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In the Supreme Court of the State of California

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

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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

(...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.

B-417; *In re Vincent J. Furriel* (1980) CUIAB Case No. 79-6640, Precedent Benefit Decision No. P-B-412.)[10]

Further, any "variance" among these decisions is immaterial. For example, the District points to a few terminological differences used by the Board in various non-precedential decisions, noting that the Board's inquiry has focused alternatively on an employee's "reasonable expectation," "loss of . . . customary work," or "work history within the same period in the previous year." (District's Brief 49.) But these variations are simply different iterations of the same fundamental legal inquiry: whether an employee is not working because he or she is on a contemplated recess, as shown by contract, schedule, or other objective indicia of the terms of employment.

Thus, for example, the Board's precedent decision in *Brady* held that an employee who is placed "on call" for a summer session is not on recess, and accordingly is allowed to obtain benefits (if otherwise eligible) if not called in during that session. (3 CT 998.) Similarly, *Calandrelli* (which is non-precedential) held that a substitute teacher who was *not* placed "on call" for a summer session was *not* entitled to benefits, as that employee "stopped work due to the summer recess" and the summer session "was not a term *for this claimant*." (3 CT 809, 816, italics added.) As it did in *Brady*, the Board in *Calandrelli* looked to the claimant's specific employment arrangement to determine how to treat the summer session for purposes of the between-term exception. (3 CT 810.)

The other decisions cited by the District—all of which are non-precedential—are also consistent with the Board's longstanding

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[10] *Rowe* is available at <http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb417.pdf> [as of March 22, 2017]; *Furriel* is available at <http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb412.pdf> [as of March 22, 2017].

interpretation of the between-term exception. In *In re Stephen M. Dolgin* (2004) CUIAB Case No. AO-89918 (unpublished), the Board allowed summer benefits for substitute teachers who were "on a summer substitute list" and otherwise eligible. (District's MJN in Court of Appeal, Exh. B, p. 51.) In *In re Linda Weil* (2009) CUIAB Case No. AO-179906 (unpublished), the Board denied summer benefits where the claimant, who had worked as a substitute and temporary teacher and librarian during the regular school year, "did not have a reasonable expectation of work" during the summer. (District's MJN in Court of Appeal, Exh. C, p. 101.) The Board recognized "a distinction between school employees who generally know they will not be working during prescheduled vacations and those who have some expectation of work when the fall and spring terms are over." (*Id.*, Exh. C, p. 99.)

Similarly, in *In re Jilma Solorzano* (2010) CUIAB Case No. AO-209182 (unpublished), the Board denied summer benefits where a school employee had "no expectation, reasonable or otherwise, of work" in the summer (District's MJN in Court of Appeal, Exh. D, p. 122), explaining that "school employees are generally not entitled to receive unemployment benefits during a summer recess unless they have some reason to expect that they would be working during that period" (*id.*, Exh. D, p. 109). Indeed, the Board in *Solorzano* acknowledged "Congress' intent to prohibit payment of unemployment benefits to salaried personnel during 'vacation' or 'recess' periods" (*id.*, Exh. D, p. 115), and expressly stated that the between-term exception is not a "blanket bar" to summer term benefits (*id.*, Exh. D, p. 119). Finally, in *In re Mark J. Fiore* (2012) CUIAB Case No. AO-277576 (unpublished), the Board agreed that the claimant was entitled to benefits during the summer of 2011 because he had a "reasonable expectation of summer work" during that period. (2 CT 382.) But—consistent with *Brady*—it reversed the administrative law judge's award of

benefits for the recess period between the end of the summer session and the start of the fall term. (*Ibid.*)

The Union also argues that the Board has "taken two different positions," noting that in the underlying administrative proceedings the Board granted benefits to those claimants who "'had a reasonable expectation of work'" based on prior summer work, but concluded later in *Brady* that benefits were awardable to employees who were "on-call" during the summer session. (Union's Brief 36-37, citing 2 CT 378, 3 CT 898.) As the Union recognizes, however, both articulations "serve the same goal" and ultimately ask the same legal question: whether an employee is "not working during the summer session because of lack of work or because of a summer vacation." (Union's Brief 37; see also pp. 4-6, above.)[11]

3. The Board's interpretation is consistent with that of the Employment Development Department and the U.S. Department of Labor

