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.	)	
	)	

After a Decision by the Court of Appeal
First Appellate District, Division 1

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

I. ISSUES BEFORE THE COURT

Before this Court for resolution are two issues: (1) Is a public school district a "business establishment" for purposes of the Unruh Civil Rights Act (Civ. Code § 51), and (2) Even if a public school district is not a "business establishment," can it nevertheless be sued under the Unruh Act when the alleged discriminatory conduct is actionable under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.). Both are issues of first impression.

In his Petition for this Court's Review, Petitioner additionally presented the following two questions: (1) Is a K-12 public-school victim of prohibited discrimination entitled to the enhanced penalties of Civil Code section 52 because either 1) the Unruh Act applies to public schools directly, or 2) its remedies are incorporated into the relevant provisions of the Education Code; and (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.

II. INTRODUCTION

This Court has been asked to decide whether victims of alleged discrimination may hold a public school district liable under the Unruh Civil Rights Act (Civ. Code § 51) and avail themselves to the remedies set forth in section 52. More

specifically, this Court will settle whether the statutory term "business establishment" extends to public school districts, which are state actors and are Constitutionally mandated to provide free and public education to all of California's youth.

The Court of Appeal's lengthy and detailed opinion thoughtfully and carefully analyzed why the Unruh Act should not apply to public school districts. It correctly reviewed the history behind the Act, evaluated this Court's precedents, explained why federal decisions and their summary conclusions must be disregarded, and noted the availability of other comprehensive state and federal statutory schemes that provide remedies to victims of discrimination. It confirmed that the Act is not directed at, and does not encompass, state action, and thus ultimately concluded that public school districts are not "business establishments" subject to the Act. As set forth herein, the Court of Appeal's decision should be affirmed.

The instant action, which the parties have already settled, arose from alleged discrimination claims brought by a special-needs student against the school district when he was allegedly assaulted multiple times on school property. There is no dispute that discrimination in California public school districts is abhorrent. However, the Unruh Act is not the statutory basis to hold public school districts liable.

The Unruh Act only applies to "business establishments" – businesses in private ownership that provide services,

accommodations, facilities, advantages and privileges to members of the public. Public school districts, like all other public entities, are not businesses. Public school districts are an arm of the State – state actors engaging in state action. As governmental entities, public school districts provide governmental services, which are funded by taxpayer dollars. Specifically, public school districts carry out the Constitutional directive to provide free and public education to students K-12 within their geographical boundaries. They act as public servants, not businesses, in their provision of free and public education. Legislative history and intent, which are reflected in this Court's decisions, and other California courts, demonstrate and confirm that state actors, like public school districts, were never intended to be subject to the Act.

III. STATEMENT OF THE CASE & RELEVANT FACTUAL ALLEGATIONS

Petitioner filed the operative Second Amended Complaint on October 3, 2018, against the West Contra Costa Unified District ("District") alleging negligence, intentional infliction of emotional distress and civil rights violations arising out of alleged acts of student-on-student harassment and staff-on-student abuse. [1]

[1] Allegations regarding petitioner's alleged abuse are immaterial to this Court's purely legal consideration about whether or not a public school district is a "business establishment" subject to the Unruh Act.

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

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

The District's demurrer to the Fifth Cause of Action was sustained, without leave to amend, on the grounds that the District, a public entity, was not a "business establishment" subject to the Act.

Petitioner filed a Petition for Writ of Mandate with the First District Court of Appeal on April 23, 2019. By February 21, 2020, the matter was fully briefed.

The underlying case settled in March of 2020, [2] before oral argument and before the Court of Appeal issued its decision. Petitioner requested that the Court of Appeal dismiss the petition. Petitioner's request for dismissal was denied on September 2, 2020.

Oral argument was held on October 1, 2020, and the Court of Appeal issued its decision on November 13, 2020.

This Court granted petitioner's Petition for Supreme Court Review (and denied his request for an order directing

[2] Petitioner has been fully and completely compensated per the terms of the Settlement Agreement and Release.

depublication of the Court of Appeal's opinion) on February 24, 2021. Petitioner filed his Opening Brief on April 21, 2021.

IV. ARGUMENT

A. PUBLIC SCHOOL DISTRICTS ARE STATE ACTORS

There is no dispute that a public school district is a governmental, public entity and an arm of the state. (*Butt v. State of California* (1992) 4 Cal.4th 668, 680-681, 688; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1195) A public school district performs and carries out a state constitutional mandate – the provision of free and public education. (*Id.*) It is a state actor, engaging in state action, and does so as a public servant, not as a commercial enterprise. (*Id.*; see also, e.g., *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 825 (City acts as a public servant in the provision of sidewalks and curbs); see also, *Zuccaro v. Martinez Unified School District* (N.D. Cal. Sept. 27, 2016, No. 16-cv-02709-EDL 2016 WL10807692 (*Zuccaro*)["[P]ublic elementary school, particularly in its capacity of providing a free education to a special needs preschooler, is [ ] acting as a public servant rather than a commercial enterprise and is therefore not subject to the Unruh Act".]

As set forth *infra*, state actors, including public school districts, are not subject to the Unruh Act.

B. LEGISLATIVE HISTORY AND INTENT CONFIRMS THAT STATE ACTORS, AND SPECIFICALLY PUBLIC SCHOOL DISTRICTS, WERE NEVER INTENDED TO BE SUBJECT TO THE UNRUH ACT

1. The Unruh Act was Specifically Created to Combat Discrimination by Private Persons, Not State Actors.

As the Court of Appeal aptly explained, the origination of California's Unruh Act can be traced back to, and begins with, the *Civil Rights Cases* (1883) 109 U.S. 3. (See *Brennon B. v. Superior Court of Contra Costa County* (2020) 57 Cal.App.5th 367, 370-372.) There, the United States Supreme Court invalidated the first federal public accommodations statute, which was directed at prohibiting discriminatory conduct by private persons. (*Civil Rights Cases,* 109 U.S. at pp. 9-20.) The Court held that private conduct by private persons and entities could not be regulated by the federal government. (*Id.*) Rather, the federal government could only prohibit discrimination by state actors and regulate state action. (*Id.*)

In response, California enacted its own public accommodations statute specifically to prohibit discriminatory conduct by *private* persons and entities in the provision of goods, services and accommodations to members of the general public. (See *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 607-608; see also, generally, Horowitz, *The 1959 California*

Equal Rights in "Business Establishments" Statute – A Problem in Statutory Application (1960) 33 So.Cal.L.Rev. 260, 263 (Horowitz).)

California's original 1897 public accommodations statute, as amended in 1919 and 1923, (which is Unruh's predecessor statute), provided that:

> "[a]ll citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens." (*Warfield, supra,* 10 Cal.4th at pp. 607-608.)

