Supreme Court of California
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Supreme Court of California
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No.: S266254

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BRENNON B.,	)	Court of Appeal
	)	First District, Division One
Petitioner,	)	No. A157026
	)	
vs.	)	Contra Costa
	)	Superior Court
SUPERIOR COURT, CONTRA COSTA	)	No.: MSC16-01005
Respondent,	)	
	)	
WEST CONTRA COSTA	)	
UNIFIED SCHOOL DISTRICT, et al.	)	
	)	
Real Parties in Interest.	)	
	)	

Review of a Decision by the Court of Appeal
First Appellate District, Division One, Case No. A157026
Contra Costa County Superior Court Case No. MSC16-01005

OPPOSITION TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

California Rules of Court

(TABLE OF AUTHORITIES, cont.)

Other

CERTIFICATE OF
INTERESTED ENTITIES OR PERSONS

The undersigned, on behalf of Real Parties in Interest, West Contra Costa Unified School District, et al, certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, Rule 8.208.

Dated: January 12, 2021 By: /s/ Cody Lee Saal

CERTIFICATE OF WORD COUNT

The text of this brief in opposition to the petition is set using **13-pt Times New Roman**. According to Word, the computer program used to prepare this brief, this brief contains **3,485** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set forth in California Rules of Court, Rule 8.204(b) and Rule 8.504(d).

Dated: January 12, 2021 By: /s/ Cody Lee Saal

OPPOSITION TO PETITION FOR REVIEW

I. INTRODUCTION

Real Parties in Interest West Contra Costa Unified School District, et al (hereinafter "District") hereby submit the following Opposition to Petitioner Brennon B.'s Petition for Supreme Court Review of the First District Court of Appeal's decision that public school districts are not "business establishments" subject to the Unruh Civil Rights Act – the *first* California appellate court decision to address whether a public school district is subject to Unruh Act liability.

No arguable grounds for review exist. The Court of Appeal's decision creates no conflict in California law – there are no conflicting appellate court rulings. Until there is a conflict in California state courts, the issue is not ripe for review and this case is not the appropriate vehicle for reviewing the issue.

Nevertheless, petitioner urges that the Court of Appeal erred and that this state's Supreme Court should give deference to federal courts (particularly, federal district courts) that have attempted to interpret this issue of state law.

In so doing, petitioner misrepresents the allegations in this case, misrepresents the causes of action in the operative Complaint, and misrepresents the issues that were carefully addressed by the Court of Appeal.

Petitioner should have raised his challenges to the Court of Appeal's decision in a timely Petition for Rehearing. He failed to do so. He now asks the Court to consider issues that were never raised before the Court of Appeal.

The Petition for Review[1] fails to demonstrate how the case presents any ground for review and therefore should be **denied**.

II. PROCEDURAL HISTORY AND ISSUES PRESENTED

Plaintiff filed the operative Second Amended Complaint on October 3, 2018 against the District alleging negligence, intentional infliction of emotional distress, violation of right to petition and violation of the Unruh Civil Rights Act arising out of alleged acts of student-on-student harassment and staff-on-student abuse.[2] Plaintiff never alleged any California Education Code violation, nor any violation of the IDEA (Individuals with Disabilities Education Act), nor any violation of the ADA (Americans with Disabilities Act), in his operative Complaint.

Plaintiff alleged that the District is a public entity within the meaning of Cal. Gov. Code § 811.2, 900 et. seq.

Plaintiff's Fifth Cause of Action alleged violation of the Unruh Civil Rights Act, California Civil Code section 51, et seq. Plaintiff alleged that

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[1] The Petition for Review has been filed by attorney Alan Charles Dell'Ario, who was counsel for Amicus Curiae party, Consumer Attorneys of California, throughout the appellate proceedings in support of petitioner's Petition for Writ of Mandate. Instead of representing Amicus party, he apparently now is representing petitioner himself. No substitution or association of counsel has been filed. Petitioner has failed to serve the instant petition on the State Solicitor General at the Office of the Attorney General, as required by Civil Code section 51.1, and the petition should not have been accepted for filing absent a Proof of Service. Petitioner must cure this failure and the Court must allow the Attorney General reasonable additional time to file a brief in this matter.

