**No.: S266254**

**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

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

# APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT

After and in support of the published Opinion filed November 13, 2020, by the Court of Appeal, First Appellate District, Division One, No. A157026

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

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## CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rules of Court, rule 8.488, the undersigned, counsel for Real Parties in Interest West Contra Costa Unified School District certifies that no other person has a financial interest in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge and if called to testify as a witness could competently testify to the matters contained therein.

Executed this 15th day of September, 2021, at Sacramento, California.

*/s/ Richard S. Linkert*

Richard S. Linkert

## APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to rule 8.520(f) of the California Rules of Court, Schools Insurance Authority respectfully requests leave to file the attached amicus curiae brief in support of Real Party in Interest West Contra Costa Unified School District's response and opposition to Petitioner Brennon B.'s attempts to expand the scope of liability available against school districts under California Law.

Schools Insurance Authority was founded in order to address rising insurance costs and the lack of coverage options that school districts faced in the 1970s. The Sacramento County Office of Education invited each school district within its jurisdiction to send a representative to serve on a task force to research this insurance issue. The decision was made to establish a self-insurance pool to cover common property losses and to purchase excess insurance to cover catastrophic losses, and thus, the first Joint Powers Agreement was created that enabled Sacramento County school districts to pool together for the purpose of self-insurance. Under these codes, Schools Insurance Authority (SIA), originally named Sacramento Insurance Authority, was formed on July 1, 1974, making it the oldest joint powers authority (JPA) in California.

Today, SIA has a total of 35 members, representing school districts, county offices of education and joint powers authority, all located in Northern and Central California. Although not all members participate in all programs, it is through the joining

together for the purpose of self-insuring, group purchase, loss control and greater financial resources, that continued stabilization of insurance costs can be maintained for school districts who participate in Schools Insurance Authority programs.

Thus, Schools Insurance Authority was created to protect school districts and other educational entities from the continuing threats of rising insurance costs and ever-expanding liability against school districts.

Schools Insurance Authority has no interest in or connection to either party in this case but does represent the interests of numerous similarly situated school districts. No party or party's counsel authorized the attached amicus curiae brief in whole or in part. No person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Schools Insurance Authority seeks leave to file the accompanying brief because it offers a unique perspective about the consequences of continued expanded liability against school districts. Further, the school districts represented by Schools Insurance Authority will be directly affected by the Court's opinion in this matter.

Because Schools Insurance Authority believes the accompanying brief would assist the Court it in its resolution of the important issues involved in this matter, it respectfully requests this Court's leave to file the amicus brief.

## ARGUMENT

The fundamental question presented to this Court is whether public education is a business enterprise. The clear answer is "no." And the reason for that answer is that at its fundamental core, a business is aimed at generating profits whereas a public school is aimed at generating an educated populace.

Petitioner seeks a judicial expansion of the Unruh Act and as discussed below, the statute and public policy do not allow it. This Amicus Brief will discuss how the Unruh Act does not apply to the public school system as its constitutionally dictated purpose is not to serve the business interests of its owners or members. Furthermore, regarding remedies, statutory interpretation of the Education Code requires the conclusion that Unruh does not apply and as Unruh imposes exemplary damages, the Legislature did not intend for it to apply to public schools. Finally, a new imposition of Unruh's treble damages and attorney fees provisions would further cripple school educational finances in the wake of rising verdicts and the hundreds of millions of dollars required in indemnity and defense costs by the recent passage of AB 218. A finding that a public school is a "business enterprise" under Unruh would further divert educational funds from the classroom even though plaintiffs are already able to bring discrimination claims against schools under a panoply of other discrimination statutes including the Education Code.

### A. Since the Founding of the United States, the Special Nature of Public Education has been Recognized.

A business enterprise is an entity with the purpose of providing goods or services with the goal of earning a profit for its owners. A public school does not have the goal of generating profits but operates through taxpayer funds and typically at a loss with continual budget shortfalls. Public education is fundamentally different in its origins, funding and constitutionally mandated purpose than that of a business.

Since the founding of the United States, the special nature of publicly provided education has been recognized as vital to ensuring the continuance of our democracy. As emphasized by Thomas Jefferson:

> Educate and inform the whole mass of the people, …they are the only sure reliance for the preservation of our liberty."

(*Thomas Jefferson, Jefferson Himself: The Personal Narrative of a Many-Sided American*, ed. Bernard Mayo (1942; repr., Charlottesville, VA: University Press of Virginia, 1970), 145.)