In addition, the District's arguments fail to account for the fact that the Board's interpretation is consistent with the longstanding views of the Employment Development Department (EDD) and the U.S. Department of Labor—another ground for affording it weight. (AOB 21-22.) The District does not address that the EDD, like the Board, has interpreted the between-term exception to preclude benefits only during "school recess" periods. (See *ibid.*; see also Employment Development Dept., Benefit Determination Guide, Miscellaneous MI 65 School Employee Claims, ¶ IV.F ["[I]f the claimant is scheduled to work 'on call' during the summer

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[11] Once this Court clarifies the operation of the between-term exception, on remand the Board may need to consider additional facts in determining whether each claimant in this case was on a contractually contemplated recess. (See AOB 29-30, fn. 20.)

recess period, but does not get called to work, the claimant is not in a recess period. The reason the claimant did not work is not due to the recess period, but due to lack of work during the summer school session"].)[12]

The Board's interpretation is also consistent with the Department of Labor's view that an "academic term" under FUTA may include "nontraditional periods of time when classes are held, *such as summer sessions*." (U.S. Dept. of Labor, Employment & Training Admin., *Benefit Standards of Conformity Requirements for State UC Law, Between/Within Terms Denial* at p. 3 (2015 update) (*Benefit Standards*), italics added; see also AOB 22.)[13] And, contrary to the District's suggestion (District's Brief 22), the Department of Labor's December 22, 2016 Unemployment Insurance Program Letter (UIPL 5-17) supports the Board's view, not the District's. Specifically, in the context of discussing what constitutes a "reasonable assurance" of work in a subsequent academic term, the Program Letter provides one example of when a summer session may constitute an "academic term," such as when "the college has a 12-month academic year, consisting of four quarters." (District's MJN, Exh. A, pp. 10-11.) The District posits that this means summer may be an "academic term" *only* under these specific circumstances. This is not a fair reading of the Program Letter. There is nothing in the Program Letter to suggest that by providing one particular example in the context of addressing a different issue (reasonable assurance), the Department of Labor intended to override its own guidance document and limit the circumstances in which a summer school session can constitute an "academic term." (District's Brief 22,

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[12] (<http://www.edd.ca.gov/uibdg/Miscellaneous_MI_65.htm> [as of March 22, 2017].)

[13] *Benefit Standards* is available at <https://workforcesecurity.doleta.gov/unemploy/conformity-benefits.asp> [as of March 22, 2017].

quoting District's MJN, Exh. A, pp. 10-11.) Further, this example shows that the Department of Labor, like the Board, determines whether summer school constitutes an "academic term" by looking to the individual employee's contract and schedule, not the mere fact that the unemployment happens to occur during the summer. (See District's MJN, Exh. A, pp. 10-11.)

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

The District's interpretation of the between-term exception is also at odds with the Unemployment Insurance Code's "fundamental purpose" of "reduc[ing] the hardship of unemployment." (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 558; see also AOB 23-25.) Unemployment compensation "provid[es] benefits for persons unemployed through no fault of their own," and is "designed to 'reduce involuntary unemployment and suffering caused thereby to a minimum.'" (*Gilles v. Department of Human Resources Development* (1974) 11 Cal.3d 313, 316, quoting § 100.) Unemployment benefits "provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." (*California Human Resources Department v. Java* (1971) 402 U.S. 121, 131-132.) "Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services." (*Id.* at p. 132.)

To achieve these goals, this Court has long recognized that "[t]he provisions of the Unemployment Insurance Code must be liberally construed" in favor of benefits, and benefit "denial" provisions must be

construed narrowly. (*Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 584; see also *United States v. Silk* (1947) 331 U.S. 704, 711-712, abrogated on other grounds as recognized in *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324-325; *Brady*, *supra*, P-B-505 at p. 7; U.S. Dept. of Labor, Unemployment Insurance Program Letter (UIPL) 43-93 (Sept. 30, 1994).)[14] The Board's narrow construction of the between-term exception helps achieve these statutory goals. (See AOB 23-25; accord Union's Brief 14-15, 18-19.)

Further, the between-term exception is an exception to the general mandate that educational employees must receive equal treatment to employees in other fields of work with respect to unemployment benefits. (§ 1253.3, subd. (a).) And in most other fields of work, "on call" workers are generally eligible for unemployment benefits when they are "on call" but are not called to work through no fault of their own. (AOB 31; §§ 100, 1251, 1252, 1253, 1253.3, subd. (a), 1256; see also *Brady*, *supra*, P-B-505 at p. 9; *Johnson*, *supra*, P-B-373 at p. 3.)

