable that Congress intended that "academic terms" be a subset of the "academic year." The United States Department of Labor ("DOL"), in a memorandum to states explaining the amendments, stated that:

> The period between two regular and successive terms is the short period of weeks between regular semesters or quarters, whether the institution operates on a two or three semester or a four-quarter basis. The suspension of classes during that short period in which services are not required is not a compensable period. (CT, Vol. 3, 812.)

More recently, the DOL issued a written advisory on December 22, 2016, titled "Interpretation of 'Contract' and 'Reasonable Assurance' in Section 3304(a)(6)(A) of the Federal Unemployment Tax Act" in which it addressed the eligibility of a college instructor for between-term benefits where the college maintained an academic year consisting of four quarters (fall, winter, spring, summer). The DOL rejected the argument advanced by UESF here, and concluded that a summer term could only be treated as an "academic term" if "the college has a 12-month academic year, consisting of four quarters." (DISTRICT RJN, Exh. A, pp. 10-11.) Here, the DISTRICT's summer school session is voluntary, and falls outside of the academic year, and therefore is a period of ineligibility because it falls between academic years.

This intent harmonizes with Education Code § 37620, which clearly identifies the "academic year" as that occurring when "teaching sessions" are occurring, and to be conterminous with the regular school year of no less than 175 days. This intent also establishes that the voluntary summer school cannot be an academic term falling within the compulsory academic year.

5. There Is No Basis Under State Law For Treating Summer School As An "Academic Term" For The Purposes Of Overriding The Legislative Intent Of U.I. Code § 1253.3

The federal legislation was modeled upon a premise that a school district had a single school year, beginning in the fall, and ending in the spring, with a traditional summer recess. State law parallels this model, defining the "academic year" as the regular school year of no less than 175 days. (Education Code §§ 37620, 44908.) School-term employment is based upon a recurring right to return for the following academic year for both certificated (i.e., credentialed) and classified employees (*See, e.g.,*

Education Code §§ 44954, 45103(d)(2), 44949, 45117, 44932, *et seq.,* and 45113).

Employment during the academic year does not vest an employee to the right to employment during the summer term. (*See, e.g.*, AR Vol. 7, P1537; CT, Vol. 2, 0719 (¶ 5), 0729 (¶ 8).) Therefore, treating the summer session as an "academic term" for the purposes of U.I. Code § 1253.3 violates the intent behind that statute and would lead to absurd results. The intent of state law, and the federal law on which it was modeled, was to determine eligibility of school-term employees with a reasonable assurance of returning to their school-term positions when the regular school year started in the fall. However, treating a summer school session as an "academic term" under U.I. Code §1253.3 would require school districts to provide two reasonable assurance notices – one in the spring applying to employment for the summer term, and a second in the summer applying to employment in the fall – in order to establish ineligibility during recess periods.

There is nothing in the federal or state statute that would suggest that school districts should be obligated to issue multiple reasonable assurance notices throughout the calendar year. As was noted in a December 13, 2005 ruling[5] of ALJ Peter Wercisnki, which was subsequently modified by the CUIAB:

> If a summer school session is an academic term, the summer school session is the second academic term to determine eligibility in the first summer recess period, and the fall term is the second academic term to determine eligibility in the second summer recess period. Thus, a claimant would not be ineligible for benefits during the first summer recess period but would be

[5] Claimant Seymour Glasser, SFUAB Case No. 1647976; CUIAB Case No. AO-127364. The DISTRICT cites the ALJ decisions not as binding authority, but because of the clarity with which they address the faulty reasoning behind the argument that summer school is an "academic term" for the purposes of U.I. § 1253.3.

ineligible for benefits during the second summer recess period if there is no reasonable assurance of work in the summer session but there is reasonable assurance for the fall term. Nothing in the statute or decisions interpreting it suggest that different results should occur for the two summer recess periods or that separate findings of reasonable assurance for the summer school session and the fall term are required to determine whether section 1253.5(b) applies to the two summer recess periods .... (CT, Vol. 3, 0778-0779.)