[2] Factual allegations regarding the abuse petitioner allegedly suffered are entirely irrelevant to the inquiry of whether or not a public school district is a "business establishment" subject to Unruh Act liability. Petitioner pled no facts regarding how or why a public school district should be a "business establishment" for purposes of the Act, and has consistently insisted that he need not do so.

the District is a "business establishment" subject to the Act, but pleaded no facts regarding how or why a public school district is, or should be, considered a "business establishment."

On December 7, 2018, the District filed a demurrer to, *inter alia*, the Fifth Cause of Action on the grounds that the District is not a "business establishment" subject to the Unruh Act.

On February 21, 2019, the trial court issued a tentative ruling sustaining, without leave to amend, the District's demurrer to the Fifth Cause of Action for alleged violation of the Unruh Act, ruling that as a governmental entity, the District was not a "business establishment" subject to the Act. In its tentative ruling, the Court stated that it "denies leave to amend because it cannot see any serious possibility of amending to bring the District within the Unruh Act. If plaintiff contests this tentative to seek leave to amend, he should come to the hearing prepared to explain what he proposes to allege, and why it will suffice."

Plaintiff did not contest or object to the tentative ruling. Plaintiff did not seek leave to file an amended complaint. Plaintiff failed to bring to the trial court's attention his contention that the ruling was in error and that denial of leave to amend was in error because additional facts could be alleged to compel an alternative ruling.

The order sustaining the demurrer in part without leave to amend was entered on March 4, 2019.

Petition filed a Petition for Writ of Mandate on April 23, 2019 asking the Court of Appeal to vacate the Superior Court's order sustaining the demurrer, arguing that a public school district should be considered a "business establishment" subject to the Unruh Act.

The Court of Appeal accepted briefings from the parties on the issue of whether or not a public school district is/should be a "business establishment" for purposes of application of the Unruh Act.

On September 5, 2019, the Court of Appeal requested additional briefing on the issue of whether subsection (f) of the Unruh Act supports petitioner's argument that the Unruh Act should apply to public school districts. Both parties submitted the requested supplemental briefing.

The underlying case settled on March 3, 2020. The parties alerted the Court of Appeal and requested dismissal of the writ petition. The Court of Appeal retained jurisdiction. Petitioner raised no objection to the Court of Appeal retaining jurisdiction.

On August 31, 2020, the Court of Appeal issued a notice that the matter would be set for oral argument on October 1, 2020.

On September 1, 2020, the Court of Appeal issued a Notice that the court intended on taking judicial notice of the entire legislative history of the Unruh Act and Education Code Sections 200 et seq (specifically, all versions of the legislation as it moved through the Legislature, and all committee, floor, and enrolled bill reports and analyses, and author's transmission letter urging signature by the Governor). The court further advised that it intended to take judicial notice of Horowitz's law review article, *The 1959 California Equal Rights in "Business Establishments" Statute – A Problem in Statutory Application* (1960) 33 So.Cal.L.Rev. 260.

Petitioner submitted a Letter Brief supporting the Court of Appeal's taking of judicial notice and argued that the authorities, specifically including the Horowitz law review article, supported petitioner's position.

Oral Argument was held on October 1, 2020.

The Court of Appeal issued a detailed and well-reasoned 61-page opinion on November 13, 2020 denying petitioner's Petition for Writ of Mandate. Specifically, the Court addressed the following issues: "(1) whether a public school district is a business establishment for purposes of the Unruh Civil Rights Act (Civ. Code, § 51), and (2) even if a school district is not a business establishment, whether it can nevertheless be sued

under the Unruh Act where, as here, the alleged discriminatory conduct is actionable under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.).” (Opn. at 1.)

The Court of Appeal confirmed that “[b]oth are issues of first impression in the California appellate courts.” (*Id.*)

The Court of Appeal held that:

- A public school district is not a “business establishment” subject to the Unruh Act;
- Education Code Section 201(g) does not establish that public school districts are business establishments subject to the Unruh Act;
- Subsection (f) of the Unruh Act (which states that a violation of the ADA constitutes a violation of the Unruh Act) does not establish that the Unruh Act applies to public school districts. Rather, only a violation of the ADA by a *business establishment* is also a violation of the Unruh Act.

