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.	

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 CONSOLIDATED ANSWER TO THE BRIEFS OF RESPONDENT'S AMICI CURIAE

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INTRODUCTION

The issues presented by this appeal concern whether section 1253.3, subdivisions (b) and (c), of the Unemployment Insurance Code—the between-term exception—precludes non-salaried educational employees who are placed on-call during a summer session from collecting benefits when they are not called in due to a lack of available work.[1] Amici California School Boards Association's Educational Legal Alliance (ELA) and Oakland Unified School District (OUSD) support respondent San Francisco Unified School District, arguing that the plain language of the exception *categorically* requires the denial of benefits during any period between the end of the spring semester and the start of the fall semester, where a school employee has a reasonable assurance of fall employment. As petitioner California Unemployment Insurance Appeals Board argued in its opening and reply briefs, that interpretation is incorrect.[2]

There is no unambiguous or plain meaning of the "period between two successive academic years or terms" as applied to summer school, and thus the Court must look to traditional tools of statutory interpretation to ascertain and effectuate the Legislature's intent. Those tools—in particular, the legislative history, statutory purpose, and longstanding agency interpretations—establish that the between-term exception is not a blanket prohibition on unemployment benefits for school workers during the summer months, but rather precludes benefits only during planned recess or

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

[2] This brief does not respond to the amicus brief of the American Federation of Teachers, AFL-CIO, submitted in support of petitioner United Educators of San Francisco, as the arguments it makes are generally consistent with of the Board's interpretation.

vacation periods, as determined by the employee's contract and schedule, whenever such periods may occur. (Board's Opening Br. 16-28.)

Significantly, neither ELA nor OUSD argue that their interpretation is supported by section 1253.3's legislative history or the unemployment benefits program's overall purpose of reducing the hardships of unemployment. Instead, they rely on strained textual inferences and authorities extrinsic to the unemployment benefits context. And their policy arguments in support of their interpretation cannot be reconciled with the central purpose of the unemployment insurance program—reducing the hardship of unemployment. Indeed, the categorical rule they advance would undermine that core purpose by precluding benefits for a large number of economically vulnerable school employees throughout the summer months, even if they lose work through no fault of their own during a scheduled work period.

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. SUMMARY OF THE PARTIES' POSITIONS

This case involves complex issues of statutory interpretation on which the parties have taken three distinct positions. Many of the arguments raised by ELA and OUSD either misstate the Board's interpretation, or fail to appropriately distinguish between the different interpretations taken by the Board and the Union. Accordingly, to help clarify the parties' positions and how they relate to the arguments raised by respondent's amici, the Board provides the following summary of the parties' positions.

A. The Board's Position

The Board interprets the between-term exception to preclude unemployment benefits only where a school employee is not working due to a planned recess or vacation period, as determined by the employee's contract and schedule. (Board's Opening Br. 16-28; Board's Reply Br. 4-6.) Thus, when a non-salaried substitute teacher or classified employee is placed "on call" by his or her district for a summer school session, but is not called to work through no fault of his or her own, that employee is not on recess, but instead has lost work during a scheduled work period. Under such circumstances, the between-term exception does not preclude that employee from collecting unemployment benefits. (Board's Opening Br. 28-31.)

This conclusion follows from ordinary principles of statutory interpretation. The statute provides that "unemployment compensation benefits ... are payable" to employees of educational organizations "in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis" of other services, "except as provided by this section." (§ 1253.3, subd. (a).) The exception relevant here provides that, "with respect to service in an instructional, research, or principal administrative capacity for an educational institution," these benefits

> are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms ... 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.

(§ 1253.3, subd. (b); see also *id.*, subd. (c) [providing a similar exception that applies to educational employees working "in any other capacity"].) As the Board explained in its principal briefs, the plain language of

subdivisions (b) and (c) is ambiguous as to whether, and under what circumstances, a summer school session constitutes a "period between ... academic years or terms" (in which case benefits are generally precluded), or instead constitutes an academic term within an academic year (in which case benefits are generally available to otherwise eligible employees). (Board's Opening Br. 14-16; Board's Reply Br. 4, 6-10.) Because the text does not provide an unambiguous answer, this Court must look to extrinsic tools of statutory interpretation.