The importance of ensuring an educated populace to support the democratic structure created by the Constitution meant it was necessary for the public to fund the expense of public schools:

> The whole people must take upon themselves the education of the whole people and be willing to bear the expenses of it. There should not be a

> district of one mile square, without a school in it, not founded by a charitable individual, but maintained at the public expense of the people themselves.

(John Adams, "To John Jebb," September 10, 1785, *The Works of John Adams: Second President of the United States* (Boston: Little, Brown, 1854), 540.)

In California, the right to public education was determined to be so vital that it was guaranteed as a constitutional right in 1879. The California Constitution mandates that a state system of free schools must be provided:

> The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

(Cal. Const., Art. IX § 5.)

California is legally mandated to operate public schools throughout the State. This is unlike the origins and purpose of a business establishment which can open and close its doors as it wishes. Under the California Constitution, public education is "uniquely a fundamental concern of the State." (*Butt v. California* (1992) 4 Cal. 4th 668, 685.) "The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." (*Ibid.*)

California public schools are not a business in any sense of the normal word. On the contrary, a business establishment is not governed by multiple constitutional provisions dictating the structure of the system and dictating its purpose and behavior. These constitutional provisions mandate such things as how the superintendent of the system is to be elected; the creation of county boards of education; and input on the salaries of public-school employees, apportionment of aid and the retirement system. This even includes the mandate to adopt and pay for textbooks as a constitutional right. For instance, a few of these such provisions include:

- A Superintendent of Public Instruction shall be elected by the qualified electors of the State at each gubernatorial election. The Superintendent of Public Instruction shall enter upon the duties of the office on the first Monday after the first day of January next succeeding each gubernatorial election. No Superintendent of Public Instruction may serve more than 2 terms.
  (Cal Const, Art. IX § 2.)

- The State Board of Education, on nomination of the Superintendent of Public Instruction, shall appoint one Deputy Superintendent of Public Instruction and three Associate Superintendents of Public Instruction who shall be exempt from State civil service and whose terms of office shall be four years. This section shall not be construed as prohibiting the appointment, in accordance with law, of additional Associate Superintendents of Public Instruction subject to State civil service.
  (Cal Const, Art. IX § 2.1.)

- Except as provided in Section 3.2 of this article, it shall be competent to provide in any charter framed for a county

> under any provision of this Constitution, or by the amendment of any such charter, for the election of the members of the county board of education of such county and for their qualifications and terms of office. (Cal Const, Art. IX § 3.3.)

- The State Board of Education shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute. (Cal Const, Art. IX § 7.5.)

"A school district is an agency of the state; the school system is a matter of general state concern." (*Chico Unified School Dist. v. Board of Supervisors* (1970), 3 Cal. App. 3d 852.) The general structure of operation for the state school system is dictated either by the Constitution or the State Legislature. Each individual school cannot itself even determine its own curriculum. It is dictated at the discretion of the State Legislature:

> Clearly the curriculum and the courses of study included in the common state curriculum are not prescribed by the Constitution, but are details left to the discretion of the Legislature. They do not constitute a part of the system, but are simply a function of that system.

(*Cal. Teachers Ass'n v. Bd. of Trs.* (1978) 82 Cal.App.3d 249, 255.)

The land public schools sit on does not belong to the district but to the State with the districts holding title as trustees. (*Chico Unified School Dist. v. Board of Supervisors* (1970), 3 Cal. App. 3d 852, 855 [finding "even [the] beneficial ownership of the fee

title to school district property is in the state and the district holds legal title as trustee."].)

Unlike a private business where a CEO or a board of directors has discretion over who can be granted or ceded decision-making power, the State Legislature itself does not have authority to transfer authority over any part of the public school system to entities outside of the school system. For example, in *Mendoza v. State of California* (2007) 149 Cal.App.4th 1034, the court found the Romero Act, Ed C §§ 35900 et seq., was unconstitutional because it effectively granted to the mayor of Los Angeles a complete veto power over the selection of the Los Angeles Unified School District's superintendent. The court held the law violated California Constitution Article IX § 6 as the "legislature had no authority to transfer authority over any part of the school system to entities outside of the public school system." (*Id.* at p. 1035.)

