In the Supreme Court of the State of California

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

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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case requires the Court to decide how the exception in Unemployment Insurance Code section 1253.3, subdivisions (b) and (c) applies to substitute teachers and other non-salaried public school employees who are not called to work during a summer school session.[1] The exception disallows benefits for school employees "between two successive academic years or terms" who have a "reasonable assurance" of work in the next academic year or term. The meaning of the "between-term" exception is not clear from this text, standing alone. The Court must therefore turn to traditional tools of statutory construction.

In light of the unemployment insurance program's fundamental purpose of reducing unemployment's hardships, this exception to benefits should be read narrowly to serve—but not extend beyond—its intent. In general, educational workers are entitled to benefits "in the same amount, on the same terms, and subject to the same conditions" as employees in other fields. (§ 1253.3, subd. (a).) The between-term exception was primarily designed to prevent a windfall that would otherwise be conferred on full-time salaried teachers, who are typically paid for a full year even though they are expected to work for nine months, and further recognizes that employees on a scheduled recess (whether salaried or not) can plan in advance for such periods and, if necessary, seek other work. There is no suggestion, however, that Congress or the Legislature intended to systematically disadvantage school workers who do not fall into these categories.

Consistent with that intent, for more than 30 years, the Board has interpreted the between-term exception to allow for benefits when a district

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

fails to provide a school employee with work during a contemplated work period—defined by the agreement between the parties—regardless of the season. Applying this standard, substitute teachers and other school employees who are paid only for days worked, and who are "on call" for summer classes, are entitled to benefits if their employing district elects not to call them for work.

Necessarily, this standard requires the Board (and, on review, a court) to examine an on-call employee's individual employment agreement—including any contract and schedule—to determine whether the period for which benefits are claimed is a contemplated work period, or instead a recess. The District and the Union argue for alternative, bright-line rules. While these may appeal for their ease of application, neither is supported by the between-term exception's language, legislative intent, or the overarching policies that underlie unemployment insurance.

The District argues—and the Court of Appeal held—that the "between-term" exception is a categorical bar to benefits during a summer school session. Under this view, school employees with a reasonable assurance of work in the fall are *never* entitled to benefits during the summer months, regardless of their employment status. Contrary to the District's assertion, the plain language of section 1253.3 does not categorically preclude the Board from awarding benefits to school workers during the summer months; "academic" term is not exclusive of "summer" term. And the District's effort to recast the legislative history misses the mark, as nothing suggests that Congress or the California Legislature meant to treat school workers who serve our students during summer months differently from all other workers. This Court should reject such an interpretation, which would deprive many of the public sector's most economically vulnerable employees of the essential economic support that the unemployment insurance program is intended to safeguard.

The Union, in contrast, argues that any substitute teacher or other "paraprofessional" employee who does not receive a reasonable assurance of summer school employment—again regardless of the terms of that employee's employment agreement—is entitled to unemployment benefits. Further, according to the Union, benefits may be awarded for regularly scheduled summer vacation and recess periods when no classes are in session. Although the Union agrees with the Board on several important issues (see p. 26, below), it appears that the Union's reading of the between-term exception would allow non-salaried employees to obtain benefits during planned summer recess periods even where there is a reasonable assurance of employment in the fall, which is not the function of the unemployment insurance program.

Text, intent, and policy drive the conclusion that the between-term exception allows for benefits where a non-salaried school employee is placed "on call" by the employing district for a summer academic session, but is not called by the district due to a lack of work. In the Board's view, this case does not present a close question. But even assuming it did, the Court should give great weight to the Board's long-standing and reasonable interpretation of the between-term exception, in light of the Board's expertise and its role in administering the Unemployment Insurance Code, and because its interpretation is consistent with that of other expert agencies, including the U.S. Department of Labor.

For these reasons, the Board respectfully requests that this Court reverse the Court of Appeal's decision and remand for proper application of the between-term exception to the facts of this case.