It is clear from the language of the original public accommodations statute, and the historical context in which it was enacted, that it sought to prohibit discrimination (particularly, racial discrimination) by *private* businesses that provided services and accommodations to the public. (See generally, Horowitz, *supra,* 33 So.Cal.L.Rev. at pp. 261-263.)

"Places of public accommodation" are (and have always been) privately owned entities that provide services, facilities and accommodations to the general public.[3] As the California Court of

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[3] The ADA recognizes and confirms that places of "public accommodation[ ] are operated by private entities, not public

Appeal stated in *Carolyn v. Orange Park Community Association,* "[P]laces of public accommodation are places designed and intended to provide services, goods, privileges and advantages to members of the public, usually in exchange for payment (and when not requiring payment, often motivated by some other advantage to the entity providing the accommodation, such as promoting its good will to the community)." (*Carolyn v. Orange Park Cmty. Ass'n* (2009) 177 Cal.App.4th 1090, 1104.)

A public school district is not a "place of public accommodation," nor is it the functional equivalent.[4] (*Brennon B.*, *supra,* 57 Cal.App.5th at p. 389, quoting *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 697 (*Curran*).) A public school district is not classically open to the general public. "Patrons" or members of the general public cannot use a public school district's recreational facilities "at their convenience" or for their amusement, nor can they take classes at their leisure, store their belongings in school lockers, or decide to dine at the school

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entities." (*Sandison v. Mich. High Sch. Athletic Ass'n* (6th Cir. 1995) 64 F.3d 1026, 1036; see also, 28 C.F.R. § 36.104 (providing that "[p]ublic accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation" and that "[p]lace of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories.").)

[4] Federal courts across the country have confirmed that a public school district, in performing educational functions, is not a place of public accommodation under federal law. (*Brennon B., supra,* 57 Cal.App.5th at p. 382, fn. 8.)

cafeteria. (See, e.g., *Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72, 81 (*Isbister*); *Curran, supra,* 17 Cal.4th at pp. 699-700) Only authorized guests are permitted to enter a school district's campus, and are required to sign in at the front office and obtain a visitor's pass.

It is only privately owned businesses and places of public accommodation in private ownership – not state actors – that were subject to the original public accommodations statute (and continue to be subject to the current version of the statute). As the Court of Appeal stated, "nothing in the historical context from which the Unruh Act emerges suggests the state's earlier public accommodation statutes were enacted to reach 'state action'…these statutes were enacted to secure within our state law the prohibition against discrimination **by privately owned services and enterprises** the United States Supreme Court referenced in the *Civil Rights Cases*." (*Brennon B., supra,* 57 Cal.App.5th at p. 372)(emphasis added).)

Alleged discrimination by state actors (such as by public school districts) was instead redressed through federal statutes to vindicate constitutional rights – statutes that could reach state action. (See, e.g., *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483 (*Brown*); see also, Horowitz, *supra,* 33 So.Cal.L.Rev. at pp. 260-263.) Alleged discrimination by and between private persons was to be redressed through the public accommodations statute (the then-existing version of the Unruh Act). (See

Horowitz, *supra,* at p. 281 ["[i]t was clear that in [former] [Civil Code] Section 51 and 52 the Legislature enacted a principle creating a right not to be discriminated against on grounds of race in some, but not all, **relationships between private persons.**" (emphasis added)].)

However, through the 1950's, private businesses continued to discriminate against African-American patrons, refusing to make their services and facilities available to them. A number of appellate courts declined to hold these private businesses liable under the then-existing version of the Unruh Act. (See *Long v. Mountain View Cemetery Assn.* (1955) 130 Cal.App.2d 328 (private cemetery not held liable); *Coleman v. Middlestaff* (1957) 147 Cal.App.2d Supp. 833 (dentist's office not held liable); *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887 (private school not held liable).)

In response, in 1959, Legislature enacted the current version of the Unruh Act to confirm its application to any and all privately owned business establishments that provide services, facilities, advantages, accommodations and privileges to members of the public. (*Isbister*, *supra,* 40 Cal.3d at pp. 75-76, quoting *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 486 (*Burks*).)

2. Inclusion of The Term "Schools" in Earlier Drafts of The Act Does Not Suggest The Legislature Intended For The Act To Include State Actors.

As originally introduced, the legislation attempted to list, in broad terms, the types of facilities and entities that were intended to be subject to the Act. (See *Curran, supra,* 17 Cal.4th at 687, quoting *Warfield, supra,* 10 Cal.4th 608-609.) Ultimately, however, after a series of amendments, the Legislature determined that the Act only applies to "business establishments of every kind whatsoever." (*Id.*; Civil Code § 51(b); see also, Horowitz, *supra,* 33 So.Cal.L.Rev. at pp. 265-270.)

While the term "schools" appeared in earlier drafts [5], nothing in the legislative history suggests that the Act was intended to reach discriminatory conduct by state actors, such as by public school districts. (See *Brennon B., supra,* 57 Cal.App.5th at p. 379, citing Horowitz, *supra,* 33 So.Cal.L.Rev. at p. 262.) Rather, the "schools" contemplated by the Legislature were those "which primarily offer[ed] business or vocational training," not public schools. (See *Brennon B., supra*, at p. 376-377, quoting Horowitz, *supra,* 33.So.Cal.L.Rev. at p. 268-269 & fn. 35, 36.) A review of the amendments and the historical context of the Act's

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[5] The term "business establishment" was never intended to encompass *all* of the entities or activities listed in the initial bill "without regard to whether such activities reasonably could be found to constitute a business establishment." (*Warfield, supra,* 10 Cal.4th at p. 615.)

origination, demonstrates that the "schools" the Legislature contemplated as being subject to the Act were those in private ownership, involving private actors. (See *Brennon B., supra,* at p. 378.)

Indeed, in no prior version of the Act did the Legislature list or include governmental entities or state actors as being subject to the Act, nor did the Legislature ever include language that suggested it was creating a private right of action against the State or other governmental entities. The absence of any specific enumeration of state and local government entities in the Legislative history (and final version) of the Unruh Act, when the Legislature specifically enumerated state and local governmental entities as being subject to other state statutes (such as the Government Code, including FEHA), strongly corroborates the Legislature's intent to exclude governmental entities from the entities covered by Unruh Act liability. (See *Wells, supra,* 39 Cal.4th at p. 1190 ["The specific enumeration of state and local governmental entities in one context, but not in the other, weighs heavily against a conclusion that the Legislature intended to include public school districts as "persons" exposed to CFCA liability."].)

As discussed in further detail *infra*, this Court has confirmed that the Act only applies to "facilities in *private* ownership, but otherwise open to the public," not state actors. (*Isbister, supra,* 40 Cal.3d at pp. 75-76 (emphasis added).)

3. The Legislature Did Not Include Subsection (f) to Expand the Statute to Apply to State Actors; Only a Violation of the ADA by a Private Business Establishment is Actionable under the Act.