Here, even Petitioner acknowledges that school districts in California are state agencies for purpose of immunity under the Eleventh Amendment of the U.S. Constitution. This is because judgment against a school district would be satisfied out of state funds; under California law, school districts are agents of the state that perform state governmental functions. (*Belanger v. Madera Unified School Dist.* (9th Cir. Cal. Apr. 29, 1992), 963 F.2d 248, cert. denied, (U.S. Feb. 22, 1993), 507 U.S. 919.) No business enterprise, such as a store or a restaurant, is afforded such immunity.

### B. A Public School District Fails the Unruh Business Enterprise Test as its Primary Purpose is not to Serve the Business or Economic Interest of its Owners or Members.

The progression of California precedent on this issue dictates that the test for whether an entity qualifies as a 'business enterprise' under the meaning of the Unruh Act is whether the entity is an enterprise with the primary purpose of serving the business or economic interest of its owners or members.

As this Court stated in *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, after reviewing the historical progression of public accommodation laws since the passage of the Unruh Act:

> Nonetheless, although past California decisions demonstrate that the Act clearly applies to any type of for-profit commercial enterprise, and to nonprofit entities – like the condominium association in *O'Connor* – whose purpose is to serve the business or economic interests of its owners or members, no prior decision has interpreted the "business establishments" language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members.

(*Curran, supra,* 17 Cal.4th at p. 697 [emphasis added].)

In applying this test, *Curran* analyzed whether the Boy Scouts' "purpose is to serve the business or economic interests of its owners or members." It found the Boy Scouts' membership decisions were that of a charitable, expressive, and social organization, and the Scouts' formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members. Instead, its primary purpose was to instill values in its members: "The record establishes that the Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose." (*Id.* at p. 697.) *Curran* therefore held, "given the organization's overall purpose and function, the Boy Scouts cannot reasonably be found to constitute a business establishment whose membership decisions are subject to the Act." (*Id.* at p. 697 [emphasis added].) Applying this test here, it is clear a public schools' purpose is not to serve the business or economic interests of its owners.

**1. California public schools fail all aspects of the test set by this Court: whether its purpose is to serve the business or economic interests of its owners or members**

California schools have a constitutionally mandated purpose, which is not to serve the business or economic interests of its owners or members. Schools also do not have owners or members, nor do they generate any business or economic profits to anyone. They instead generate social value.

**a. Article IX of the California Constitution dictates the purpose behind creating a system of public schools – to instill knowledge in future generations to ensure the preservation of our rights and liberties.**

A public school's purpose is undeniably not to serve the business or economic interests of its owners or members. A public school's purpose is to promote education in its students. In enacting education as a fundamental right under the California Constitution, the Legislature expressly stated the policy behind the enactment was to effect:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

(Cal. Const., Art. IX § 1 "Legislative Policy".)

Therefore, just like the Boy Scouts whose primary purpose was to instill values in its youth members, a public school's primary purpose is to instill knowledge in its students. It serves society at large by creating educated citizens in order to effectuate the essential need recognized by our founders, including Thomas Jefferson and John Adams in creating a knowledgeable populace necessary to preserve the rights and liberties of our democracy.

**b. Public education is one of the State's most basic sovereign powers; public schools do not have owners or members whose**

**economic interests are served by their operation.**

A public school does not have owners or members. It is an arm of the State. The California Constitution mandates the establishment and structure of operation. The State Legislature is given broad powers and discretion in creating laws and regulations in controlling the operation of public schools. It "is well settled that the state retains plenary power over public education… there can be no doubt that public education is among the state's most basic sovereign powers." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1195.) The individual school districts or superintendents themselves do not even have the ultimate power over their schools: "The Constitution has always vested 'plenary' power over education not in the districts, but in the State, through its Legislature, which may create, dissolve, combine, modify, and regulate local districts at pleasure." (*Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367, 369, fn. 1, citing to *Butt v. State of California* (1992) 4 Cal.4th 668, 680–681; accord, *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164,1195.) "Public education is an obligation which the State assumed by the adoption of the Constitution." (*Butt v. State of California* (1992) 4 Cal.4th 668, 680–681.)

Therefore, the State itself is in control of public schools. There are no owners or members whose economic interests are implicated. At most, local districts, superintendents, and school boards are merely agents of the State, "[l]ocal districts are the

State's agents for local operation of the common school system. …" (*Butt, supra*, 4 Cal. 4th at pp. 680–681.)

### c. Public Schools do not serve any business or economic interests as they are constitutionally barred from collecting any fees from students.

Article IX, Section 5 of the California Constitution mandates that "a system of common schools by which a free school shall be kept up and supported…" This has been termed the constitutional "free school" guarantee. Far from not serving the business or economic interests of owners, public schools are constitutionally guaranteed to be free to California children.