School-term employees finishing the traditional school year in the spring "return" to their customary positions in the fall. The federal legislation never contemplated that a voluntary summer session falling outside the academic year would constitute an academic term. Moreover, none of the California Education Code sections cited by UESF purporting to define "academic term" (UESF Opening Brief, p. 24) deal with the K-12 public school system, but with university systems. Education Code § 37620, dealing with K-12 school districts, is far more persuasive and applicable.

D. UESF's Citations To Examples Of Instruction Occurring During The Summer Do Not Support Making The District's Summer School Session An Academic Term

UESF cites a Department of Labor publication stating that an academic term constitutes "that period time *within an academic year* when classes are held. Examples include semesters and trimesters. Terms can also be other nontraditional periods of time when classes are held, such as summer sessions." (UESF Opening Brief, p. 21.) (Emphasis provided.)

This excerpt in fact supports the DISTRICT's interpretation. As noted above, the DOL states that an academic term must fall "within an academic year." This would disqualify the DISTRICT's summer school session, which falls outside the academic year, from being an academic term.

The DOL's more recent written advisory, issued December 22, 2016, concluded that a summer session could only be treated as an academic term if "the college has a 12-month academic year, consisting of four quarters." (DISTRICT RJN, Exh. A, pp. 10-11.) Here, the DISTRICT's summer school session is voluntary, and falls outside of the academic year (which consists of a fall and spring term), and therefore is a period of ineligibility because it falls between academic years.

E. Out-Of-State Cases Do Not Support UESF's Argument That The Summer School Session Is An Academic Term

While acknowledging that the majority of out-of-state cases do not support its contention that the summer session constitutes an academic term, UESF nonetheless cites *Evans v. State Department of Employment Security* (Wash Ct. of Appeals 1994) 72 Wash.App. 862 (*Evans)* as supportive of its argument, while conceding that the case was decided before changes were made to that state's unemployment insurance statute.

In *Evans,* the court addressed the claim of a part-time community college instructor who applied for unemployment benefits after she did not receive a summer quarter teaching assignment. Washington state law mirrored the provision of U.I. §1253.3 prohibiting benefits "between two successive academic years or terms." The claimant argued that summer was itself an academic term and not a period between academic terms. Without a statutory definition of "academic year," and in the absence of evidence to distinguish the community college summer quarter from any other quarter, the

Washington court concluded that the community college summer quarter was an academic term, not a period between two successive academic years or terms, and that the instructor was eligible for unemployment benefits during the summer.

Significantly, after *Evans*, Washington unemployment insurance law was amended to define "academic year" as "fall, winter, spring and summer quarters or comparable semesters unless, based on objective criteria . . . the quarter or comparable semester is not in fact a part of the academic year of the institution." Subsequently, the court in *Thomas v. State Department of Employment Security* (Wash. Ct. of Appeal 2013) 176 Wash.App. 809, concluded that, under the new statute, no evidence indicated that summer was part of the school district's academic year or that the school operated on a year-round schedule similar to the community college in the *Evans* case. The court found that Thomas met the three benefit-disqualifying factors in the Washington statute, which are identical to the California factors: (1) benefits based on noninstructional services provided to an educational institution, (2) benefits sought for a period between two successive academic years and (3) reasonable assurance that he would be returning to work for the next school year.

Therefore, none of the Washington State cases support UESF's argument that the DISTRICT's voluntary summer session constitutes an academic term.

F. The 2005 Order Has No Preclusive Effect

UESF contends that a 2005 "Statement of Decision" and ensuing judgment from Honorable James L. Warren (Case No. CPF 05-504939) ("2005 Order") serves as *res judicata* as to the claims raised herein. The Court of Appeal declined to give the 2005 order *res judicata* or collateral estoppel effect on a number of grounds, first noting that the prior lawsuit and the current lawsuit raised different claims:

> The 2005 case differs from the instant case in that the claimants in the prior case sought unemployment benefits for the period when summer school was in session only, whereas the claimants in the instant case seek benefits that would cover the entire period between the conclusion of the regular school term of 2010-2011 and the beginning of the regular school term in 2011-2012. (*UESF*, p. 8.)