Petitioner urges that the Legislature's inclusion of subsection (f) to Section 51 ("A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section") expands the reach of the statute to include state actors. (Opening Brief, p. 30.) He argues that any violation of the ADA by any person or entity is also a violation of the Act, and since a public school district (state actor) is subject to Title II of the ADA, it must therefore be subject to the Unruh Act. (*Id.* at pp. 29-33.) This argument ignores the controlling authorities of this Court that confirm that the ADA was *not* incorporated into the Unruh Act in its entirety and "that the Act has always been, and remains, a business establishment statute, and that it is violations of the ADA *by* business establishments (or, as denominated by the ADA, "public accommodations") that are actionable as violations of the Unruh Act under Civil Code 51, subdivision (f)." [6] (*Brennon B.*, *supra,* 57 Cal.App.5th at p. 404,

[6] This argument further ignores that the ADA itself distinguishes between private entities (subject to Title III) and public entities (subject to Title II), and that the private entities subject to Title III are the exact same entities that are subject to Unruh. (See 42 U.S.C. § 12181(7) [providing that "[t]he following private entities

relying on *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, *Rojo v. Kliger* (1990) 52 Cal.3d 65, and *Munson v. Del Taco Inc.* (2009) 46 Cal.4th 661.)

As this Court confirmed in *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, and later in *Rojo v. Kliger* (1990) 52 Cal.3d 65, violations of Title I of the ADA, which prohibits discrimination in employment, are *not* incorporated into the Unruh Act. Therefore, not *any* violation of the ADA constitutes a

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are considered public accommodations": "an inn, hotel, motel, or other place of lodging," "a restaurant, bar, or other establishment serving food or drink," "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment," "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or retail establishment," "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service," "a gymnasium, health spa, bowling alley, golf course, or other place of recreation" etc.).] Federal cases examining the reach of Title III confirm that it applies to *private entities* that provide public accommodations and that public entities are *not* places of public accommodation. (*See, e.g., Sandison v. Mich. High Sch. Athletic Ass'n* (6th Cir. 1995) 64 F.3d 1026, 1036 (stating that "Title III protects disabled individuals from unequal enjoyment of 'places of public accommodation' [a]nd § 12181(7) and § 36.104 make clear that public accommodations are operated by private entities, not public entities"); *DeBord v. Bd. of Educ.* (8th Cir. 1997) 126 F.3d 1102, 1106 (stating that "Title III of the ADA applies to private entities providing public accommodations, however, not to public entities"); *Bloom v. Bexar Cty*. (5th Cir. 1997) 130 F.3d 722, 726-27 (citing, inter alia, *Sandison* and *DeBord* for the proposition that Title III is inapplicable to public entities).)

violation of Unruh. (*Rojo, supra,* at p. 77.) Rather, only a violation of the ADA by a "*business establishment*" is actionable under Unruh. (*Alcorn, supra,* at p. 500.)

"[T]here is no indication that the Legislature intended to broaden the scope of [Civil Code] section 51 to include discrimination other than those made by a 'business establishment' in the course of furnishing goods, services or facilities to its clients, patrons or customers." (*Id.*, citing Horowitz, *supra,* 33 So.Cal.L.Rev. at pp. 272-279, 288-289, 294.)

Even though *Alcorn* and *Rojo* were decided prior to the 1992 amendment that included subsection (f), "[t]here is not the faintest suggestion in the legislative history, however, that the Legislature intended to overrule *Alcorn*, as well as other cases by our Supreme Court following it. (E.g. *Rojo v. Kliger* (1990) 52 Cal.3d 65, 67)." (*Brennon B.*, *supra,* 57 Cal.App.5th at p. 402.) Further, "no subsequent case has ever suggested *Alcorn* was overruled by statute and is no longer controlling as to the scope of the Unruh Act." (*Id.*)

In *Munson v. Del Taco Inc.* (2009) 46 Cal.4th 661, 673, this Court recognized that the Unruh Act is this state's equivalent of Title III of the ADA. [7] It therefore stands to reason that only Title III violations are incorporated into the Unruh Act.

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[7] *Munson* specifically involved alleged violations of Title III of the ADA.

Indeed, the purpose of incorporating Title III violations into the Unruh Act was to allow litigants to recover the remedies of Unruh upon establishing a Title III violation (particularly an ADA access violation) without having to prove intentional discrimination. (See *Munson, supra,* at pp. 670-673; see also, *Molski v. M.J. Cable, Inc.* (9th Cir. 2007) 481 F.3d 724 (allowing for recovery of monetary damages under Unruh for alleged Title III violations).)

The Ninth Circuit in *Bass v. County of Butte* (9th Cir. 2006) 458 F.3d 978 squarely rejected the argument that any violation of the ADA is per se a violation of Unruh stating, "The plaintiff's reading 'would, in effect, add to the text that a violation of an individual's right under *any part of* the ADA shall constitute a state-law violation as well, even if the subject matter of the alleged ADA violation is wholly outside the state-law protection at issue. The text of the amendments does not sweep so broadly." (*Bass, supra,* at p. 982.)

"Rather, the legislature only intended to incorporate those provisions of the ADA germane to the *original scope of the Unruh Act*." (*Anderson v. County of Siskiyou* (N.D. Cal. 2010) 2010 WL 3619821, at p. *6.) As the Unruh Act has only ever been intended to apply to places in private ownership that provide public accommodations, it stands to reason that only Title III violations are incorporated. "To conclude that the Unruh Act encompasses [public entities] simply because the ADA does would

impermissibly render 'business establishment' under the Unruh Act synonymous with 'public entity' under the ADA." (*Id.* at fn. 4.) Of course, a public entity is not synonymous with a privately held business establishment.

These cases demonstrate that the language of subsection (f) cannot be interpreted in isolation and without regard to this Court's decisions and the Legislative history of the Unruh Act, including the legislative intent behind the 1992 amendment. As the Court of Appeal stated, there is "no indication the Legislature intended, as to disability discrimination only, to transform the Unruh Act into a general anti-discrimination statute making any violation of the ADA by any person or entity a violation of the Act. On the contrary, throughout the legislative process, the Unruh Act was consistently described as prohibiting discrimination *by business establishments*." (*Brennon B.*, *supra,* at p. 400.)

Moreover, nothing in the legislative history suggests that the Unruh Act, through subsection (f) or otherwise, was intended to reach state actors or state action. To conclude that it does would amount to an impermissible expansion of the statute. (*Anderson, supra,* at p. *6.)

Thus, a public school district cannot be sued under the Unruh Act simply because it can be held liable for alleged discriminatory conduct under the ADA. By its express language, and as confirmed by this Court, the Act does not apply to just any

or every entity or establishment[8] – it only applies to those private entities that can reasonably be found to constitute a "business establishment" (See *Warfield, supra,* 10 Cal.4th at p. 615.) And a violation of the ADA by such a "business establishment" (which would be a violation of Title III of the ADA) is also actionable under the Act. (Civ. Code 51(f).)