Furthermore, additional regulations have been put in place prohibiting public schools from requiring any fees. For instance, a public school is barred from requiring a pupil "to pay any fee, deposit, or other charge not specifically authorized by law." (5 Cal Code Reg § 350.) This has been interpreted to also apply to educational extracurricular activities. See *Hartzell v. Connell* (1984), 35 Cal. 3d 899 [reversing denial of plaintiff taxpayer claim challenging a public school's charging of fees for participation in certain extracurricular activities as this violated the "free school" guarantee of Cal. Const. art. IX, § 5, and it was barred by Cal. Code Regs. tit. 5, § 350. The financial hardship of the school district was no defense to the violation of the free school guarantee].) Therefore, instead of generating profits, a public school is constitutionally and statutorily barred from

charging students fees or charges for all educational and extracurricular instruction and activities.

Public schools arguably raise money in selling tickets to football games, holding fundraising auctions or selling school pride items such as t-shirts. However, this argument was already rejected in *Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828. *California Lutheran* like *Curran,* examined the primary purpose of a religious school and whether it was to serve the business or economic interest of its owners or members. (*Id.* at p. 837 ["Nonetheless, … no prior decision has interpreted the 'business establishments' language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members"].) *California Lutheran* found the purpose of a religious school was "the education of children in keeping with its religious beliefs." (*Id.* at p. 839.)

The *California Lutheran* plaintiff raised the argument that like the country club in *Warfield,* the religious school engaged in business transactions with the public in selling tickets to football games and holding fundraising auctions. *California Lutheran* held that even though at times the school sold items to nonmembers, this was distinct from its core function or purpose. Like the boy scouts in *Curran,* the school selling football tickets was not selling access to their basic services of providing an education to students with a religious framework. (*Id.* at p.838-

839, see *Curran, supra*, 17 Cal.4th at p.699-700 ["business transactions are distinct from the Scouts' core functions and do not demonstrate that the organization has become a commercial purveyor of the primary incidents and benefits of membership in the organization"].) The non-profit school in *California Lutheran* was not therefore a business enterprise under the Unruh Act.

Therefore, any argument that a public school sells items to nonmembers like football tickets or yearbooks is unavailing, as this is distinct from its core function of providing educational instruction to students, this does not transform it into a business enterprise under the Unruh Act.

**2. Petitioner's proposed test of asking whether a school is the "functional equivalent" of a business is not actually a test.**

In Petitioner's Reply, he merely repeats the words "functional equivalent" over and over representing that that is the test of Unruh application. The Reply argues that since a public entity is the "functional equivalent" of a business, it is a business enterprise under Unruh. But this begs the question. What is the "functional equivalent"? It is apparently whatever Petitioner says it is. Petitioner argues it is irrelevant that public schools are state actors because they are the functional equivalent of a business entity. Petitioner's mere categorical statement that an entity is the "functional equivalent" of a business alone cannot be the test. It creates an arbitrary standard. This Court has already answered the question of what the test is to determine whether an entity is a business

enterprise under the Act: whether the entity's "purpose is to serve the business or economic interests of its owners or members…" (*Curran, supra,* 17 Cal.4th at p. 697.) Here, the purpose of a public school is to educate students. (Cal. Const., Art. IX § 1.) The fact that a public school is similar to a nonprofit as it is funded by taxpayers weighs even more heavily against Petitioner's argument that a public school is the functional equivalent of a business entity. As discussed in *California Lutheran*, this is a factor which weighs against a finding Unruh applies:

> Although the fact that the School is nonprofit is not controlling, this does mean that it should not be deemed a business unless it has some significant resemblance to an ordinary for-profit business. In our society, however, private elementary and secondary schools are overwhelmingly not-for-profit enterprises. Even such prestigious and well-endowed private schools as Groton School and Phillips Exeter Academy are charitable organizations [websites omitted]. And public schools, of course, are run on a nonprofit basis by the government.

(*California Lutheran, supra,* 170 Cal.App.4th at p.839 [emphasis added].)

As discussed at length above, California public schools in their purpose, organization and funding bear no resemblance to an ordinary for-profit business. Therefore, as its legislatively

declared purpose is to instill knowledge in the children of California in order to preserve the preservation of the rights and liberties of the people, it is not a business enterprise subject to the Unruh Act.

### C. Statutory Interpretation Requires the Conclusion that Unruh Does Not Apply.

California Education Code section 201, subdivision (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 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.