ARGUMENT

I. THE BOARD'S LONG-STANDING INTERPRETATION OF THE AMBIGUOUS BETWEEN-TERM EXCEPTION IS REASONABLE AND ENTITLED TO GREAT WEIGHT

As the Board explained in its opening brief, the Court of Appeal erred in holding that substitute teachers and certain other public school employees who do not receive an annual salary, but instead are paid only for days worked, are categorically precluded from obtaining unemployment benefits when they are placed "on call" by their employing district for a summer school session but are not called in due to a lack of work. (AOB 13-31.) The governing statute—the between-term exception under section 1253.3, subdivisions (b) and (c)—precludes school employees from obtaining unemployment benefits "during the period between two successive academic years or terms" if they have a reasonable assurance of work in the second successive year or term. (§ 1253.3, subds. (b) & (c); see AOB 7-8.)

The statutory text is ambiguous as to whether, and under what circumstances, a summer school session is an "academic term" during which benefits are available, or is instead a period "between . . . academic years or terms" during which benefits are generally excluded. (AOB 14-16.) However, traditional tools of statutory construction, including the legislative history (AOB 16-18), purpose (AOB 23-25), and longstanding agency interpretations (AOB 18-22), demonstrate that Congress and the California Legislature intended the between-term exception to exclude benefits only during those periods when a school employee is on a contemplated recess or vacation, as determined by the agreement between the parties, where there is a reasonable assurance of continued

employment.[2] Thus, for example, if a full-time, salaried teacher is not working during the summer months, he or she is generally considered to be on a paid recess during which the between-term exception precludes benefits, even if the teacher has been placed "on call" for additional summer work. (AOB 29.) Meanwhile, if a substitute teacher who is paid only for days worked is placed on-call for a summer school session by the district, the teacher informs the district that he or she is available for work, and the district does not call that teacher due to lack of work, the teacher, if otherwise eligible, is entitled to benefits during the on-call period. (AOB 30.)[3]

The Board's interpretation of the between-term exception is entitled to weight not only because the Board has relevant expertise and is charged with implementing the Unemployment Insurance Code, but also because the Board has for more than 30 years interpreted it to preclude benefits only when an educational employee who has a reasonable assurance of work during the upcoming academic term is on a *contemplated recess*, as shown by the employee's contract, schedule, and other objective indicators of the terms of employment. (AOB 18-22; *Association of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 389-390 [weight given to agency interpretations depends on "factors relating to the agency's technical knowledge and expertise, which tend to suggest the agency has a comparative interpretive advantage over a court[,] and factors relating to the care with which the

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

[3] To be eligible for unemployment benefits, a worker must, among other things, establish sufficient wages during the base period (§§ 1275, 1280, 1281), become unemployed through no fault of his or her own (§§ 1252, 1256), and be able to work, available to work, and looking for work (§ 1253).

interpretation was promulgated, which tend to suggest the agency's interpretation is likely to be correct"].) The reasonableness of the Board's interpretation is further shown by the fact that it is consistent with that of other expert agencies. (AOB 21-22; see pp. 17-18, below.)

The Board's considered interpretation stands in contrast to those of the District and the Union. As discussed below, neither of these alternative interpretations can be reconciled with the text, purpose, and legislative history of the between-term exception or the overarching policy objectives of unemployment insurance.

II. THE DISTRICT'S INTERPRETATION—WHICH WOULD CATEGORICALLY EXCLUDE BENEFITS FOR SCHOOL EMPLOYEES DURING THE SUMMER, REGARDLESS OF CIRCUMSTANCES—IS UNSUPPORTED

A. Contrary to the District's "Plain Language" Arguments, the Text of the Between-Term Exception Is Ambiguous

As the Board argued in its opening brief (AOB 14-16), the text of section 1253.3 does not compel the categorical denial of unemployment benefits during summer school sessions, regardless of the terms of the employee's contract, schedule, and his or her "on call" status. The words of the statute do not clearly define whether, or under what circumstances, a summer school session constitutes an "academic term" during which benefits may be payable, or instead constitutes a "period between two successive academic years or terms," during which benefits are excluded where there is a "reasonable assurance" of continued employment. (§ 1253.3, subds. (b), (c).) Accordingly, the Court must look to extrinsic sources to ascertain and effectuate the Legislature's purpose in enacting the between-term exception. (AOB 13-16; accord United Educators' Opening Brief on the Merits (Union's Brief) 17.)