Petitioner did not file any Petition for Rehearing.

Petitioner filed the instant Petition for Supreme Court Review on December 23, 2020. In his Petition for Review, petitioner reframes the issues as follows:

> “1. Is a K-12, public-school victim of prohibited discrimination entitled to [the] enhanced penalties [of section 52] because either 1) the Unruh Act applies to public school directly or 2) its remedies are incorporated into the relevant provisions of the Education Code?
>
> “2. Does Brennon B.’s Second Amended Complaint state a cause of action against defendants under the Unruh Act or Education Code, and if not, can it be amended to do so?”

In addition to asking the Court to determine whether a public school district is subject to Unruh Act liability, petitioner now asks the Court to consider whether the remedies set forth in Section 52 have been incorporated into “various provisions” of the Education Code and whether

plaintiff's operative Complaint states a cause of action for alleged violation of the Education Code. These were not issues before the Superior Court or the Court of Appeal and have no bearing on the question of whether a public school district is subject to Unruh Act liability.

III. PETITION FOR REVIEW SHOULD BE DENIED

A. The Court of Appeal Decision Creates No Conflict in California Law

The Court of Appeal in this matter was asked to decide an issue of first impression in California Courts – whether a public school district is a "business establishment" for purposes of application of the Unruh Civil Rights Act. Prior to this opinion, there were no published California Court of Appeal decisions analyzing and deciding this issue. Currently, there are no conflicting appellate court rulings.

Federal court opinions addressing this state law issue have no binding or precedential effect in California and *do not* create any conflict of state law in California to the extent they are in opposition with this appellate decision. State court decisions control substantive issues of state law.

Further, not only are federal court cases attempting to interpret issues of state law that have not been addressed by California Courts of Appeal only minimally persuasive, but where, as here, the cited federal court opinions contain no analysis explaining their conclusions, they are "patently *unpersuasive*." (See *Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 375(emphasis added).) The Court of Appeal in this case properly addressed and gave appropriate weight to those federal court decisions.

Nevertheless, petitioner urges this Court to defer to federal district courts that have attempted to interpret this issue of state law, suggesting

that the federal courts are better suited to interpret and decide this issue of state law than this state's own Court of Appeal.

Federal cases are *not* controlling, *not* binding, and where the opinions are "bereft of any depth," they are "patently unpersuasive." (See *Id.*) Federal courts that have reached contrary decisions to this Court of Appeal decision create *no conflict in California state law* and this Court is under no obligation to give any deference to federal courts, *especially* on an issue of state law.

B. The Issue is Not Ripe for Review

Given that there are no contrary California Court of Appeal decisions, the issue is not ripe for review and this case is not the best vehicle to review the issue.

Unless and until a Court of Appeal reaches a contrary ruling – that a public school district *is* a business establishment subject to Unruh Act liability when it provides free and public education – there is no conflict of state law for this Court to resolve.

Even if a Court of Appeal were to decide that a public school district is a business establishment subject to the Act in a context other than the provision of free and public education, such an opinion *still* would not create any conflict of state law – it would simply illustrate a distinguishable circumstance where a public school district might be acting as a business enterprise.

This Court should allow the issue to percolate in the appellate courts until the issue is ripe for review and deny this Petition for Review.

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C. Petitioner's Arguments That the Court of Appeal Erred are Without Merit and, in Any Event, Should Have Been Raised in a Timely Petition for Rehearing

1. Each of Petitioner's Arguments that the Court of Appeal Erred are Entirely Without Merit and Demonstrate No Ground for Review.

Petitioner first astonishingly argues that the Court of Appeal erred by considering and relying on *this* Court's prior Unruh Act decisions and that the Court of Appeal should have instead deferred to federal courts that have attempted to interpret this issue of state law. Petitioner goes so far as to argue that this Court's prior Unruh Act decisions are not controlling, but that federal court cases are, and that this Court should follow "the distinguished federal judges who have found public schools to be 'business establishments' within the meaning of the Act." (Petition at 18, fn. 21). Petitioner further argues that the Court of Appeal should have limited its analysis to considering only the single admonition that the term "business establishment" be interpreted in the broadest sense possible, ignoring all other "principles" that govern the issue. (Petition at 20.)