Here, those familiar tools establish that Congress intended the between-term exception to preclude benefits only when an employee is on a scheduled recess, and not to impose a blanket prohibition on unemployment benefits during the summer months. The legislative history shows that Congress's primary concern was preventing salaried employees from collecting windfall unemployment benefits during planned recess periods, for which they are already fully compensated. Further, the between-term exception recognizes that employees on a scheduled recess (whether salaried or not) can plan in advance for such periods and, if necessary, seek other work. (Board's Opening Br. 16-18, 30-31; Board's Reply Br. 1, 10-13.)

The Board's interpretation of the between-term exception, which looks to the reasons why an employee is not working, rather than the time of year when unemployment occurs, has been longstanding and consistent, and accordingly is entitled to weight. (Board's Opening Br. 18-21; Board's Reply Br. 13-17.) Further, the Board's interpretation is consistent with those of the U.S. Department of Labor (DOL) and the California Employment Development Department (EDD), both of which have indicated that the exception depends on the reasons why an employee is not working, and neither of which have supported the categorical view taken by

the District and its amici here. (Board's Opening Br. 21-22; Board's Reply Br. 17-19.)

Further, the Board's interpretation is consistent with the Unemployment Insurance Code's purpose of reducing the hardship of unemployment and the rule of equal treatment for workers in all fields of labor, including educational workers. In line with this purpose, it is well settled that the Code's provisions must be liberally construed to further these objectives, and that provisions denying benefits must be construed narrowly. (Board's Opening Br. 23-25; Board's Reply Br. 19-20.) The Board's rejection of a bright-line, categorical prohibition of summer benefits is also consistent with the practical reality that individual employees' contracts and work schedules can vary significantly, even within the same district or school. (Board's Opening Br. 28-29 & fn. 19; Board's Reply Br. 9, fn. 4.) Determining benefits requires a case-by-case inquiry.

B. The Union's Position

The Union agrees with the Board at the general level—that the between-term exception does not categorically prohibit benefits during the summer months. However, the Union's view diverges from the Board's in interpreting precisely when and how the between-term exception applies. In the Union's view, if a non-salaried substitute teacher or other on-call worker merely seeks to work during a summer session, that session constitutes an "academic term" for that employee, and the between-term exception does not apply during that session—even if the District does not place the worker on call. (Union's Opening Br. 17-32; Union's Reply Br. 10-11.) Further, because the summer session is an "academic term" for such employees, the between-term exception applies between the spring and summer terms only if the employee is given a reasonable assurance of

summer work. If no such assurance is given, the between-term exception does not apply at all, and the employee is entitled to benefits (if otherwise eligible) for the entire summer, including recess periods between the spring and summer terms, and between the summer and fall terms. (Union's Opening Br. 33-35.) Under such circumstances, the Union argues, even if an employee works in the spring and is given a reasonable assurance of fall work, the between-term exception does not apply because spring and fall are not successive terms—they are separated by the intervening summer term. (*Ibid.*)

C. The District's Position

The District favors a bright-line rule, interpreting the between-term exception to categorically prohibit unemployment benefits for school employees who are placed on call during a summer academic session but not called into work, at least for school districts on a traditional September-to-June calendar. (District's Answer to Board's Opening Br. 1, 3-4, 15-30.) In the District's view, the "academic year" unambiguously means the fall and spring semesters in a traditional September-to-June calendar, and thus the period "between ... academic years" necessarily and categorically excludes the summer months, regardless of whether a district offers a summer school session. (*Ibid.*)

II. ELA'S ARGUMENT THAT SECTION 1253.3 CATEGORICALLY PRECLUDES SUMMER BENEFITS FOR SCHOOL EMPLOYEES IS UNAVAILING

Like the District, ELA contends that the between-term exception categorically precludes any unemployment benefits during the summer months for school employees who have a reasonable assurance of fall employment. (ELA Br. 10-29; see also OUSD Br. 7-10.) ELA asserts several "plain language" arguments, some of which look beyond the

statutory text, along with several arguments based on extrinsic sources. (ELA Br. 10-29.) Regardless of how these arguments are framed, however, they do not support ELA's categorical interpretation. As explained below, the text of the between-term exception is ambiguous and does not "evince[] an unmistakable plain meaning" with respect to summer school. (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 508.) And ELA's extrinsic sources do not support its position that the between-term exception imposes a *categorical* bar on summer benefits. Notably, ELA does not consider the between-term exception's statutory context, its legislative history, or the broader purpose of the unemployment compensation scheme, all of which counsel strongly against ELA's categorical interpretation. (Cf. *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [where statute's language permits more than one reasonable interpretation, courts may consider other aids, including the "statute's purpose, legislative history, and public policy"].)[3] And ELA's attempts to undermine the longstanding and consistent interpretations of the Board, DOL, and EDD—all of which reject ELA's categorical interpretation—are unavailing. ELA's arguments for imposing a blanket prohibition on summer benefits lack merit.