1. The term "academic year" as used in Education Code section 37620 does not resolve the ambiguity

In response, the District contends that the term "academic year" in section 1253.3 unambiguously means only the fall and spring semesters in a traditional school calendar, and thus that summer school sessions always occur "between" academic years or terms. (District's Answer to CUIAB's Opening Brief (District's Brief) 1, 4-6, 19-21.) While the District states summarily that the "plain language" of section 1253.3 requires this result (*id.* at pp. 1, 5-6), the District's analytical approach establishes that the text is ambiguous; the District does not rely on the plain text of section 1253.3, but rather the language of other statutes outside of the Unemployment Insurance Code.

The District primarily relies on Education Code section 37620, which establishes a minimum number of school days for schools with year-round compulsory schedules. As a threshold matter, there is no indication that the Legislature relied on Education Code section 37620 to define an "academic year" for purposes of section 1253.3 of the Unemployment Insurance Code. Rather, the California Legislature imported the phrase "between . . . academic years or terms" directly from the Federal Unemployment Tax Act (FUTA). (AOB 5-8; *Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 844 (*Russ*).) Thus, it is FUTA and the authorities interpreting it—not the California Education Code—that provides interpretive guidance. (See AOB 16-18.)

And, in any event, the District's argument that "academic year" as used in Education Code section 37620 excludes the summer is incorrect. (District's Brief 4, 19-21, 27-29.) Section 37620 does not define "academic year" or speak to whether, or under what circumstances, a summer session may be part of an "academic year." (See Union's Brief 23-25.) Instead, it establishes a minimum number of school days in a year-round school's

academic calendar, requiring that "schools and classes shall be conducted for a total of no fewer than 175 days during the academic year." (Ed. Code, § 37620.) It does not specify when those 175 days must occur or when the academic year must begin or end, nor does it preclude a district from holding classes for more than 175 days. And, to be clear, section 37620 governs only "continuous school program[s]"—i.e., year-round schools—and accordingly does not apply to school districts that follow traditional academic calendars (like the District here). (Ed. Code, § 37600; accord Union's Brief 23.)

2. The District's additional asserted "textual" arguments also lack merit

The District also contends that the term "academic year" cannot include summer school because, under the Education Code, a District is not obligated to provide a summer academic session, students generally are not obligated to attend, summer school teaching is not creditable towards attaining teacher tenure, and there is no statutory right to summer school employment based on working during the regular school year. (District's Brief 20-21, 28-29, citing Ed. Code, §§ 37620, 41420, 48200, 44913, 44932, 44949, 44954, 45103, 45113, 45117.) The District effectively argues that the phrase "between . . . academic years or terms" should be read to mean "between [*compulsory*] . . . academic years or terms."

The Court should reject the District's request to add a limitation that finds no basis in the plain language of section 1253.3. The fact that summer school sessions are often different in some respects from fall and spring semesters does not indicate that the Legislature intended to *categorically preclude* unemployment benefits during such summer

sessions, regardless of the circumstances of employment.[4] For a non-salaried substitute teacher or non-professional employee, being "on call" for a summer session is not materially different from being "on call" for a fall or spring semester, and such employees are generally entitled to benefits (if otherwise eligible) if they are "on call" but do not receive work during a fall or spring term. (§§ 100, 1251, 1252, 1253, 1253.3, subd. (a), 1256; *In re Linda A. Johnson* (1977) CUIAB Case No. 77-5385, Precedent Benefit Decision P-B-373 at p. 3 (*Johnson*).)[5] In that circumstance, the employee may reasonably forgo other employment opportunities to be available for the district during the "on call" period contemplated by contract. There is nothing in the statutory text that supports, much less compels, treating such employees differently during summer school sessions.[6]

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[4] Additionally, the District's one-size-fits-all model fails to account for the practical reality that individual employees' contracts and work schedules can vary significantly, even within the same district or school. (AOB 28-29 & fn. 19.)

[5] *Johnson* is available at <http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb373.pdf> [as of March 22, 2017]. Moreover, the distinctions cited by the District do not typically apply to substitute teachers, as substitute teaching during any term is generally permissive rather than mandatory (MJN, Exh. K, p. 162), substitute teachers generally do not receive tenure (Ed. Code, §§ 44929.21, subd. (b), 44953), and substitute teachers generally do not have a statutory right to employment during any part of the school year (*id.*, § 44954).

[6] The Board agrees that summer school sessions are different from regular academic terms, in that their terms vary greatly from district to district, and this is reflected in employee contracts. This highlights the problem with the Union's view that summer school generally is an academic term for substitute teachers and paraprofessional employees. (Union's Brief 19-26.) The determination of whether a summer session is part of an academic term requires a fact-based inquiry based on the contract-based expectations of the district and the employee.