This argument is not only offensive to this Court and all California appellate courts, but it also demands that the Court of Appeal conduct the same cursory analysis as federal courts and issue an opinion "bereft of any depth."

Petitioner next argues that the Court of Appeal's consideration of, and reliance on, two law review articles was improper, arguing that such sources do not control the issue – but in the same breath asks this Court to consider and rely on a different law review article (one that petitioner never cited throughout the appellate process, and never raised to the Court of Appeal). Petitioner had the opportunity to request that the Court of Appeal take judicial notice of this source and consider it as part of its analysis but failed to do so. Instead, petitioner *supported* the Court of Appeal's reliance

on the Horowitz law review article, among other authorities. Now that the Court of Appeal has interpreted Horowitz's article (and other sources) contrary to petitioner's position, petitioner argues that such reliance was inappropriate. This argument is disingenuous and should be rejected.

Petitioner goes on to argue that the Court of Appeal erred by not considering two Court of Appeal decisions – *Mackey* and *Gatto*. (*Mackey v. Bd. of Trs. of Cal. State Univ.* (2019) 31 Cal.App.5th 640; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744.)

However, the public entity defendants in those two cases never challenged the application of the Unruh Act. In neither case did the Court of Appeal address or analyze the issue of whether or not the Unruh Act applied. Therefore, neither case is relevant nor availing here.

In *Mackey*, the public university defendant did not challenge application of the Act and the court conducted no analysis on that issue. In any event, a public university is easily distinguishable from a public school district – one reason being that while students between the ages of 6 and 18 are subject to compulsory full-time education (Cal. Ed. Code § 48200), there is no such compulsory attendance law requiring enrollment/attendance at a public university. Thus, even had the court in *Mackey* conducted any analysis on Unruh's application, the case would be inapposite. The Court of Appeal committed no error by not including this case in its opinion.

The issue in *Gatto* was the applicable statute of limitations for an Unruh Act claim, whether the enforcement of a dress code was a recognized classification under the Act (alongside sex, race, religion, etc.) and whether enforcement of the dress code violated the plaintiff's right to full and equal access under the Act. The Court of Appeal addressed, analyzed and distinguished *Gatto* at length in its opinion. (Opn. at 32, fn.

9.) Petitioner makes no compelling argument as to how or why the Court of Appeal erred in this analysis.

Next, petitioner simply restates (nearly verbatim from his Letter Brief to the Court of Appeal in response to the court's Notice regarding Judicial Notice) his argument that subsection (f) of the Unruh Act (which states that a violation of the ADA constitutes a violation of the Unruh Act) supports his contention that a public school district is subject to the Unruh Act, since a public school district is also subject to the ADA. The Court of Appeal addressed this argument at length in its Opinion (after requesting additional briefing on this exact issue) and rejected petitioner's argument. The Court of Appeal held that only a violation of the ADA by a *business establishment,* which a public school district is *not,* is also a violation of the Unruh Act.

Petitioner does not address why this was in error, except for stating that some federal courts have reached an opposite conclusion regarding the meaning of subsection (f) (which they do without any analysis). As discussed above, this Court is not bound by any federal court interpretation of state law and can wholly reject federal cases that contain no analysis to explain their conclusions. Simply because a federal court has interpreted subsection (f) to support the proposition that the Unruh Act applies to public schools (without any analysis) does not demonstrate any error by the Court of Appeal, nor any conflict in California law.

Lastly, petitioner restates (again nearly verbatim) his argument raised to the Court of Appeal in his Letter Brief in response to the court's Notice regarding Judicial Notice that Education Code Section 201(g) demonstrates that a public school district is a business establishment subject to the Unruh Act. The Court of Appeal thoroughly addressed, analyzed and rejected this argument in its detailed opinion.

Petitioner misleadingly argues that the Court of Appeal relied only on a single letter from the Assembly member who drafted the 1998 amendment to Education Code 200 et seq. in conducting its analysis and reaching its conclusion. This is blatantly false. The Court of Appeal did not rely on the expression of a single legislator. Indeed, the Court carefully analyzed the amendments to the Education Code to discern the Legislature's intent and properly concluded that nothing in the Education Code suggests or supports the argument that the Unruh Act applies to public school districts.