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[3] As previously noted, the between-term exception is an exception to the general rule that educational employees are to receive equal treatment to employees in other sectors. (§ 1253.3, subd. (a).) The Unemployment Insurance Code's purpose is to reduce the hardship of unemployment, and thus its provisions denying benefits must be narrowly construed. (Board's Opening Br. 23-25; Board's Reply Br. 19-20.) Nothing in the legislative history indicates any intent to categorically prohibit benefits during the summer months, as Congress's primary concern in enacting the between-term exception was to prevent full-time, salaried school employees from receiving windfall unemployment benefits during their scheduled recess and vacation periods. (Board's Opening Br. 16-18; Board's Reply Br. 10-13.) ELA's interpretation is directly at odds with these, and other, interpretive aids.

A. ELA's "Plain Language" Arguments Lack Merit

Like the District, ELA and OUSD argue that the "plain language" of section 1253.3, subdivisions (b) and (c), precludes an award of benefits "during the summer" to "all school district employees, without regard to the nature of their employment." (ELA Br. 11; see also OUSD Br. 7.) That argument is mistaken. As the Board argued in its opening brief, the language of the statute 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 must be excluded. (Board's Opening Br. 14-15, quoting § 1253.3, subds. (b), (c).) Neither the Unemployment Insurance Code nor the federal scheme governing unemployment benefits defines an "academic year" or "academic term." (*Id.* at p. 15.) Other sources—such as California's Education Code or dictionaries—are similarly unhelpful, as they do not define an "academic term"; they provide several conflicting definitions of an "academic year"; and, in any event, they are not specific to the unemployment benefits program. (*Ibid.*)

ELA and OUSD also argue that the Board's interpretation would render various provisions of the between-term exception meaningless. This too is incorrect.

ELA first contends that the only way that the phrases "academic year" and "academic term" can have independent meaning is if an "academic year" categorically excludes summer school sessions. (ELA Br. 11-12, 16-17.) If summer school is considered part of the "academic year," ELA reasons, there can never be a period between academic years that is not also a period between academic terms, which would render the phrase "academic years" superfluous. (*Ibid.*) Contrary to ELA's suggestion, the Board's interpretation properly accounts for both terms. The phrase "during the period between two successive academic years or terms" is not

intended to refer to a singular, fixed time-period in all cases, but rather to cover—broadly and flexibly—*all* recess periods that may occur under the wide variety of contracts and schedules throughout the educational system. (See Board's Opening Br. 16-25, 28-29 & fn. 19.) The reference to both academic "terms" and "years" is necessary to convey this broad intent—it means "academic years or terms," whichever is relevant in the employee's specific circumstances. This understanding is consistent with the between-term exception's legislative history. As originally adopted, the exception precluded benefits only during the period between "academic years." (Board's Opening Br. 7, fn. 5.) Congress later added the phrase "or terms" to clarify that the exception also applies to recess periods *within* the academic year—such as the weeks between the end of the fall semester and the beginning of the spring semester. (*Ibid.*) The addition of the "or terms" provision, then, further supports the Board's view that the between-term exception applies only during recess periods as defined by contract or employment agreement, whenever such periods might occur during the year.

Further, ELA's assertion that "academic year" has a single, unambiguous meaning that categorically excludes the summer, regardless of circumstances, does not withstand scrutiny when applied to year-round schools. If ELA's interpretation of "academic year" were correct, then the between-term exception would preclude summer unemployment benefits even in a year-round school where summer is the middle of a regular academic term, a result that the Legislature certainly did not intend. To avoid this unintended result in the context of year-round schools, it follows necessarily that "academic year" does not have a singular, fixed meaning, but instead may be defined differently in different contexts.

Next, ELA asserts that an "academic year" cannot mean a "calendar year," because otherwise the period between academic years could not

exist. (ELA Br. 12-13.) The Board has not, however, interpreted the term "academic year" to mean "calendar year." Instead, the Board's interpretation is that the "period between ... academic years or terms" under section 1253.3 is defined by each school district, based on the contracts and schedules it establishes with its employees. (Board's Opening Br. 16-28.)