Finally, the District contends that the Board's interpretation is barred because the statutes do not use the term "recess." (District's Brief 29.) This argument is a red herring. The statutory language does not clearly define whether, or under what circumstances, a summer school session constitutes a "period between two successive academic years or terms" during which benefits are excluded. (§ 1253.3, subds. (b), (c); see AOB 14-16.) The Board has simply used the term "recess" as a shorthand for this ambiguous phrase. Whether the Board's interpretation of the statute is supported must be judged according to the normal rules of statutory construction. And when those rules are applied, as discussed in the Board's opening brief and below (AOB 16-25; Part II.B, below), the Board's interpretation holds.

B. The Intent of the Between-Term Exception Is to Preclude Benefits Only Where an Educational Employee Is on a Contractually Contemplated Recess

1. The District's attempts to recharacterize the legislative history fail

As the Board argued in its opening brief, FUTA's legislative history demonstrates that, in enacting the between-term exception, Congress intended to preclude educational employees who have a "reasonable assurance" of continued employment from collecting unemployment benefits only during contemplated recess or vacation periods, as determined by the employment arrangement between the employee and the district. (AOB 16-18; accord Union's Brief 16.) Congress's primary concern was preventing regular salaried teachers from obtaining windfall benefits during scheduled recess periods for which they are already compensated. (*Ibid.*; see also Sen.Rep. No. 91-752, 2d Sess., p. 16 (1970) [Congress's recognition that many teachers are paid an annual salary but have a work period of less than 12 months]; Remarks of Sen. Long, 122 Conf. Rec.

33285 (daily ed. Sept. 29, 1976) [similar].) The District responds by pointing to a few portions of the legislative record that, in its view, support its position. (District's Brief 13-15, 18-19.) But none supports the conclusion that, in adopting the between-term exception, Congress intended to categorically exclude non-salaried school workers from collecting benefits during the summer months.

For example, the District argues that the testimony of Dr. Arthur M. Ross, along with the remarks of Senators Javits and Long, demonstrate that Congress adopted the between-term exception to limit the award of benefits to those who are "genuinely unemployed." (District Brief 13-15.) The District further suggests that no school worker with a reasonable assurance of fall employment can experience "[b]ona [f]ide [u]nemployment" during the summer. (*Id.* at p. 13.) But these statements must be read in context. As noted, the exception was primarily motivated by a concern that full-time salaried teachers would otherwise be able to supplement their salaries by collecting unemployment during the summer, for which they were already compensated, as well as a recognition that employees on planned recess or vacation periods can plan for those breaks in advance. But neither Dr. Ross's testimony nor the Senators' remarks suggest that Congress considered the situation of non-salaried, on-call school workers, and intended to categorically prohibit them from collecting benefits during the summer months. To the contrary, their focus on whether a person is "genuinely unemployed" is consistent with the Board's conclusion that an award of benefits depends on the terms of employment between the worker and the district and the reason for the worker's unemployment, not the time of year in which any lack of work happens to occur. (AOB 16-22, 28-31.)[7]

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[7] The District also contends that "genuine unemployment" should be defined as being "unemployed in the sense of being attached to the general (continued...)

The District also argues that the "legislative intent behind" FUTA "clearly contemplates that the academic year should exclude the summer." (District's Brief 18-19.) In support, it cites *Russ*, *supra*, 125 Cal.App.3d 834, and a statement made by Representative Corman during the floor debate over FUTA. (District's Brief 18-19.) Neither authority, however, supports the District's assertion that the between-term exception always requires the Board to deny benefits during the summer months. *Russ* did not interpret the phrase "between two successive academic years or terms," but instead interpreted the meaning of the phrase "reasonable assurance." (*Russ*, *supra*, 125 Cal.App.3d at pp. 844-847 [holding that a "reasonable assurance" of employment may consist of a statement of the district's expectations that the worker will be reemployed in the fall, and need not be an enforceable agreement]; § 1253.3, subd. (b); accord Union's Brief 28.)[8] *Russ* recognizes that the between-term exception was enacted to preclude

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(...continued)
labor force which is seeking other employment on a permanent basis." (District's Brief 15, quoting *Board of Education v. Unemployment Ins. Appeals Bd.* 160 Cal.App.3d 674, 690, fn. 7 (*Long Beach*), internal quotation marks omitted.) But substitute teachers and other on-call employees may receive benefits even if they are not seeking other employment on a permanent basis. For example, even during a fall or spring semester, such employees are entitled to benefits (if otherwise eligible) if they are on call, available for work, and not called in. (§§ 100, 1251, 1252, 1253, 1253.3, subd. (a), 1256; *Johnson*, *supra*, P-B-373 at p. 3; see also AOB 30-31.)