2. Each of Petitioner's Arguments Should Have Been Raised in a Timely Petition for Rehearing; Petitioner Failed to Do So

Each of petitioner's arguments should have been raised in a timely Petition for Rehearing. Arguments that the Court of Appeal omitted or misstated the facts or law – as petitioner does here – must be brought before the Court of Appeal in a Petition for Rehearing, as this Court will not normally consider a petition for review without those issues having been called to the attention of the Court of Appeal. (CRC 8.500(c)(2); See also, *In re Jessup's Estate* (1889) 81 Cal. 408, 471.) Petitioner failed to file a Petition for Rehearing. He therefore should be prohibited from asserting such arguments in the instant Petition and this Court should deny the Petition on this basis.

D. Should This Court Grant Review, the Issue Should be Limited

Should this Court grant review, Real Parties in Interest respectfully request that the issue be limited to only whether or not a public school district is a business establishment subject to the Unruh Act when it provides a free and public education to the students within its geographical boundaries.

This Court should not consider issues raised by petitioner for the first time in his Petition for Review, namely:

- Whether plaintiff's factual allegations are sufficient to state a cause of action for an unspecified Education Code violation; and
- Whether section 52 has been incorporated into the Education Code

Not only were these issues not briefed before the Superior Court or the Court of Appeal, but this case is not the appropriate vehicle to address or resolve those questions.

IV. CONCLUSION

The Petition for Review should be **denied.** The Court of Appeal issued a thorough and well-reasoned 61-page opinion, properly discerning the Legislature's intent regarding application of the Unruh Act by comprehensively analyzing the entire legislative history of the Unruh Act, including all versions of the legislation as it moved through the Legislature, and all committee, floor, and enrolled bill reports and analyses, and author's transmission letters urging signature by the Governor. The Court of Appeal further addressed and analyzed whether amendments to the Education Code had any impact on the analysis, and discussed at length the effect of subsection (f) on the analysis. The Court of Appeal then set forth in painstaking detail the judicial history of the Act and carefully explained why the Act does not apply to public schools.

The opinion creates **no conflict in California law.** Until there is a conflict in California appellate courts, the issue is not ripe for review, and this case is not the appropriate vehicle for reviewing the issue.

Respectfully submitted,

EDRINGTON, SCHIRMER & MURPHY LLP

Date: January 12, 2021

By: /s/ Cody Lee Saal
Cody Lee Saal
Attorney for Real Parties in Interest

PROOF OF SERVICE

Brennon v. West Contra Costa Unified School District, et al.
Supreme Court Case No.: S266254
Court of Appeal Case No.: A157026
Contra Costa County Superior Court, Case No. MSC16-01005

I, the undersigned, certify and declare as follows:

I am employed in the County of Contra Costa, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2300 Contra Costa Blvd., Suite 450, Pleasant Hill, CA 94523.

On January 12, 2021, I served the attached document entitled on the interested parties in the above action by placing a true copy thereof enclosed in a sealed envelope(s), addressed as follows:

OPPOSITION TO PETITION FOR REVIEW

Hon. Charles Treat Department 12 Contra Costa County Superior Court 725 Court Street Martinez, CA 94553 (By U.S. Mail)	Clerk, California Supreme Court 350 McAllister Street San Francisco, CA 94102 (Hand-Delivered)
Court of Appeal, First Appellate District Division 1 350 McAllister Street San Francisco, CA 94102 (Hand-Delivered)	

X **(BY MAIL)** by placing a true and correct copy of the document(s) listed above enclosed in sealed envelope(s) with postage fully prepaid in the U.S. Mail at Pleasant Hill, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 12, 2021, at Pleasant Hill, California.

/s/
Margaret Dominguez

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/12/2021 by Florentino Jimenez, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **B. (BRENNON) v. S.C. (WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT)**
Case Number: **S266254**
Lower Court Case Number: **A157026**

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1/12/2021
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/s/Cody Lee Saal
Signature

Saal, Cody Lee (286041)
Last Name, First Name (PNum)

Edrington, Schirmer & Murphy LLP

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