Finally, ELA's assertion that the Board's interpretation renders the "reasonable assurance" language "meaningless" lacks merit. (ELA Br. 17.) In the Board's interpretation, whether for a given employee a summer school session is a period during a term or between terms depends on that individual employee's contract and schedule. A full-time, salaried teacher who works at a traditional-calendar school, for example, will be on recess during the weeks between the end of the spring semester and the start of the fall semester, as that teacher's salary is designed to compensate him or her for the entire year, whether or not the teacher chooses to take on additional work in the summer such as being placed "on call" for summer school assignments. To avoid the windfall that gave rise to the between-term exception, that salaried teacher is precluded from receiving unemployment benefits during the summer months if he or she receives a "reasonable assurance" of work for the fall semester.

Similarly, if a district clearly communicates in advance to a non-salaried, on-call employee that he or she will not be scheduled to work during the summer—and thus that summer is a scheduled recess period for that employee—then the district need only provide a "reasonable assurance" of fall employment for the between-term exception to apply during the entire summer break. If, however, an on-call employee is scheduled to work or is placed "on call" by the district for a summer session, then the employee is not on recess during that term, and can collect benefits, if otherwise eligible, for any day during that term in which he or

she is not offered sufficient work. In that scenario, the "reasonable assurance" of summer work precludes benefits during the weeks between the end of the spring and the start of the summer terms, and if the district provides a "reasonable assurance" of employment during the fall semester, the employee will be precluded from collecting benefits during the weeks between the end of the summer session and the start of the fall one. The Board's interpretation fully accounts for, and gives meaning to, the "reasonable assurance" provision.

B. ELA's Extrinsic Sources Do Not Support Its Categorical Interpretation

ELA's assertion that its interpretation is supported by the Education Code and other extrinsic authorities is similarly misplaced. (ELA Br. 13-16; see also OUSD Br. 9-10.) ELA relies primarily on the Education Code, which it identifies as the "[m]ost important[]" authority for purposes of defining the between-term exception. (ELA Br. 13.) There is no indication, however, that the Legislature relied on the Education Code to define an "academic year" for purposes of section 1253.3. Rather, the California Legislature imported the phrase "between two successive academic years or terms" directly from the Federal Unemployment Tax Act (FUTA). (Board's Opening Br. 5-8; Board's Reply Br. 7.) Thus, it is FUTA and the authorities interpreting it—not the California Education Code—that provide the relevant interpretive guidance. (Board's Opening Br. 16-18; Board's Reply Br. 7.)

In any event, the Education Code does not provide a single, uniform definition of "academic year" or "academic term." Instead, that Code makes clear that these terms can, and do, have different definitions in different contexts. (See Board's Opening Br. 15.) For example, in a number of contexts, including for certain financial aid purposes, the Education Code defines an "academic year" as "July 1 to June 30,

inclusive." (Ed. Code, § 70032, subd. (a); see also *id.*, § 69800, subd. (d)(1)(A) ["For purposes of this section, 'academic year' means the most recently completed federal award year of July 1 to June 30"]; *id.*, § 67102, subd. (a) [similar definition in context of veterans' education provisions]; *id.*, § 37200 ["school year" begins on the first day of July and ends on the last day of June].) Elsewhere—as ELA notes—the Education Code suggests that an academic year typically runs from September through June for purposes of governing the assignment of classified employees to perform work in addition to their regular duties. (ELA Br. 13, citing Ed. Code, § 45102, subd. (d).)[4] ELA provides no reason why its preferred section of the Education Code should control for purposes of construing section 1253.3.

Like the District, ELA also argues that summer sessions always fall during the period "between two successive academic years or terms" because—unlike during the fall and spring semesters—during summer sessions, schools are not required to provide instruction, attendance is not compulsory for all students, and certificated employees generally do not receive credit toward permanent status. (ELA Br. 14, citing Ed. Code, §§ 37620, 41420, 44913, 44949, & 48200; compare District's Answer to Board's Opening Br. 20-21, 28-29.) As the Board noted in its reply, however, the fact that summer sessions are often different in some respects

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[4] The other provisions of the Education Code cited by ELA do not support its understanding of the term "academic year." Section 51851 makes only a passing reference to the "academic year" while discussing the requirements for driver education courses, and does not purport to define the term, much less define it for all purposes. (Ed. Code, § 51851, subd. (c).) Section 66028.3 draws a distinction between "academic year" and a "summer session" while establishing timing requirements for the adoption of fee increases at the University of California and the California State University, but does not provide a universal definition. (*Id.*, § 66028.3, subd. (d).)