4. The Legislature Did Not Intend for State Actors to be Subject to Unruh's Treble Damages Remedy.

California courts, including this Court, have held that treble damages are punitive damages, and therefore not recoverable against a public entity, including a public entity school district. (See Gov. Code. § 818; *Wells v. One2One, supra,* 39 Cal.4th at pp. 1193-1196; *Los Angeles Unified School District v. Superior Court (Doe)* (2021) 64 Cal.App.5th 549, 2021 WL 2024615, at *56; see also *Visalia Unified School District v. Superior Court* (2019) 43 Cal.App.5th 563, 570 quoting *City of Sanger v. Superior Court* (1992) 8 Cal.App.4th 444, 450 [" 'Requiring…public entit[ies] to pay punitive damages would punish the very group imposition of punitive damages was intended to benefit' – the taxpaying members of the general public.'"].)

This Court in *Wells v. One2One* held that imposing treble

[8] If it did, the term "business establishment" would be meaningless.

damages on public school districts would infringe upon the state's sovereign powers and the state's ability to carry out its constitutional mandate to provide free and public education.[9] (*Wells, supra,* 39 Cal.4th at p. 1193.) As this Court explained, "in light of the stringent revenue, appropriations, and budget restraints under which all California governmental entities operate, exposing them to [ ] draconian liabilities…would significantly impede their fiscal ability to carry out their core public missions. In the particular case of public school districts, such exposure would interfere with the state's plenary power and duty…to provide the free and public education mandated by the Constitution." (*Id*.)

This Court went on to explain:

> "School districts must use the limited funds at their disposal to carry out the state's constitutionally mandated duty to provide a system of public education. The Constitution requires, and makes the Legislature responsible for providing, "a system of common schools by which a free school shall be kept up and supported in each district...." (Cal. Const., art. IX, § 5.) The Legislature has chosen to implement this "fundamental" guarantee through local school districts with a considerable degree of local autonomy, but it is well settled that the state retains

[9] The *Wells* case involved the treble damages plus penalties provision in the California False Claims Act (CFCA) and held that such exposure to public school districts was contrary to Legislative intent and an infringement on the state's sovereign powers.

> plenary power over public education." (*Wells, supra,* at p. 1195, quoting *Butt*, *supra*, 4 Cal.4th at pp. 680-681.)
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> ***
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> "Hence, there can be no doubt that public education is among the state's most basic sovereign powers. Laws that divert limited educational funds from this core function are an obvious interference with the effective exercise of that power." (*Wells,* at p. 1195.)
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> "The Legislature is aware of the stringent revenue, budget, and appropriations limitations affecting all agencies of government – and public school districts in particular." (*Id.*)

Thus, this Court concluded that the Legislature did not intend to subject financially constrained public school districts – or any agency of the state or local government – to treble damages (plus penalties) recoveries. (*Wells*, *supra*, at pp. 1190-1196.) The reasoning and analysis of *Wells* with respect to treble damages recoveries against a public school district under the CFCA applies equally with respect to treble damages recoveries against a public school district under Unruh.

In the same vein, the Court of Appeal recently held that treble damages under Code of Civil Procedure section 340.1, in cases involving alleged childhood sexual abuse, are "primarily exemplary and punitive" and therefore public school districts (like all public entities) "maintain[ ] sovereign immunity from liability for such damages under [Government Code] section 818."

(*Los Angeles Unified School District v. Superior Court (Doe)* (2021) 64 Cal.App.5th 549 at *56, 2021 WL 2024615 at *1.)

Similarly, treble damages provided by Section 52 are primarily exemplary and punitive. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 [Unruh Act damages provision "allowing for an exemplary award of up to treble the actual damages suffered with a stated minimum amount reveals a desire to punish intentional and morally offensive conduct." (superseded by statute on another point as stated in *Munson v. Del Taco, Inc.*, *supra*, 46 Cal.4th at 664-665)] Therefore, as the treble damages recovery under Unruh is primarily punitive, public school districts are immune from such exposure. (Gov. Code § 818.)

The Court in *Los Angeles Unified School District v. Superior Court* rejected plaintiff's "public policy" argument that treble damages are needed to bring past childhood sexual abuse to light, punish past childhood sexual abuse cover ups and deter future ones. The Court held that "while this is a worthy public policy objective," it is not one for which the state has waived sovereign immunity. (*Los Angeles Unified School Dist. v. Superior Court (Doe)*, *supra*, 64 Cal.App.5th at *68, 2021 WL 2024615 at *11, citing *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 145-146.)

These authorities confirm that exemplary and treble damages under Unruh cannot be recovered against a public

entity school district, and that the Legislature did not intend for such exemplary and punitive damages to be recoverable against a public school district. Petitioner agrees. (Opening Brief, pp. 35-36.) This weighs heavily in favor of a conclusion that the Legislature did not intend for the Unruh Act to apply to public school districts.

5. The Language in Education Code 201(g) Does Not Support the Conclusion that the Legislature Intended for the Act to Apply to State Actors. Nor Are Unruh's Remedies Incorporated Into the Education Code.

Petitioner urges that California Education Code section 201(g), enacted as part of the 1998 amendments to Education Code sections 200 et seq., supports the conclusion that the Unruh Act applies to public school districts, and/or indicates that Unruh's remedies are incorporated into the Education Code.[10] The language in section 201(g)[11] does not support either argument.

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[10] The latter issue – whether Section 52 remedies are expressly incorporated into the Education Code – should be deemed beyond the scope of review. At issue is whether the language of Education Code section 201(g) provides any insight into whether the Legislature intended for public entity school districts to be "business establishments" under the Unruh Act. The language of section 201(g) does not support such a conclusion.

[11] Section 201(g) provides: "It is the intent of the Legislature that this chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of

As the Court of Appeal explained, there is nothing in the language of Education Code section 201 (as amended), nor the Legislative history, that suggests that public school districts are "business establishments" subject to the Act. (*Brennon B.*, *supra,* 57 Cal.App.5th at pp. 393-397) Rather, the Education Code provides a comprehensive and "extensive anti-discrimination statutory scheme [that] prohibits the same kinds of discrimination as does the Unruh Act," and in some respects, is more generous than the Unruh Act. (*Id.* at p. 396.)

Moreover, as discussed *ante*, the Legislature has not intended for treble damages to apply to public entities, including public school districts, because such damages are punitive. (*Wells v. One2One, supra,* 39 Cal.4th at pp. 1193-1195; *Los Angeles Unified School Dist. v. Superior Court (Doe), supra,* 64 Cal.App.5th at *56, 2021 WL 2024615 at *1.) Punitive damages

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Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes."

are not recoverable against public entities. (Gov. Code 818.) Therefore, it stands to reason that the Legislature would not incorporate a treble damages remedy into the Education Code that is specifically prohibited against public school districts. (See *People v. Castillolopez* (2016) 63 Cal.4th 322, 331 [the Legislature is deemed to have been aware of existing law and to have enacted legislation consistent therewith].)