[8] The District sometimes refers to the between-term exception as the "reasonable assurance rule." (See, e.g., District's Brief 6, 8, 9, 12, 13.) However, the meaning of the "reasonable assurance" requirement is not at issue here, and is just one of several elements required for the between-term exception to apply: the employee must be an educational employee covered by section 1253.3, subdivisions (b) or (c), must be "between . . . academic years or terms," and must have a "reasonable assurance" of employment during the subsequent academic year or term. (§ 1253.3, subds. (b) & (c).)

school workers from collecting benefits "during periods of summer *recess*." (*Russ*, *supra*, 125 Cal.App.3d at p. 843, italics added.) Similarly, Representative Corman's statement clarifies that the between-term exception prohibits payment of benefits "during the summer, *and other vacation periods*." (122 Cong. Rec. 35132, italics added.) And in common usage, a "vacation" is a period during which employer and employee agree that employee will not be working; it does not include a period where, by agreement, the employee is available to work and is standing ready to be called in by the employer. These excerpts lend further support to the Board's interpretation that the between-term exception precludes otherwise eligible non-salaried, on-call educational employees from collecting benefits only during contemplated breaks that do not require the worker to be on call.

2. Any minimal "variances" in the Board's longstanding interpretation of the exception are explained by the facts of individual cases

The Board has for more than 30 years interpreted the between-term exception to preclude benefits only when an educational employee is on a contractually contemplated recess. (AOB 18-22.) The District responds that the Board's interpretation has been inconsistent. (District's Brief 40-50.) But the asserted inconsistencies are inconsequential—variations in language and in approach that are not surprising given the fact-based nature of the inquiry. A fair reading of the Board's decisions—both precedential and non-precedential—establishes a longstanding and consistent application of the between-term exception.

The District first argues that there have been "variances" in whether the Board has required a "loss of customary summer work" for summer benefits, or instead required only an "inability to find summer work." (District's Brief 40-42, 47-50.) In support, the District parses the language

of a number of fact-specific Board decisions and asserts that selected phrases "var[y]" from language appearing in *In re Alicia K. Brady* (2013) CUIAB Case No. AO-337099, Precedent Benefit Decision No. P-B-505 (*Brady*), the precedent decision rejected by the Court of Appeal. (Slip opn. 18-20.)[9] As an initial matter, this exercise is of limited value, because the decisions that the District relies on are *non-precedential* decisions. Non-precedential decisions apply only in their own particular case, and may not be relied on as authority in other administrative cases. (See Gov. Code, § 11425.60, subd. (a); see also § 409.) These decisions require the approval of only two Board members, rather than the majority of the Board. (§ 409.) Because of their limited reach, as a practical matter, non-precedential decisions may be reviewed by Board members primarily for the correctness of the result, and not necessarily for the precision of the particular language used in discussing the applicable legal standards.

In any event, the District's assertion that some of the Board's decisions have awarded summer benefits to a school employee based on a mere failure to find summer work is wrong. Neither *Brady* nor any other decision—precedential or otherwise—reaches that result. Instead, the Board has consistently interpreted the between-term exception to preclude benefits only during contemplated recess or vacation periods, as determined by the parties' employment agreement. (See, e.g., *Brady*, *supra*, P-B-505; *In re Arthur A. Calandrelli* (2012) CUIAB Case No. AO-278558 (unpublished) (*Calandrelli*), available at 3 CT 808.) And it has uniformly held that benefits are allowed when an employee loses work during contractually contemplated work periods, including summer, through no fault of the employee. (AOB 18-20; *Brady*, *supra*, P-B-505; *In re Dorothy C. Rowe* (1981) CUIAB Case No. 79-6736, Precedent Benefit Decision P-

[9] *Brady* is available at 3 CT 990.