from fall and spring sessions (for example, in the classes offered or in the composition of the student body) is not relevant to the question whether workers who serve during these different time periods should be treated differently when it comes to unemployment benefits. (Board's Reply Br. 8-9.) They should not. There is nothing to indicate that the Legislature intended to *categorically preclude* unemployment benefits during such summer sessions, regardless of the circumstances of employment. (*Ibid.*)

The other authorities ELA relies on are similarly unpersuasive. (ELA Br. 15-16, 18-20.) ELA cites the California Department of Education's Year Round Education Program Guide (ELA Br. 15), but that guide does not purport to address how to treat summer school under the between-term exception. Indeed, that guide focuses on year-round schools, and its references to traditional schools are made only in passing. (Year Round Education Program Guide, California Department of Education.)[5]

ELA also cites the U.S. Department of Labor's (DOL) statement that an "academic year" "*most usually* means a fall and spring semester." (ELA Br. 15-16, italics added, citing U.S. Dept. of Labor, Employment & Training Admin., *Conformity Requirements for State UC Laws: Educational Employees: The Between and Within Terms Denial Provisions* (*Conformity Requirements*), at p. 3, <http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf> [as of June 29, 2017]; see also ELA Br. 18.) DOL's observation in fact supports the Board's reading. Its recognition that an academic year *usually* spans the fall and spring semesters necessarily means that an academic year does *not always* have this meaning. Indeed, DOL expressly recognizes that an "academic term" is a period "within an academic year when classes are held," which may include "nontraditional periods of time when classes are held, *such as*

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[5] (<http://www.cde.ca.gov/ls/fa/yr/guide.asp> [as of June 29, 2017].)

summer sessions." (*Conformity Requirements*, *supra*, at p. 3, italics added; see also Board's Opening Br. 22.)

The DOL regulation related to the Family Medical Leave Act (FMLA) that ELA cites is similarly not on point. (ELA Br. 18, citing 29 C.F.R. § 825.602(b).) That provision states only that employers may require instructional employees who take leave during a term to continue their leave through the end of the term under certain circumstances. (29 C.F.R. § 825.602(a).) In that specific context, the regulation defines "academic term" as the "school semester, which *typically* ends near the end of the calendar year and the end of spring each school year," and further provides that a school is limited to "two academic terms or semesters each year *for purposes of FMLA*." (*Id.*, § 825.602(b), italics added.) Nothing in this regulation nor the unemployment scheme suggests that this regulation is meant to provide guidance on how to interpret the period between academic years or terms under FUTA or its state-law analogues.

ELA's assertion that the Employment Development Department (EDD) supports its position is also wrong. (ELA Br. 19-20.) ELA cites several statements in EDD's Benefit Determination Guide, Miscellaneous MI 65 (MI-65), that discuss the application of the between-term exception *when there is no summer school*. (ELA Br. 19.) But MI-65 has a specific section that discusses summer school, and which states that

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

(MI-65, § IV.F.10.)[6] ELA attempts to dismiss this portion of the MI-65 by arguing that it "restat[es] *Brady*" (ELA Br. 20, fn. 5), but MI-65 does not cite or rely on *In re Alicia K. Brady* (2013) CUIAB Case No. AO-337099, Precedent Benefit Decision No. P-B-505 (*Brady*). Indeed, MI-65 pre-dates *Brady*, and cites and follows the Board's longstanding precedent under *In re Dorothy C. Rowe* (1981) CUIAB Case No. 79-6736, Precedent Benefit Decision No. P-B-417 (*Rowe*), and *In re Vincent J. Furriel* (1980) CUIAB Case No. 79-6640, Precedent Benefit Decision No. P-B-412 (*Furriel*). (MI-65, §§ II, IV.F.10.)

Finally, the Board's citation of Merriam-Webster's definition of an "academic year" does not "concede the point" that an academic year runs from September to June. (ELA Br. 16.) Instead, that definition was one of two different dictionary definitions provided by the Board to demonstrate that there is no single, universally accepted definition of "academic year." (Board's Opening Br. 15.)[7] Thus, even if one dictionary's definition supported ELA's reading, that fact that another does not undermines ELA's argument that the statutory text has an unambiguous plain meaning that excludes summer school sessions.

C. The Board's Position Does Not Create an Exception for On-Call Employees

ELA also argues that the Board's position impermissibly reads an "exception" into the between-term exception. (ELA Br. 20-23.) This too is

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[6] (<http://www.edd.ca.gov/uibdg/Miscellaneous_MI_65.htm> [as of June 29, 2017].)