The District makes a number of highly technical, formalistic arguments to interpret section 1253.3's benefit denial provisions as broadly as possible. But the District makes no attempt to reconcile its interpretation of the between-term exception with the Unemployment Insurance Code's core purpose of reducing the hardship of unemployment. Nor could it. The District's position would categorically eliminate unemployment benefits during the summer months for a group of employees who are among the most economically vulnerable school employees. (See AOB 24-25.) That interpretation would undermine the fundamental purpose of the Unemployment Insurance Code and should be rejected.

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[14] UIPL 43-93 is available at <https://wdr.doleta.gov/directives/corr_doc.cfm?docn=194> [as of March 22, 2017].

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

As the Board set forth in its opening brief, the out-of-state authorities relied on by the Court of Appeal are neither on point nor persuasive, and the Board's interpretation of the between-term exception is consistent with numerous out-of-state authorities. (AOB 25-28.) The District's response (District's Brief 29-40) makes no showing to the contrary.

The District identifies a number of out-of-state cases that denied summer benefits to school workers in different contexts. None of those cases, however, supports the District's view that the between-term exception creates a blanket exclusion of summer benefits for all educational employees regardless of the terms of their individual employment agreements, including substitute teachers and per-diem employees who are placed "on call" for a summer session. Indeed, the District acknowledges that many of the cases on which it relies involve full-time or regular employees, rather than substitute teachers or other on-call workers. (District's Brief 29-33; see *In re Lintz* (N.Y.App.Div. 1982) 89 A.D.2d 1038, 1039; *Campbell v. Department of Employment Security* (Ill.App. 1991) 570 N.E.2d 812, 818-819; *Friedlander v. Employment Div.* (Or.Ct.App. 1984) 676 P.2d 314, 316; *Herrera v. Industrial Claim Appeals Office of the State of Colorado* (Colo.Ct.App. 2000) 18 P.3d 819, 820; *Doran v. Department of Labor* (Ill.App. 1983) 452 N.E.2d 118, 119-120.)

Further, the only out-of-state cases the District cites involving on-call employees explained only why *full-time salaried teachers* are precluded from obtaining summer benefits, and then simply extended that rule to non-salaried per-diem employees without addressing or analyzing the material differences between the two types of workers. (District's Brief 30-31, 34-35; AOB 26; *Harker v. Shamoto* (Hawaii Ct.App. 2004) 92 P.3d 1046, 1053-1055; *In re Alexander* (N.Y.App.Div. 1988) 136 A.D.2d 788, 789.)

The District contends that the result in these cases should extend to on-call per-diem employees because the statutes "do not articulate different rules for eligibility" for such workers. (District's Brief 29-30.) But the reasons for precluding summer benefits for full-time salaried workers who are on contemplated recess simply do not apply to non-salaried per-diem employees during periods in which they are placed "on call" and stand ready to work. As noted, the exception was designed to prevent full-time, salaried teachers from gaining a windfall, and it recognizes that an employee can, if he or she chooses, seek other work during a planned recess (whether paid or not). (See *Harker v. Shamoto*, *supra*, 92 P.3d at pp. 1053-1055 [provision intended to insulate against benefit claims "during vacation, semester-break, or sabbatical leave periods when individuals are paid by but do not perform services for the [educational] institutions"]; *Chester Community Charter School v. Unemployment Comp. Bd. of Review* (Pa.Commw.Ct. 2013) 74 A.3d 1143, 1145 [benefits precluded during breaks "because [school employees] are able to anticipate those nonworking periods and, therefore, are not truly unemployed or suffering from economic insecurity"].)[15]

The District's attempts to distinguish those out-of-state authorities which include persuasive analysis and support the Board's interpretation

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[15] Nor does the District address that several of these out-of-state cases are construing materially different statutory terms than FUTA or section 1253.3, for example, statutes that prohibit benefits during the period between two "*regular* terms," rather than between two "*academic* . . . terms." (AOB 26; *Harker v. Shamoto*, *supra*, 92 P.3d at p. 1048; *Friedlander v. Employment Div.*, *supra*, 676 P.2d at p. 316; *Doran v. Department of Labor*, *supra*, 452 N.E.2d at p. 119, fn. 1; *Campbell v. Department of Employment Security*, *supra*, 570 N.E.2d at pp. 818-819.) Out-of-state cases holding that summer is not a *regular* term under those states' statutes do not speak to whether summer may be an *academic* term under FUTA and California law.

