Case No. S250149

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TAMARA SKIDGEL,
Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant and Respondent.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Statutes

Other Authorities

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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

INTEREST OF THE AMICI CURIAE

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

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

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

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

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

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and ordinary meanings in context. (*Ibid.*; *Martinez, supra,* 49 Cal.4th at p. 51.) Whenever possible courts will harmonize the portions of a statutory scheme to give effect to all. (*Messenger Courier Assn. of Americas v. California Unemp. Insurance App. Bd.* (2009) 175 Cal.App.4th 1074, 1095, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387.) "Courts should give meaning to every word of a statute if possible and should avoid a construction making any word surplusage." (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 719.) Courts may rely on extrinsic aides such as legislative history, public policy and statutory scheme only when the language is ambiguous or susceptible to more than one reasonable interpretation. (*Martinez,* at p. 51.)

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

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

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

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