[7] Moreover, the dictionary definition ELA cites does not support its reading. It defines an "academic year" as the "annual period of sessions of an educational institution *usually* beginning in September and ending in June," necessarily meaning that the academic year does *not always* span this period. (Merriam-Webster's Collegiate Dictionary (11th Ed. 2004) at p. 6, italics added.)

incorrect. The Board uniformly interprets the between-term exception, for all school employees, to preclude benefits only when an employee is on a scheduled recess or vacation period, as determined by his or her contract and schedule. (Board's Opening Br. 16-18.) The fact that various employees, with different contracts and schedules, may have different recess periods under section 1253.3 does not mean the statute "carve[s] out" any particular type of employee. (ELA Br. 20.) Instead, it reflects the application of this uniform rule to numerous employees with differing circumstances.[8]

Moreover, ELA's reliance on *Board of Education v. Unemployment Insurance Appeals Board* (1984) 160 Cal.App.3d 674, 682 (*Long Beach*), is misplaced. (ELA Br. 22-23.) *Long Beach* did not address the application of the between-term exception to summer school (the decision does not mention summer school), but instead addressed whether a district's letter offering a substitute teacher the opportunity to serve in the fall was too indefinite to constitute a "reasonable assurance" of fall employment. (*Long Beach*, at pp. 682-683.) On that particular issue, the Court of Appeal held that the "tenuous impermanent" nature of substitute work did not by itself render insufficient the district's offer of continuing employment as a substitute teacher. (*Ibid.*) But *Long Beach* neither holds nor implies that substitute teachers must be treated identically to full-time salaried teachers

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[8] ELA's assertion that the Board's position is "internally inconsistent" because the between-term exception applies to "*any* individual" and does not contain any carve-outs for "on call" employees (ELA Br. 21-22, original italics), fails for these same reasons. As noted, the Board applies the same universal rule to "any individual" covered by section 1253.3, subdivisions (b) or (c): benefits are precluded only during planned recess periods, as determined by the employee's contract and schedule.

for purposes of determining whether a given employee is on a scheduled recess or vacation period.

D. ELA's Reliance on Out-of-State Authorities Is Misplaced

ELA's reliance on out-of-state authorities is also misplaced. (ELA Br. 23-29.) ELA largely cites the same cases cited by the District, and none of those cases provides persuasive reasoning or analysis to support the District's position that the between-term exception categorically excludes summer benefits under all circumstances, including for non-salaried, on-call workers who are only paid for days actually worked. (Board's Opening Br. 25-26; Board's Reply Br. 21-22.) Indeed, one of the cases cited by ELA supports the Board's interpretation. (See *Thomas v. Department of Labor, Licensing, & Regulation* (Md. Ct. Spec. App. 2006) 170 Md.App. 650, 665 [statute precludes benefits "during scheduled and anticipated holidays, vacations, and breaks" for which employees can plan in advance and thus "are not experiencing the suffering from unanticipated layoffs that the employment-security law was intended to alleviate" (internal quotation marks omitted)].) And the additional cases cited by ELA are not helpful, as they fail to provide any persuasive reasoning or analysis to support ELA's categorical position. (See *Claim of Huff* (N.Y. App. Div. 1995) 222 A.D.2d 919 [addressing reasonable assurance issue; no discussion of summer school]; *Claim of Sifakis* (N.Y. App. Div. 1987) 133 A.D.2d 511, 512 [holding that "the Board could rationally conclude" that the summer session in that particular instance "was not part of the academic year"]; *Halvorson v. County of Anoka* (Minn. Ct. App. 2010) 780 N.W.2d 385, 391-392 & fn. 4 ["We do not conclude that for every teacher at Pines School the summer session is necessarily 'between academic years'"]; *Glassmire v. Unemployment Compensation Bd. of Review* (Pa. Commw. Ct. 2004) 856 A.2d 269, 276 [noting that the agency's findings

that a particular school's summer sessions were not part of its academic year "have not been challenged and are conclusive on appeal"]; *University of Toledo v. Heiny* (1987) 30 Ohio St.3d 143, 146 [claimant "had full knowledge that her services would not be required during the summer months"]; *South Bend Community School Corp. v. Swartz* (Ind. Ct. App. 2008) 881 N.E.2d 1093, 1095 ["Summer breaks between terms are scheduled well in advance and allow teachers to plan other activities, including alternate employment, for that time"].)