Indeed, the 1998 amendments were not intended to redefine or expand existing non-discrimination statutes, such as the Unruh Act. (*Brennon B., supra,* 57 Cal.App.5th at 395-396, quoting Assembly member Sheila Kuehl, letter to then-Governor Pete Wilson, requesting his signature on Assem. Bill No. 499 (1997–1998 Reg. Sess.) Sept. 2, 1998, p. 1.)

Therefore, petitioner's reliance on section 201(g) is unavailing with respect to the issues before this Court.[12]

6. Public Policy Does Not Support an Impermissible Expansion of the Statute to Include State Actors.

The public policy of this State is to confine, not expand, governmental liability. Indeed, "[u]nder the Government Claims Act, a public entity is not liable '[e]xcept as otherwise provided by statute.'" [citations] If the Legislature has not created a statutory

[12] Further, while it may be possible for petitioner to state a cause of action under the Education Code against West Contra Costa Unified School District, the remedies he seeks under Section 52 are not available.

basis for it, there is no government tort liability." (*State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1009 [citing, Gov. Code § 815; *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932].) "Sovereign immunity is the rule in California." (*San Mateo Union High School Dist. v. County of San Mateo* (2013) Cal.App.4th 418, 427; *Los Angeles Unified School Dist. v. Superior Court (Doe)*, *supra*, 64 Cal.App.5th at *57, 2021 WL 2024615 at *2.) Government Code section 815 provides that public entity tort liability is exclusively statutory; liability must be based on a specific statute declaring them to be liable. (*San Mateo, supra,* at p. 428.) "'This section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable. … [¶] … [¶] … [T]here is no liability in the absence of a statute declaring such liability.' (Legis. Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 815, p. 167.)' (Corona v. State of California (2009) 178 Cal.App.4th 723, 728 [100 Cal.Rptr.3d 591].)." (*Id.* at 427.)

"The law's clear purpose was ' " 'not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated

circumstances.' " ' [Citation.]" (*Id.* at p. 428, quoting *Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1214.)

While the Unruh Act is to be interpreted in the "broadest sense reasonably possible" in its application to businesses of every kind whatsoever (*Isbister, supra,* 40 Cal.3d at p. 78, quoting *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 468), the government's consent to waiver of sovereign immunity "'must be construed strictly in favor of the sovereign' [citation omitted] and not 'enlarge[d]…beyond what the language requires' [citation omitted]." (*United States v. Nordic Village Inc.* (1992) 503 U.S. 30, 34.) Without any statutory declaration of liability under the Unruh Act, the latter instruction compels a conclusion that the State has not consented to suit under the Act. Indeed, there is no indication that the state has waived sovereign immunity.

As discussed, *ante*, imposing the Act on public school districts would infringe on the state's sovereign power. (*Wells, supra,* 39 Cal.4th at pp. 1193-1196.).

Furthermore, in the absence of any legislative history and intent supporting application of the Act to state actors or other governmental entities, Unruh's embodiment of a fundamental public policy of this state, does not, simply by virtue of the importance of the policy, compel a conclusion that the Act should be expanded to include governmental entities. (See *Los Angeles Unified School District v. Superior Court (Doe)*, *supra*, 64 Cal.App.5th at *68, 2021 WL 2024615 at *11, citing *Kizer v.*

County of San Mateo (1991) 53 Cal.3d 139, 145-146; see also, *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887, at pp. 891-892.) The state's public policy against invidious discrimination cannot be the sole basis for imposing the Act on a given entity. (See *Reed, supra,* at pp. 891-892.)

Thus, Petitioner's "public policy" argument [Opening Brief, at pp. 17-18] must be rejected.

C. CALIFORNIA CASE AUTHORITY CONFIRMS THAT THE ACT ONLY APPLIES TO BUSINESSES IN PRIVATE OWNERSHIP, NOT STATE ACTORS

1. Supreme Court Precedent.

This Court has examined the meaning of the term "business establishment" in a number of cases.[13] In each, the defendant was a private business entity. The Court's analysis in each of these cases thus turned not on whether the defendant was a private business entity, but rather, whether and to what extent the private entity engaged in sufficient business-like activities or transactions with the general public (or non-members), such that the private entity might reasonably be found to constitute a "business establishment" for purposes of

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[13] *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463 (*Burks*); *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790 (*O'Connor*); *Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72 (*Isbister*); *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594 (*Warfield*); *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670 (*Curran*)

application of the Unruh Act. (See *Warfield, supra,* 10 Cal.4th at p. 615; *O'Connor v. Village Green Owners. Assn.* (1983) 33 Cal.3d 790, at pp. 795-796.)

These cases appear to suggest the following analytical framework in determining whether a given entity is subject to the Act: (1) whether the defendant is a privately owned entity or business [14]; (2) determining the core purpose of the private entity's existence [15]; and (3) to what extent does the private entity engage and/or transact with members of the general public (non-members).[16]

As each of the defendants in the subject cases were indisputably private entities, the threshold requirement was satisfied, and the Court focused its analysis on the remaining

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[14] See *Isbister, supra,* 40 Cal.3d at pp. 75-76, 84, 91; *Warfield, supra,* at p. 607; *Burks, supra,* at p. 471.

[15] See *O'Connor, supra*, at p. 796; *Isbister, supra*, at pp. 81, 91; *Warfield, supra*, at pp. 599, 611, 620, 622, 630; *Curran, supra,* at pp. 695-697, 700.

[16] See *Curran, supra,* at pp. 699-700; See *Warfield, supra,* at pp. 621-623, 599 ["Because such 'business transactions' with nonmembers are conducted on a regular and repeated basis and constitute an integral part of the club's operations…we conclude that the club falls within the very broad category of 'business establishments;'" "[T]he business transactions that are conducted regularly on the club's premises with persons who are not members of the club are sufficient in themselves to bring the club within the reach of [the Act]."]

prongs. However, even with the first prong satisfied, the Court repeatedly confirmed in these cases that the Act only applies to entities and facilities in *private ownership*. (See *Isbister, supra,* 40 Cal.3d at pp. 75-76, 91 [the Act applies to "facilities in *private ownership*, but otherwise open to the public" and is directed at "*private* discrimination" (emphasis added)]; *Burks, supra,* 57 Cal.2d at p. 471 [the Act prohibits "*private* persons or organizations" from engaging in discriminatory conduct (emphasis added)]; *Warfield, supra,* 10 Cal.4th at p. 607 [the Act can be traced to early common law doctrine that prohibited discrimination by *privately-owned* public enterprises that served members of the general public].)