The Court of Appeal also noted that both *res judicata* and collateral estoppel "require a strict identity of the issues being litigated. [Citation omitted.] We note the issues in the 2005 case and the present case are not precisely identical. In the 2005 case, the question was whether the six-week summer session constituted an academic term. In the present case, the eligibility question is broader in that it includes the weeks before and after the summer session." (UESF, p. 9.)

Moreover, the 2005 Order interpreted the term "academic year" to mean July 1 through June 30. However, under that interpretation, there is virtually no duration of time that could come "between academic years." This interpretation would make the implementation of this provision of U.I. Code § 1253.3 impracticable in every conceivable instance. Therefore, the term "academic year" could only have one meaning: the 175-day period of time that is a subset of the full calendar year, therefore allowing a "period between academic years" as that term is defined in Education Code § 37620.

Citing *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 257, the Court of Appeal stated that "[a] prior determination is not conclusive where the issue is purely a question of law if injustice would result or if the public interest requires relitigation of the issue." (*UESF*, p. 10.) It also cited this Court's refusal to extend *res judicata* to the issue of whether unemployment insurance constitutes a

reimbursable state mandate in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, noting that, either way, the outcome would have a significant effect either on California's taxpayers or employers.

Here, the Court of Appeal noted that "[t]he potential impact of an erroneous statutory interpretation extends beyond San Francisco. All school districts in this state offering summer school programs are potentially affected." (UESF, p. 11.) The DISTRICT submits that the Court of Appeal properly affirmed the Trial Court's invocation of the public policy exception to *res judicata* and collateral estoppel with respect to the 2005 Order. This Court's grant of review of the Court of Appeal's decision also implicitly acknowledges the proper invocation of the public interest exception, given the potential financial impact of the resolution of this matter on both California public schools and their employees.

VI.

CONCLUSION

U.I. Code §§ 1253.3(b) and (c) establish that school-term employees receiving reasonable assurance are not eligible for benefits during the period between academic years or terms. Education Code § 37620 establishes that the term "academic year" consists of the period of not less than 175 days during which teaching sessions take place. Under Education Code § 37620, an "academic year" is clearly intended to be a subset of the 365-day calendar year, and is equally clearly intended to exclude the summer period between academic years.

The entire architecture of the school calendar is premised upon the 175-day academic year. For example, Education Code § 41420(a) provides that "[n]o school district, other than one newly formed, shall, except as otherwise provided in this article,

receive any apportionment based upon average daily attendance from the State School Fund unless it has maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year." Education Code § 48200's requirement of "compulsory full-time education" is premised upon the 175 day academic year, as is the Education Code §44913 restriction that service during summer school shall not count towards a certificated employee's progress towards tenure.

Treating the DISTRICT's summer school session as an "academic term" would not only run counter to the entire structure of the school district calendar, it would essentially lead to the self-nullification of the reasonable assurance rule set forth in U.I. Code § 1253.3. If a summer school session occurring between academic years constitutes an academic term, it would render the denial provisions for the "period between academic years" a nullity, and essentially require that provision to self-evaporate from the statute. Congress' amendment to the original federal unemployment statute to define an academic term as being a subset of the academic year ensures that each part of the statute has meaning. "It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage," and "'[a]n interpretation that renders statutory language a nullity is obviously to be avoided.'" (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038–1039.) Since UESF's contention that the DISTRICT's voluntary summer session constitutes an academic term would render the

cannot stand as a matter of law.

DATED: January 31, 2017

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN

By:_____
John R. Yeh
Attorneys for Respondent San Francisco Unified School District

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the Petition for Writ of Mandate is produced using 13-point Times New Roman type including footnotes and contains no more than 7,944 words, which is fewer than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: January 31, 2017

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN

By: _____
John R. Yeh
Attorneys for Respondent San Francisco Unified School District

SUPREME COURT COPY

Attorney or Party without Attorney: JOHN R. YEH, SBN 154576 BURKE, WILLIAMS & SORENSEN, LLP 1503 GRANT ROAD SUITE 200 MOUNTAIN VIEW, CA 94040 *Telephone No:* *Attorney for:* Respondent	*For Court Use Only* SUPREME COURT FILED APR 05 2017 Jorge Navarrete Clerk Deputy
Ref. No. or File No.:	
Insert name of Court, and Judicial District and Branch Court: SUPREME COURT OF THE STATE OF CALIFORNIA	
Petitioner: UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA *Respondent:* SAN FRANCISCO UNIFIED SCHOOL DISTRICT	