Finally, ELA has failed to distinguish the well-reasoned out-of-state cases that support the Board's position. (ELA Br. 27-29.) Each of those cases applies the fundamental rule, consistent with the Board's interpretation here, that the application of the between-term exception depends on the nature of the employment agreement and the reason why the employee is not working, and not the time of year during which the unemployment happens to occur. (Board's Opening Br. 26-28; Board's Reply Br. 22-23.)

E. ELA's Argument that the Board's Interpretation Exceeds Its Rulemaking Authority Lacks Merit

ELA contends that the Board's interpretation makes substantive changes to the statute that may not be implemented without either new legislation or formal rulemaking. (ELA Br. 30-40.) This Court should decline to consider this argument because it was not raised in the proceedings below, is not fairly encompassed within the issues presented, and was not argued by any of the parties to this appeal. (See *In re Marriage of Oddino* (1997) 16 Cal.4th 67, 82, fn. 7 [this Court does "not ordinarily consider questions not raised by the appellate record and put forward only by an amicus curiae"].)

This argument lacks merit in any event. Contrary to ELA's assertions, the issues before this Court do not involve "legislation" or

"rulemaking," but rather the proper interpretation of the between-term exception under section 1253.3, subdivisions (b) and (c). This Court is well equipped to resolve these questions using the traditional tools of statutory interpretation, and this Court's decision in this case will supersede any prior interpretations by the Board on these issues.[9]

Further, if it choses to entertain it, the Court should reject ELA's argument that in adopting *Brady*, the Board "'exceed[ed] the authority conferred upon it by statute.'" (ELA Br. 30, quoting *California Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 242.) The Board—like many other administrative agencies—is expressly permitted to designate some of its decisions as precedential (§ 409), and may do so if the decision "contains a significant legal or policy determination of general application that is likely to recur." (Gov. Code, § 11425.60, subd. (b).) Such designations are "not rulemaking and need not be done under" the requirements for promulgating regulations set forth in the Government Code. (*Ibid.*) Further, that the Board's interpretation is informed by policy considerations does not mean that its decision "stray[s] into the realm of legislation." (ELA Br. 31.) Instead, it reflects a proper understanding of

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[9] To the extent ELA's "rulemaking" arguments are really about the weight to be given to the Board's interpretation, they should also be rejected. (ELA Br. 30-31 [arguing that the Board's interpretation has been inconsistent].) For more than 30 years, the Board has consistently held that the exception does not impose a categorical bar on summer benefits, but instead looks to whether a particular employee is not working due to a planned recess period, or instead has lost work during a scheduled work period. (*Rowe*, *supra*, P-B-417; *Furriel*, *supra*, P-B-412; Board's Opening Br. 18-21.) Any minor variations in the Board's decisions are inconsequential, consisting of different iterations of this same fundamental legal inquiry in the course of conducting case-by-case determinations, based on an ambiguous statute, without clear precedent to guide it. (Board's Reply Br. 14-17.) The Court's decision in this case will undoubtedly result in greater consistency going forward.

the Board's role in interpreting a statute. (See, e.g., *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, *supra*, 34 Cal.4th at p. 737 [courts may consider "public policy" when interpreting statutes].) Indeed, agencies are empowered to designate decisions as precedential when they contain "significant ... policy determination[s]." (Gov. Code, § 11425.60, subd. (b).) Moreover, the Board's interpretation does not "leave[] numerous operational questions unanswered" (ELA Br. 32-33), but instead provides clear guidance to districts by allowing them to control, through contracts and clear communications with their employees, who is "on call" for a summer session and who is on recess. (Board's Opening Br. 28-31; Board's Reply Br. 4-5, 25-26.) It is irrelevant that some questions might be left unanswered by a precedent decision. (ELA Br. 32-33 [contending that open questions require rulemaking]; see also ELA Br. 34-38.) Adjudicatory proceedings often decide only the specific questions presented by a particular case, and leave related questions for another day. (See, e.g., *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531.)

Finally, that the Legislature has recently sought to enact bills related to the between-term exception has little bearing on the current provision, and no bearing on whether the Board has the power to interpret that provision's meaning. (ELA Br. 33-34; see also OUSD Br. 12-13.) "'Unpassed bills, as evidences of legislative intent, have little value,'" and courts "cannot ascertain legislative intent from the failure of subsequent Legislatures to act on adopting the language at issue." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 927, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396.) Accordingly, unless and until the Legislature amends the between-term exception, the Board and the Court must interpret it in its existing form,

using traditional tools of statutory interpretation in order to carry out the Legislature's intent.