With regard to the remaining prongs, this Court explained in *Warfield* that not all businesses engage in activities or transaction with the public, or do so sufficiently enough, to bring them within the purview of the Act. (*Warfield, supra,* at pp. 614-623.) It is possible for some privately owned businesses and entities to be considered "truly private" and thus not subject to the Act. (*Warfield, supra,* at pp. 617-618; *Isbister, supra,* at p. 84.) Therefore, the heart of the analysis lies in evaluating the nature, purpose and regularity with which the private entity engages in transactions or activities with non-members (the general public). (*Warfield, supra,* at pp. 621-623, 599; *Curran, supra,* at pp. 699-700.)

Because a public school district is indisputably *not a business, nor a private entity*, an evaluation of whether a public school district engages in sufficient business-like transactions with the public (prong three) is not reached, leading to the conclusion that the Unruh Act does not apply.

Examining only the third prong would eviscerate any limitation on the scope of the Act and render the term "business establishment" meaningless. Doing so would allow for an impermissible expansion of the statute.

This Court's decisions, following careful consideration of "both the historical genesis of our public accommodation law and the legislative history of the Act," clearly demonstrate that the Unruh Act is, and has always been, "directed at private, rather than state, conduct." (*Brennon B.*, *supra,* 57 Cal.App.5th at p. 388.)

2. Court of Appeal Decisions.

California Court of Appeal decisions support the conclusion that the Act does not apply to state action, but rather, applies only to private entities. As several Courts of Appeal have held, the Act does not apply to government entities because they are not "business establishments." (See *Burnett v. San Francisco Police Dep't* (1st Dist. 1995) 36 Cal.App.4th 1177, 1191-92 [holding that the Unruh Act does not apply to legislative bodies]; *Qualified Patients Assn. v. City of Anaheim* (4th Dist. 2010) 187 Cal.App.4th 734, 763-64 [holding that enacting legislation does

not convert a government entity into a "business establishment" for purposes of the Act]; *Harrison v. City of Rancho Mirage* (4th Dist. 2015) 243 Cal. App. 4th 162, 175-76 [holding that a city is not a "business establishment" for purposes of the Act]; see also, *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808 [because a governmental entity acts as a public servant, carrying out a core governmental task, it is not likely a "business establishment" subject to the Unruh Act. (*Carter,* 224 Cal.App.4th at 825.)

The Court of Appeal decisions upon which petitioner relies – *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744 and *Mackey v. Board of Trustees of Cal. State Univ.* (2019) 31 Cal.App.5th 640 – do not hold otherwise. In *Gatto,* the plaintiff was refused admission to the county's fair because he was wearing a vest with a Hell's Angels insignia. The issue 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. (*Gatto, supra,* 98 Cal.App.4th 744.) The County never challenged Unruh's threshold requirements or application. Therefore, the case is unavailing to petitioner here. His reliance on two sentences of passing dictum to support the proposition that *Gatto* is controlling must be rejected. As petitioner agrees [Opening Brief at pp. 18, 23], a case

is not authority for issues not raised and resolved. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 943.)

Mackey is similarly unavailing. There, the Court of Appeal never ruled on, or even addressed in dictum, the question of whether the Act applies to a school, as the public university defendant did not challenge application of the Act. In any event, a public university is easily distinguishable from a public school district. Enrollment in a public university is not compulsory,[17] membership is selective, and tuition and fees are charged. Most importantly, a public university is not carrying out a fundamental right mandated by the California Constitution. Thus, even had the court in *Mackey* conducted any analysis on Unruh's application, the case would be inapposite.

The Court of Appeal's decision in *California Lutheran* confirms that it is a private entity's core purpose for existence (second prong of the analysis), and whether its transactions with non-members (the general public) (third prong) are related to the private entity's primary purpose, that control whether a private entity constitutes a "business establishment" for purposes of the Act. [18] (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828 (*California Lutheran*).)

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[17] The students that a public school district serve are subject to compulsory full-time education. (See Cal. Ed. Code § 48200.)

[18] Nothing in *California Lutheran* suggests that a state actor or public governmental entity is, or could be, subject to the Act. In fact, the opinion reiterates that Unruh's application revolves

California Lutheran involved a *private* religious school, not a public school district. The threshold question of whether or not the defendant was a private entity, involving private conduct, was satisfied and not at issue. Rather, the court centered its analysis on the second and third prongs of the analysis, namely, the primary, core purpose of the private school's existence (to inculcate religious values on its select members), and the nature and extent of the private school's engagement with non-members (the general public).[19] The court held that the private school's "business transactions" with the general public (such as selling tickets to sporting events, and selling concessions at such sporting events) "[did] not involve the sale of access to the basic activities or services offered by the organization," and therefore did not bring the private school within the purview of the Act. (*California Lutheran, supra,* 170 Cal.App.4th at p. 839, citing *Curran, supra,* 17 Cal.4th at p. 700.) The court distinguished the

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around assessing a *private organization's* interactions with non-members. (*California Lutheran, supra*, 170 Cal.App.4th at pp. 836-840.)

[19] The private school's transactions with *members* did not (and does not) control the outcome. As the court explained, in reliance on this Court's rulings in *Warfield* and *Curran,* the analysis turns on a private entity's "business transactions with *nonmembers*." (*California Lutheran, supra,* at p. 840 (emphasis in original).) A "private organization can engage in some business transactions with *members* without the risk of becoming a "business enterprise" for purposes of the Unruh Act." (*Id*.)(emphasis in original)

private school's non-member transactions from the non-member transactions in *Warfield*. Because the country club's "'business transactions' with nonmembers [were] conducted on a regular and repeated basis and constitute[d] an integral part of the club's operations," the country club in *Warfield* was a "business establishment" for purposes of the Act. (*California Lutheran, supra,* at pp. 836-837, quoting *Warfield, supra,* 10 Cal.4th at p. 599.) Unlike in *Warfield*, the private school's business transactions with non-members were not an integral part of the private school's operations, and thus were not sufficient to deem the private school a "business establishment" under the Act.[20] (*California Lutheran, supra,* at pp. 838-839, citing *Curran, supra,* at pp. 699-700.)

Ultimately, these cases confirm that only private entities that engage in sufficient business transactions or activities with members of the general public are subject to the Unruh Act.

D. CALIFORNIA AND FEDERAL LAW HAVE LONG DISTINGUISHED STATE ACTORS FROM PRIVATE ACTORS

California law expressly recognizes the difference between a governmental entity and a private entity, providing the former

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[20] The Court of Appeal in Brennon B. questioned this outcome, but not the analysis, noting that a private school would likely qualify as a "business establishment." (*Brennon B., supra,* 57 Cal.App.5th at p. 391, citing Horowitz, *supra,* 33 So.Cal.L.Rev. at pp. 285-286.)

the benefit of numerous protections, privileges, immunities and exemptions not otherwise afforded to the latter. (See, *inter alia,* Gov. Code §§ 815-844.6) Indeed, the California Government Code provides an entirely separate body of law specifically for governmental entities due to their special status. (Gov. Code §§ 810-996.6.)