PROOF OF SERVICE HAND DELIVERY	*Hearing Date:*	*Time:*	*Dept/Div:*	*Case Number:* S235903

1. *At the time of service I was at least 18 years of age and not a party to this action.*

2. I served copies of the SAN FRANCISCO UNIFIED SCHOOL DISTRICT V. UNITED EDUCATORS OF SAN FRANCISCO ANSWER BRIEF

3. *a. Party served:* KAMALA D. HARRIS, ESQ.
   b. Person served: KONSTANTIN C., PERSON IN CHARGE.

4. *Address where the party was served:* OFFICE OF THE STATE ATTORNEY GENERAL
   455 GOLDEN GATE AVENUE
   SAN FRANCISCO, CA 94102

5. *I served the party:*
   a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party on: Thu., Feb. 02, 2017 at: 1:00PM, to the person(s) indicated below in the manner as provided in 1011 CCP.

   KONSTANTIN C., PERSON IN CHARGE.

   (1) **(Business)** I informed him or her of the general nature of the papers.to the person(s) indicated below in the manner as provided in 1011 CCP.

7. ***Person Who Served Papers:***
   a. KIJANA HAMILTON

   First Legal
   1138 Howard Street
   San Francisco, CA 94103
   Telephone (415) 626-3111
   Fax (415) 626-1331
   www.firstlegalnetwork.com

   Recoverable Cost Per CCP 1033.5(a)(4)(B)
   d. ***The Fee for Service was:***
   e. I am: Not a Registered California Process Server

8. ***I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.***

   Date: Fri, Feb. 03, 2017

(KIJANA HAMILTON)

Attorney or Party without Attorney:		For Court Use Only
JOHN R. YEH, SBN 154576 BURKE, WILLIAMS & SORENSEN, LLP 1503 GRANT ROAD SUITE 200 MOUNTAIN VIEW, CA 94040 *Telephone No:* *Attorney for:* Respondent	*Ref. No. or File No.:*	SUPREME COURT FILED APR 05 2017 Jorge Navarrete Clerk Deputy
Insert name of Court, and Judicial District and Branch Court: SUPREME COURT OF THE STATE OF CALIFORNIA		
Petitioner: UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA *Respondent:* SAN FRANCISCO UNIFIED SCHOOL DISTRICT		

PROOF OF SERVICE HAND DELIVERY	*Hearing Date:*	*Time:*	*Dept/Div:*	*Case Number:* S235903

1. *At the time of service I was at least 18 years of age and not a party to this action.*

2. I served copies of the SAN FRANCISCO UNIFIED SCHOOL DISTRICT V. UNITED EDUCATORS OF SAN FRANCISCO ANSWER BRIEF

3. *a. Party served:* STEWART WEINBERG, ESQ.
   b. Person served: "JANE DOE," PERSON IN CHARGE.

4. *Address where the party was served:* WEINBERG, ROGER & ROSENFELD
   1001 MARINA VILLAGE PARKWAY
   SUITE 200
   ALAMEDA, CA 94501

5. *I served the party:*
   a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party on: Thu., Feb. 02, 2017 at: 3:25PM, to the person(s) indicated below in the manner as provided in 1011 CCP.

   "JANE DOE," PERSON IN CHARGE.

   (1) **(Business)** I informed him or her of the general nature of the papers.to the person(s) indicated below in the manner as provided in 1011 CCP.

7. ***Person Who Served Papers:***
   a. MATT SANNA

   First Legal

   600 W. Santa Ana Boulevard, Suite 101
   Santa Ana, CA 92701
   Telephone (714) 541-1110
   FAX (714) 541-8182
   www.firstlegalnetwork.com

   Recoverable Cost Per CCP 1033.5(a)(4)(B)
   d. ***The Fee for Service was:***
   e. I am: (3) registered California process server
   (i) Independent Contractor
   (ii) Registration No.: 1196
   (iii) County: San Francisco

8. ***I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.***

   Date: Fri, Feb. 03, 2017

(MATT SANNA)