No.: S266254

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

On Review of an Order Sustaining a Demurrer
Honorable Charles Treat, Judge

REPLY TO ANSWER

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West Contra Costa Unified School District's answer[1] reflects a fundamental misunderstanding of the purpose of a petition for review. As the Court knows well, the petition seeks to persuade the Court to number this case among the 55 or so non-capital cases it considers each year from the 3,500 petitions it receives. The point is not that the Court of Appeal got it wrong (it did), but that this case presents issues worthy enough to be chosen for decision out of the petition-for-review selection contest the Court conducts.

The District does not dispute the impact the Court of Appeal's ruling has on California's seven million school children and their families. The District does not dispute that the issues are of first impression for a California appellate court. The District does not dispute that the opinion below fails to discuss the facts giving rise to the case or that the Court of Appeal chose to reject the parties' request for dismissal without saying so in its opinion. Rather, the District raises procedural objections without merit and offers a strained rebuttal to Brennon's arguments on the merits.

[1] Mislabeled "Opposition." The pages are not numbered in accordance with Cal. Rules of Court, rule 8.204(b)(7). All references to rules are to the California Rules of Court.

I. Review by this Court is not dependent on a conflict in the courts of appeal.

The District asserts, incorrectly, that a conflict in the decisions of the courts of appeal is required before an issue is "ripe" for review. This misapprehends Rule 8.500, subdivision (b) and the ripeness and justiciability doctrines. (See *Pacific Legal Foundation v. California Coastal Com*. (1982) 33 Cal.3d 158, 170 (*Pacific Legal*).) The grounds for review are "to secure uniformity of decision *or* to settle an important question of law." (Rule 8.500, subd. (b)(1).) The grounds are disjunctive.

Moreover, ripeness has nothing to do with conflicts in the courts of appeal.

> The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion.

(*Pacific Legal, supra,* 32 Cal.3d at p. 170.)

If the Court were to conclude the Court of Appeal erred in deciding the case after the parties requested it be dismissed, then issues this petition presents would not be "ripe." The proper course would seem to be to order the opinion depublished. (Rule 8.1125.)

> On the other hand, the [ripeness] requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be

> lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question.

(*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452, citing *Pacific Legal*, court emphasis omitted.)

The ripeness doctrine fails to support the District's opposition to review. Rather, the doctrine's application presents another reason to grant Brannon's petition. The amicus letters in support of review attest to the "widespread public interest" in the question, establishing the exception to the ripeness requirement the Court recognized in *Pacific Legal*.

The District seems to have confused ripeness with percolation. One commentator has noted, "Sometimes the Supreme Court will wait for an issue to be debated thoroughly—or "percolate" . . . before review is granted. . . ." (J. Eisneberg, et al., Cal. Prac. Guide Civ. App. & Writs (2020) ¶13.73.1.) But no rule so provides and the issues here have percolated through 30 years of federal decisions, yielding conflicting answers to the questions the petition presents.

Brennon relies on the "settle an important question of law" ground for review. (Rule 8.500, subd. (b)(1).) The District offers nothing to refute his assertion that the case presents an "important issue of law." The Court of Appeal thought so.

II. Brennon need not have filed a petition for rehearing.

The District incorrectly asserts Brennon forfeited his right to seek review by not seeking rehearing in the Court of Appeal.[2] Rule 8.500, subdivision (c)(3) provides otherwise.

The District also incorrectly asserts that Brennon has "reframed" the issues in a way required them to be presented in a petition for rehearing. But issues need only be stated "in terms of the facts of the case." (Rule 8.504, subd. (b)(1).) Brennon initiated an original writ proceeding. He sought review of the trial court's order sustaining the District's demurrer to his cause of action under the Unruh Act. The "issue" before the Court of Appeal was whether Brennon's pleading stated a cause of action - under the Unruh Act[3] - or on any other theory presented by his factual allegations. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 *(Zhang)*.) The Court of Appeal determined it did not and denied Brennon's petition. (Opn. at p. 59.) Brennon's Education-Code theory is "fairly included" in the issue before the Court - whether his complaint states a cause of action. (See Rule 8.516 (b)(1).)

On September 1, 2020, the Court of Appeal notified the parties that it would be taking judicial notice of the legislative history of the Act and of the relevant Education Code provisions. It invited

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[2] Brennon's counsel neglected to include that information in the Petition for Review and regrets the error. (Rule 8.500, subd. (b)(3).)

[3] "The label given a petition, action or other pleading is not determinative; rather, the true nature of a petition or cause of action is based on the facts alleged and remedy sought in that pleading." (*People v. Villa* (2009) 45 Cal.4th 1063, 1067–1068.)

the parties to file supplemental briefs. Brennon raised the Education-Code issue on September 21, when he filed his brief the court had invited. He included a section captioned "Brennon's complaint states, or may be amended to state, a cause of action under the Education Code."