III. OUSD'S ASSERTION THAT THE BOARD'S INTERPRETATION WILL IMPOSE SIGNIFICANT FINANCIAL BURDENS ON SCHOOL DISTRICTS IS MISTAKEN

OUSD asserts that upholding the Board's longstanding interpretation of the between-term exception to allow summer benefits under some circumstances will create a significant financial burden for school districts. (OUSD Br. 11-12; see also ELA Br. 32.) The Board's position, however, does not impose any sweeping changes or significant financial burdens. For more than three decades the Board has held that the between-term exception does not impose a categorical ban on summer benefits, and allows benefits when an employee loses work during contractually contemplated work periods, including summer, through no fault of the employee. (*Rowe*, *supra*, P-B-417; *Furriel*, *supra* P-B-412; Board's Opening Br. 18-21.) There is no evidence that this longstanding interpretation has imposed any significant financial burdens on school districts.[10]

Further, to the extent that the Board's interpretation will impose some financial costs on districts, those costs are almost entirely within each

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[10] The Union's position, on the other hand, might lead to a substantial increase in costs. The Union argues that summer school is an "academic term" for *all* day-to-day substitute teachers and on-call paraprofessional employees, and that, as a result, all such workers who seek employment and are otherwise eligible are entitled to unemployment benefits for the entire summer—including periods between the spring and summer terms, and between the summer and fall terms—unless they are given a reasonable assurance of employment during the summer term. (Union's Opening Br. 19-26.) If the Union's view is adopted, districts might well face significant financial burdens by having to pay summer unemployment benefits to a large number of non-salaried employees who otherwise would not be eligible for such benefits.

district's control. Districts decide which employees are placed "on call" for a summer session—and thus are potentially eligible for unemployment benefits if not called to work—and which employees are placed on recess for the summer and given a reasonable assurance of fall employment—and thus are ineligible for summer benefits under the between-term exception. (Board's Opening Br. 28-31; see also American Federation of Teachers Br. 14-18 [arguing that districts can control the costs of unemployment benefits for non-salaried employees through the collective bargaining process].)

Moreover, all indications are that the costs of unemployment insurance for districts are, and will remain, quite modest, particularly in relation to overall district budgets. For example, in fiscal year 2014-2015, total statewide unemployment insurance payouts under the School Employees Fund (SEF) averaged about $113 annually per covered employee (equivalent to 0.25% of total wages paid), and in fiscal year 2015-2016 they averaged about $98 annually per covered employee (equivalent to 0.21% of total wages paid). (Annual Report to the Fund Participants on the School Employees Fund for State Fiscal Year 2015-16 at pp. 1, A3 (March 2017) [listing total number of SEF-covered employees, total wages paid, and total unemployment payouts], available at <http://www.edd.ca.gov/pdf_pub_ctr/txsefar15-16.pdf> [as of June 29, 2017].) Notably, it is undisputed that "on call" school workers are, and for several decades have been, entitled to unemployment benefits, if otherwise eligible, when they are not called to work through no fault of their own during a fall or spring semester. (Board's Reply Br. 9, 12, fn. 7.) There is no evidence that the availability of these benefits has imposed significant financial burdens on school districts. Nor is there any evidence that formal guidance from this Court allowing such benefits to on-call employees during summer school sessions would impose any significant new burdens. Indeed, given the relatively small number of employees typically placed

"on call" for summer school and the relatively short length of most summer school sessions, there is no evidence or reason to believe that a decision from this Court in line with the Board's longstanding interpretation would impose any significant new financial burdens on school districts.

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 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 remand the matter for further proceedings consistent with its opinion.

Dated: June 30, 2017

Respectfully submitted,

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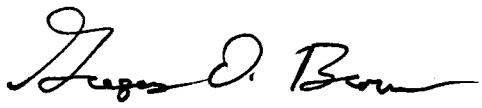
CERTIFICATE OF COMPLIANCE

I certify that the attached **CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S CONSOLIDATED ANSWER TO THE BRIEFS OF RESPONDENT'S AMICI CURIAE** uses a 13 point Times New Roman font and contains 6,601 words.

Dated: June 30, 2017

XAVIER BECERRA
Attorney General of California



GREGORY D. BROWN
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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 June 30, 2017, I served the attached

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S CONSOLIDATED ANSWER TO THE BRIEFS OF RESPONDENT'S AMICI CURIAE

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 June 30, 2017, at San Francisco, California.

J. Perez
Declarant

Signature

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