are unavailing. (District's Brief 35-40.) In each case, the court applied the same fundamental rule, consistent with the Board's interpretation, that the application of the between-term exception turns on the nature of the employment agreement and the *reasons* an employee is not working—i.e., whether the employee is on a contractually contemplated recess, or has instead lost work during a contractually contemplated work period. (AOB 26-28; see *Evans v. Employment Security Dept.* (Wash.Ct.App. 1994) 866 P.2d 687, 688-689 [benefits allowed where "summer is an academic term" for that particular school]; *Thomas v. State Dept. of Employment Security* (Wash.Ct.App. 2013) 309 P.3d 761, 765 & fn. 3 [benefits denied where summer is not part of the academic year for that particular institution]; *Chester Community Charter School v. Unemployment Comp. Bd. of Review*, *supra*, 74 A.3d at p. 1145 [summer benefits allowed where school employee was temporarily laid off prior to end of spring term]; *McKeesport Area School Dist. v. Commonwealth of Pennsylvania* (Pa.Commw.Ct. 1979) 397 A.2d 458, 462 [benefits allowed where lockout pushed back the start of the fall semester]; *Chicago Teachers Union v. Johnson* (7th Cir. 1980) 639 F.2d 353, 356 [benefits allowed where district unexpectedly ended its spring term three weeks early]; *Baker v. Department of Employment & Training Bd. of Review* (R.I. 1994) 637 A.2d 360, 363 [noting distinction between "school employees who meet the criteria for classification as 'unemployed' and those that are on summer or holiday recess"].)

The weight of out-of-state authority is consistent with the Board's interpretation of section 1253.3, and no case provides any reasoned support for the District's view that the between-term exception creates a blanket exclusion of benefits between the spring and fall semesters, regardless of the circumstances.

C. The District's Other Arguments Lack Merit

The District presents several additional arguments in support of the Court of Appeal's decision. None has merit.

First, the District argues that the between-term exception is not limited to regular full-time teachers, but applies to substitute teachers as well. (District's Brief 7-13.) But the Board does not dispute that the exception may apply to substitute teachers under appropriate circumstances. The relevant question is what those circumstances are, particularly with respect to summer school sessions. The tools of statutory construction show that Congress intended the exception to apply only when school workers—including substitute teachers—are not working due to a recess or vacation contemplated by the terms of employment. (See pp. 4-6, above; see also AOB 17-18.)

The District additionally suggests that the Board's position would require awarding teachers a "'full year's income'" even though "'they have agreed to work and be paid for only 41 weeks of each year.'" (District's Brief 12, quoting slip opn. 19.) But most substitute teachers are not paid for a full year. Instead, typically they receive compensation only for those days on which they actually work. (See, e.g., MJN, Exh. K, pp. 155, 160-165.) And non-salaried substitute teachers and other per-diem workers who are placed "on call" for a summer session have generally agreed to work and will earn wages, if called—and in many cases, have forgone other work during that period. When such per-diem employees are placed "on call" but not given work, unemployment benefits are not a windfall but rather serve the precise purpose for which such benefits are intended—to "reduce the hardship of unemployment." (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.*, *supra*, 59 Cal.4th at p. 558.)

The District also asserts that there is "only one exception" to the "rule of ineligibility" during the summer months, which is an allowance for

retroactive summer eligibility if an employee is not actually given an opportunity to return in the fall. (District's Brief 15-17.) That is incorrect. As discussed above, there is no general "rule of ineligibility" during the summer months. (See Parts I, II.A, & II.B, above.) In any event, contrary to the District's repeated assertions (District's Brief 2, 15-17, 45), substitute teachers who are precluded from benefits under the between-term exception are *not* entitled to retroactive benefits if they are not offered work in the second academic year or term. The statutory provision allowing such retroactive benefits does not apply to teachers covered by section 1253.3, subdivision (b), but instead applies only to "other employees" covered by section 1253.3, subdivision (c). (§ 1253.3, subds. (b), (c), & (i).)

Finally, the District contends that *always* treating summer as an academic term would lead to administrative problems, requiring different "reasonable assurance" notices between spring and summer, and between summer and fall. (District's Brief 23-24.) But that argument addresses the Union's position, not the Board's. The Board does not contend that summer school is generally, or always, an academic term. Instead, its position is that a summer session's treatment under the between-term exception is necessarily contextual, and that the summer school period may be part of an "academic term" for those employees who lose work contemplated by the objective terms of their employment during that time period.