The Court of Appeal discussed at length the Education Code amendments and what it perceived to be the legislative intent behind them. (Opn. at pp. 37–43.) So far as the opinion reflects, the court saw Brennon's petition as a vehicle to issue its opinion on the applicability of the Unruh Act and nothing more. It did not even discuss the standard of review applicable when a trial court sustains a demurrer without leave to amend. (*Zhang*, *supra*, 57 Cal.4th at p. 370.)

The Court of Appeal also understood the practical impact of its opinion. The Education Code provided a remedy for the "same kinds of discrimination as does the Unruh Act." (Opn. at p. 41.) Victims such as Brennon would not be able to seek the Unruh Act's "generous" remedies, however. (Opn. at p. 42.) The court extensively discussed the interplay of the Unruh Act and the Education Code. Whether Brennon's complaint stated a cause of action under the Code was fairly embraced in that discussion and did not require Brennon to file a petition for rehearing to raise the question here.[4]

[4] Any limitation on the scope of review is a matter of policy, in any event. The Court has discretion to expand or contract or re-define the issues. (Rule 8.500, subd. (c), rule 8.516.)

III. The District's *ad hominem* attack on Brennon's merits arguments is unwarranted and wrong.

Characterizing Brennon's arguments as "astonishing," "offensive to this Court and all California appellate courts," "misleading" and "blatantly false," the District mis-states his arguments and castigates him inappropriately.

The long line of federal cases on which Brennon relies do hold contrary to the Court of Appeal. Those cases are not binding on any California court and Brennon never suggests they do. But they are persuasive. (See *People v. Memro* (1995) 11 Cal.4th 786, 882.) Even unpublished federal opinions are considered persuasive. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [finding reasoning in unpublished federal district court opinion persuasive].) The Court of Appeal cited with favor the single district court opinion that sided with it against the applicability of the Unruh Act to public schools. (Opn. at p. 34 citing *Zuccaro v. Martinez Unified School District* (N.D. Cal. Sept. 27, 2016, No. 16-cv-02709-EDL) 2016 WL 10807692.)

Brennon appropriately argues that the federal cases starting with *Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal. 1990) 731 F.Supp. 947, 952 (*Sullivan*) analyze the question correctly. The Court of Appeal deemed *Sullivan* "bereft of analysis." A fair reading of the *Sullivan* opinion belies that characterization. (731 F.Supp. at pp. 952–953.) Brennon submits the Court of Appeal over-analyzed the question.

Brennon correctly describes the law reviews cited by the Court of Appeal. In his letter brief to the Court of Appeal he stated, "Professor Horowitz maintained the statute applied only to

private individuals and entities."(Br. at 1 filed 09–21–20.) And he appropriately points to the law review article[5] cited by this Court in its first, post-1959-amendments decision concerning the scope of the Unruh Act. (*Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 469 *(Burks)*.) Nothing inappropriate exists in his scholarship. Nothing in the District's answer addresses its merits.

The Court of Appeal's analysis of the legislative intent behind the 1998 amendments to the Education Code does, in fact, hinge on Assembly Member Kuehl's transmittal letter to the Governor. The key sentence of that letter on which the court relied and set forth in italics, was not in any of the prior history. "The bill does not redefine or expand existing non-discrimination statutes." (Opn. at p. 40.)

The District perceives some error in Brennon relying on arguments he advanced below but never says why. No reason exists not to so rely. Raising new arguments for the first time in a petition for review is not sound appellate practice.

At the petition for review stage, the appropriate focus is on whether this case should be among those the Court selects for decision. The District's merits argument do not add to that analysis.

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[5] No need exists to seek judicial notice of a law review article as did the Court of Appeal and as the District seems to maintain Brennon is required to do. Law reviews are among the "materials [that] are appropriate in construing statutes, determining constitutional issues, and formulating rules of law." (Law Rev. Comm. Comment to Evid. Code 450, 7 Cal.L.Rev.Comm. Reports 1 (1965).)

CONCLUSION

The District does not discuss or dispute the conclusion the Court reached in *Burks*. As the versions of the 1959 amendments wound through the Legislature, specific industries or establishments were deleted until the final version extended coverage of the Act to "all business establishments of every kind whatsoever." Public schools were among those deleted along the way. "These deletions can be explained on the ground that the Legislature deemed specific references mere surplusage, unnecessary in view of the broad language of the act as finally passed." (*Burks*, *supra*, 57 Cal.2d at p. 469.)

This petition presents important questions of widespread public interest. Whether the Court of Appeal got it right or not, this Court should grant the petition determine the scope of the Unruh Act as it has done in the past.

Respectfully submitted,

Dated: January 22, 2021 By: /s/ Alan Charles Dell'Ario

Attorney for Petitioner
Brennon B.

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Dated: January 22, 2021 By: /s/ Alan Charles Dell'Ario

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Supreme Court of California

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Supreme Court of California

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Lower Court Case Number: **A157026**

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