California courts, including this Court, have also recognized the distinct and fundamental differences between governmental entities and private businesses, including private non-profit organizations. (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164 [discussing the fundamental difference between a public school district (state actor) and a charter school (private actor)]; *Los Angeles Leadership Academy, Inc. v. Prang* (2020) 46 Cal.App.5th 270 [Nonprofit charter school and two related nonprofit public benefit corporations not afforded the same tax exemptions as public entities].)

Federal law similarly distinguishes and recognizes the difference between governmental entities and private entities. (See, e.g. *Ortiz v. Alvarez* (E.D. Cal. 2018) 341 F. Supp. 3d 1087 (nonprofit organization that provides educational services for a school district is a private actor); see also, generally, 28 C.F.R. § 36.104, 42 U.S.C. §12131 et seq., and 42 U.S.C. § 12181 et seq., recognizing the difference between public entities, which are subject to Title II of the ADA, and private places of public accommodation, which are subject to Title III.)

These authorities counsel against petitioner's attempt to make a public school district (state actor) synonymous with a "business establishment" or "place of public accommodation" (private actor).

E. FEDERAL CASES APPLYING THE UNRUH ACT TO PUBLIC SCHOOLS ARE NOT PERSUASIVE

Petitioner relies heavily on federal district court cases that have heedlessly applied Unruh to public school districts. These cases ignore "the historical genesis of the Unruh Act, its legislative history, scholarly commentary, and the decisions of [California's] high court." (*Brennon B., supra,* 57 Cal.App.5th at 392-393.)

Indeed, the federal courts applying the Act to public entity school districts have done so without meaningful analysis – and some without any analysis at all. (See *Sullivan v. Vallejo City Unified Sch. Dist.* (E.D. Cal. 1990) 731 F. Supp. 947 (public school district constitutes "business establishment" because the term is to be interpreted "in the broadest sense possible"); *Doe v. Petaluma City Sch. Dist. (Petaluma I)* (N.D. Cal. 1993) 830 F.Supp.1560, 1581-82 (no discussion regarding why public school district constitutes "business establishment," simply concludes that it does citing *Isbister* and *Sullivan*); *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp.1369, 1388 (public school district constitutes "business establishment" because the term is to be interpreted "in the broadest sense possible,"

following *Sullivan* and *Petaluma I*); *Davison v. Santa Barbara High Sch. Dist.* (C.D. Cal. 1998) 48 F.Supp.2d 1225, 1232-33 (no discussion regarding applicability of Unruh to public school districts); *Y.G. v. Riverside Unified Sch. Dist.* (C.D. Cal. 2011) 774 F.Supp.2d 1055, 1065-66 (no discussion regarding applicability of Unruh to public school districts other than footnote reference to subsection (f) of Section 51); *Walsh v. Tehachapi Unified Sch. Dist.* (E.D. Cal. 2011) 827 F.Supp.2d 1107, 1123 (public school district constitutes "business establishment" because the term is to be interpreted "in the broadest sense possible," following *Nicole M., Sullivan* and *Davison*); *K.T. v. Pittsburg Unified Sch. Dist.* (N.D. Cal. 2016) 219 F.Supp. 3d 970, 983 (same, following *Walsh, Nicole M., Davison* and *Y.G.*); *Z.T. v. Santa Rosa City Sch.* (N.D. Cal. 2017) 2017 U.S. Dist. LEXIS 165695, at *16-19 (same, following *K.T., Walsh, Nicole M., Petaluma I* and *Sullivan*); *E.F. v. Delano Joint Union High Sch. Dist.* (E.D. Cal. 2016) 2016 U.S. Dist. LEXIS 139397 at *25 (same, following *Sullivan*); *Herrera v. L.A. Unified Sch. Dist.* (C.D. Cal. 2017) 2017 U.S. Dist. LEXIS 220241 at *13-14 (same, following *E.F., Walsh, Nicole M., Petaluma I* and *Sullivan*).)

As noted above, many of these federal cases simply cite to *Sullivan v. Vallejo City Unified School District,* the first district court case to conclude that a California public school district is a "business establishment." However, as the Court of Appeal noted,

Sullivan's analysis is "bereft of any depth," and, its analysis has been rejected by this Court in *Warfield*. (*Brennon B., supra,* 57 Cal.App.5th at 392-393.)

Where 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.)

The federal district court in *Zuccaro v. Martinez Unified school District* (N.D. Cal. Sept. 27, 2016, No. 16-cv-02709-EDL) 2016 WL 10807692 (*Zuccaro*), however, did perform a meaningful and thoughtful analysis regarding whether the Unruh Act applies to a public school district, and correctly concluded that it does not. [21] The *Zuccaro* court rejected the line of district court

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[21] While there may be only one federal court opinion declining to hold a public school district liable as a "business establishment" under the Act (*Zuccaro*), several California Northern District Court cases have declined to apply the Unruh Act to other governmental entities, some noting that it is not clear whether governmental entities may be held liable under the statute. (See *Anderson v. County of Siskiyou* (N.D. Cal. Sept. 13, 2010) 2010 WL 3619821 at *6 [holding county jail is not a "business establishment" subject to the Unruh Act; "To conclude that a jail is governed by the Unruh Act, notwithstanding the fact that it lacks the attributes of a business, would amount to an impermissible expansion of the statute."]; *Goodfellow v. Ahren* (N.D. Cal. Mar. 26, 2014) 2014 WL 1248238 at *8 ["What is less clear, however, is the extent to which governmental entities may be held liable under the statute."]; *Romstad v. Contra Costa County* (9th Cir. 2002) 41 Fed.Appx. 43, 46 [holding County Department of Social Services is not a "business establishment" for purposes of the Unruh Act]; *Williams v. County of Alameda*

cases above that have ignored this Court's decisions and the origins of the Unruh Act, and held that a public school district acts as a public servant, not a commercial enterprise, in the provision of free and public education to special needs students, and is therefore not subject to the Act. (*Zuccaro,* at. *9-13.)

This Court should likewise reject the line of federal district court cases relied on by Petitioner, as they are "bereft of any depth" and are "patently unpersuasive." (*Brennon B., supra,* at 393; *Gong, supra,* at 375.)

(N.D. Cal. Oct. 30, 2018) 2018 U.S. Dist. LEXIS 185930 at *14-16 [holding the State of California, County of Alameda, the Board of Supervisors of Alameda County, and Alameda Social Services Agency, as government entities, are not "business establishments" subject to the act because "the nature, purpose, and structure of each entity are that of a public servant;" they are not "commercial enterprises" and their programs "do not confer business benefits to the government entities, their employees, or the program beneficiaries."]; *Taormina v. California Dept. of Corrections* (S.D. Cal. 1996) 946 F.Supp.829 [holding state prison is not a business establishment].) These cases support the conclusion that the Act should not apply to governmental entities (state actors).