D. Non-Salaried Employees Who Are Placed "On Call" During a Summer Academic Session but Not Called to Work Are Not on Recess, but Instead Are Unemployed

Substitute teachers and other non-salaried, on-call workers who are placed "on call" during a summer session are not on a planned recess, but are instead generally expected by the district to be available for work. (AOB 28-31.) For such employees, a summer school session is no different

than any other academic term—they are expected to be ready to work when needed, and often forgo other employment opportunities to make themselves available. (*Ibid.*) And when they are not called in or not given sufficient work, they are genuinely unemployed through no fault of their own. (*Ibid.*)

The District does not address this point. It argues that whether an employee is on "recess" is irrelevant because section 1253.3 creates a blanket exclusion of benefits during the summer months for educational employees who have a reasonable assurance of fall work. (District's Brief 2-3, 29.) But as explained above, that contention is incorrect. (See Parts I, II.A, & II.B, above.) The between-term exception requires a contextual inquiry that focuses on the objective terms of employment, including an employee's contract and schedule. (*Ibid.*) Section 1253.3 does not preclude substitute teachers or classified per-diem employees who are placed "on-call" during summer school sessions from obtaining benefits during those weeks in which they are "on call" but not called in. (AOB 28-31.) Once this Court clarifies the governing standard, on remand the Board may need to consider additional facts to determine whether each claimant was on a contemplated recess.

III. The Union's Interpretation—That Benefits Must Be Awarded to Any Substitute or Non-Professional Worker Who Is Not Given a Reasonable Assurance of Work During the Summer Session—Is Also Incorrect

The Union's opening brief is consistent with the Board's in several material respects. The Union agrees that the question presented by this appeal cannot be resolved by section 1253.3's plain language. (Compare AOB 14-16, with Union's Brief 17.) It also concurs with the Board's conclusion that Congress's purpose in enacting the between-term exception under FUTA was to ensure that benefits "be denied during a vacation

period." (Union's Brief 16; compare AOB 16-18.) It agrees that the between-term exception must be construed narrowly, in order to achieve the Unemployment Insurance Code's purpose of reducing the hardship of unemployment. (Compare AOB 23-25, with Union's Brief 14-15, 18-19.) And it rejects the suggestion that the Education Code defines an "academic year" or an "academic term" for purposes of section 1253.3. (Compare AOB 13-15, with Union's Brief 23-27.)

But the Board does not share the Union's view that summer school is necessarily an "academic term" for all substitute teachers and non-professional workers, regardless of circumstances (Union's Brief 19-26, 33-35), or that because the claimants in this case did not receive a "reasonable assurance" of employment for the summer "academic term," they are entitled to benefits for the entire period between the end of Spring 2011 semester and the start of Fall 2011 semester. (Union's Brief 34.)

The Union's interpretation is at odds with the intent of the unemployment insurance benefits program, which is to lessen hardship in times of unexpected unemployment. (See Part II.B.4, above.) The Union's interpretation, as the Board understands it, would require the Board to provide benefits precisely during recess periods that are fully contemplated by the parties, allowing workers to seek additional employment if they so choose. (See Parts I, II.A, & II.B, above.)[16]

This Court should thus reject both the District's and the Union's interpretations. Instead, as discussed in the Board's opening brief and

[16] The Union suggests that its interpretation of section 1253.3 applies only to "substitute teachers and paraprofessional employees," and not to full-time salaried professionals. (Union's Brief 1, 14-17, 33.) But that view cannot be reconciled with the text of the between-term exception, which states that it applies to "*any* individual" who performs services for an educational institution. (§ 1253.3, subds. (b) & (c), italics added.)

above, the Court should hold, consistent with the Legislature's and Congress's intent, that the between-term exception precludes benefits for non-salaried, on-call school employees during—and only during—contractually contemplated recess periods.

CONCLUSION

This Court should reverse the Court of Appeal's decision and hold that the between-term exception (§ 1253.3, subds. (b) & (c)) does not preclude non-salaried, on-call substitute teachers and other non-salaried, on-call classified employees from being eligible for unemployment benefits during a summer term, where such employees are placed on call for that term but are not called in to work. It should further remand the matter for additional proceedings consistent with its opinion.

Dated: March 23, 2017

Respectfully submitted,

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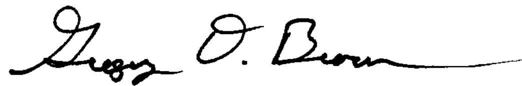

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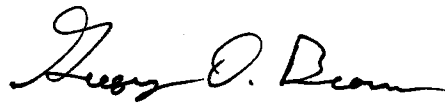
CERTIFICATE OF COMPLIANCE

I certify that the attached CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,056 words.

Dated: March 23, 2017

XAVIER BECERRA
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 23, 2017, I served the attached **CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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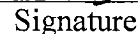
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 23, 2017, at San Francisco, California.

Anh Ho	
Declarant	Signature

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