F. A PUBLIC SCHOOL DISTRICT IS NOT ENGAGING IN A BUSINESS ACTIVITY IN THE PROVISION OF FREE AND PUBLIC EDUCATION; EVEN IF IT DID ENGAGE IN A BUSINESS ACTIVITY, IT WOULD STILL NOT BE SUBJECT TO THE ACT

The state's provision of free and public education is not a "business activity" and cannot even remotely be characterized as such. The provision of free and public education is mandated by the California Constitution and constitutes state action.

Even if a public school district were to engage in a business-like activity or transaction in some circumstance, doing so would not be sufficient to bring the public school within the purview of the Act. As the Court of Appeal astutely explained:

> "The 'overall function' of a public school district is not to 'enhance' its 'economic value.' (*O'Connor, supra,* 33 Cal.3d at p. 796.) While a public school district may provide some athletic facilities for physical education of its students, these facilities are not the district's 'principal activity and reason for existence.' (*Isbister, supra,* 40 Cal.3d at p.76.) Nor do public school districts provide a "physical plant" for "patrons [to] use at their convenience' and for which they pay an annual membership fee. (*Id.* at p. 81) 'Commercial transactions' with the general public are not 'an integral part of [a public school district's] overall operations.' (*Warfield, supra,* 10 Cal.4th at p. 622.) The 'attributes and activities' of a public school district are not 'the functional equivalent of a classic place of public accommodation or amusement.' (*Curran, supra,* 17 Cal.4th at p. 697.) And whatever commercial activities a public school district may engage in (such as allowing school clubs or booster

> organization to sell goods to raise funds for extracurricular student activities, or allowing school athletic departments to charge a small admission fee for student athletic events), 'do not involve the sale of access to the basic' education that public school districts are charged by the state with delivering to every school-age child pursuant to state constitutional mandate. (*Id.* at p. 700, italics omitted.) Public school districts do not 'sell the right to participate' in the basic educational programs and services they deliver. (*Randall v. Orange County Council* (1998) 17 Cal.4th 736, 744.)." (*Brennon B., supra,* 57 Cal.App.5th at p. 398.)

Therefore, simply because a public school district (like West Contra Costa Unified School District) engages in some business-like transactions with members of the general public or provides services to "non-members," such transactions do not involve the sale of public education, and such transactions are distinct from the District's core reason for existence. (See *Curran*, *supra,* at pp. 677-700; *Warfield, supra,* at pp. 622.) Therefore, such transactions do not convert a public school district into a "commercial purveyor" that might otherwise be subject to the Act.[22] (See *Id.*)

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[22] Notably, the alleged discrimination in the case at bar did not occur in the course of a business transaction with a non-member (member of the general public). The alleged discrimination occurred with respect to the provision of free and public education to a member student. Thus, assuming *arguendo* that a public school district could be subject to the Act, at issue was a transaction with a member, with respect to his access to the school district's services – which falls outside of the Act. (See *Curran, supra,* 17 Cal.4th at pp. 700-701 [rejecting the concern

that not extending the scope of the Act to membership policies would allow the Boy Scouts to "be free to discriminate in its membership decisions on any basis, and that no remedy would be available." This Court explained, "To begin with, even though the provisions of the Unruh Civil Rights Act do not apply to the membership policies of the Boy Scouts, it does not follow, as the trial court assumed, that the boy Scouts are therefore free to exclude boys from membership on the basis of race, or on other constitutionally suspect grounds, with impunity. The Unruh Civil Rights Act is not the only legislative measure that is aimed at curbing discrimination…Moreover, even if other potential remedies against invidious discrimination by an organization like the Boy Scouts are considered inadequate, that circumstance cannot justify extending the scope of the Unruh Civil Rights Act further than its language reasonably will bear."]; see also, *California Lutheran*, *supra,* at pp. 839-840 ["Moreover, as the trial court aptly noted, '[T]he complaint of Mary Roe and Jane Doe isn't that they were excluded from purchasing a sweatshirt or going to a football game, but their dismissal from the school goes to the very heart of the reason for the[ ] existence of the school....' In *Curran,* the court recognized that the Boy Scouts could be a business, and hence be prohibited from discriminating, with respect to its nonmember transactions, yet *not* be a business, and hence *not* be prohibited from discriminating, with respect to its membership decisions…[B]oth *Warfield* and *Curran* focused on business transactions with *nonmembers.* It seems implicit in both opinions that an otherwise private organization can engage in some business transactions with *members* without the risk of becoming a "business enterprise" for purposes of the Unruh Act." (emphasis in original.)]

G. VICTIMS OF ALLEGED DISCRIMINATION ARE NOT LEFT WITHOUT REDRESS. THEY MAY AVAIL THEMSELVES TO THE PANOPLY OF ROBUST STATUTORY SCHEMES TO HOLD A PUBLIC SCHOOL DISTRICT LIABLE

Public school districts are indeed subject to stringent anti-discrimination laws. Victims of alleged discrimination are not left without redress against public schools and may avail themselves to the panoply of comprehensive anti-discrimination statutory schemes set forth in the Education Code (Section 200 et seq.), Government Code (Gov. Code section 11135), Title II of the ADA (42 U.S.C. section 12131 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. section 794) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681 et seq.).

These statutory schemes apply to public school districts and ensure that victims of alleged discrimination are fully and completely compensated.

V. CONCLUSION

The historical genesis of the Unruh Act, coupled with its Legislative history and the decisions of this Court, compel the conclusion that the Unruh Act was never intended to be applied to state actors, including public entity school districts.

The Court of Appeal's decision holding that the Unruh Act does not apply to public school districts because they are not "business establishments," and that the Act *only* applies to "business establishments," should be affirmed.

Respectfully submitted,

Dated: June 25, 2021

By: /s/ Cody Lee Saal

Attorney for Real Parties in Interest

CERTIFICATE OF WORD COUNT

The text of this brief is set using **13-pt Century Schoolbook**. According to Word, the computer program used to prepare this brief, this brief contains **10,146** 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 8.520(c).

Dated: June 25, 2021 By: /s/ Cody Lee Saal

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 June 25, 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:

ANSWER BRIEF ON THE MERITS

Hon. Charles Treat Department 12 Contra Costa County Superior Court 725 Court Street Martinez, CA 94553	California Solicitor General 1515 Clay Street Oakland, CA 94612-1499 (for California Attorney General)

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 June 25, 2021, at Pleasant Hill, California.

/s/
Cody Lee Saal

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Csaal@esmlawfirm.com**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/25/2021

Date

/s/Cody Lee Saal

Signature

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