Petitioner argues that this provision "incorporated" the remedies available under the Unruh Civil Rights Acts to purported violations of the Education Code, and specifically, §220. As the Court of Appeal held, the language of the statute does not support Petitioner's conclusion.

The words of a statute "generally provide the most reliable indicator of legislative intent." (*Bernard v. Foley* (2006) 39 Cal.4th 794, 804.) If the words are "clear and unambiguous the inquiry ends. There is no need for judicial construction and a court may not indulge in it. "'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.)

In interpreting a statute, "we strive to give effect and significance to every word and phrase." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284.) "We give the words of a statute their ordinary and usual meaning and construe them in the context of the statute as a whole." (*American Liberty Bail Bonds, Inc. v. Garamendi* (2006) 141 Cal.App.4th 1044, 1052.) "We must presume that the Legislature intended 'every word, phrase and provision … in a statute … to have meaning and to perform a useful function.'" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)

In adopting Section 201, the Legislature did not state that the section "incorporates" the remedies from various code section,

including the Unruh Act. The section clearly states that the code section is "consistent" with the numerous code sections set forth. Each of those code sections, in turn, are anti-discrimination statutes. Thus, a plain reading of the statute shows that it is the legislature's intent that Section 201 has the consistent goal of California being anti-discrimination. In *Donovan v. Poway Unified Sch. Dist.* (2008) 167 Cal. App. 4th 567, 591, the 4th District Court of Appeal described Section 201 and the reference to other statutes as follows:

> Section 201, subdivision (g) references Title IX and FEHA, along with other state and federal laws (including Gov. Code, § 11135 et seq. & tit. VI of the federal Civil Rights Act of 1964, 42 U.S.C. § 1981 et seq.), which are to be used as interpretive aids when construing the antidiscrimination provisions within that chapter.

In *Donavan,* the Court was deciding whether Education Code §220 had a private right to action for money damages. In doing so, the Court looked at the legislative history of the statutory scheme encompassed by §220, which includes §201 as a statement of intent. The Court noted:

> An interpretation of section 220 requires consideration of various other provisions in the Education Code, including section 200, which sets forth the state's antidiscrimination policy; section 201, which contains legislative declarations in support of that policy; and sections 262.3 and 262.4, which provide for enforcement of the antidiscrimination law. As statutes "in pari materia," meaning "of the same matter" or "on the same matter" (Altaville Drug Store, Inc. v.

> Employment Development Department (1988) 44 Cal.3d 231, 236, fn. 4), they must be interpreted together (Walker v. Superior Court (1988) 47 Cal.3d 112, 124, fn. 4; Hicks v. E.T. Legg & Associates (2001) 89 Cal.App.4th 496, 505 [A "'statute is not to be read in isolation,'" but rather "'it must be construed with related statutes and considered in the context of the statutory framework as a whole'"]; Estate of Burden (2007) 146 Cal.App.4th 1021, 1028 [legislation "on the same or similar subjects" may be examined to ascertain legislative intent]).

(*Donovan, supra,* 167 Cal. App. 4th at pp. 590-91.)

The *Donavan* Court found that the legislative history, beginning in 1982 with Assembly Bill No. 3133 (1981–1982 Reg. Sess.) when sections 200 and 220 were originally enacted, and at least through 1998 as evidenced by Assembly Bill No. 499, the Legislature relied on Title IX and developing federal law to shape California's own antidiscrimination laws. (*Donovan, supra*, 167 Cal. App. 4th at pp. 589-90.) Thus, section 201 was not premised on State law as Appellant urgers, but, rather of Federal Law. The *Donavan* Court further found that under Education Code sections 262.3 and 262.4 provide enforcement for violations of the anti-discrimination provisions under the Education Code after a 60-day cooling off period. (*Ibid*.)

Thus, through statutory construction, reference to the Unruh Act in section 201 does not "incorporate" the damages available under Unruh Act. The reference was only meant to show the consistency of the anti-discrimination provisions of the Education Code in terms of goals and intent with other anti-

discrimination laws. Had the Legislature wanted to incorporate the remedies available under the Unruh Act into violations of the Education Code, it could have done so. The statute, however, does not incorporate any remedy or even the elements of Unruh. It simply states that the goals of the act are consistent with the goals of Unruh, anti-discrimination.

Further, as the Court of Appeal found, the Education Code's extensive antidiscrimination statutory scheme prohibits the same kinds of discrimination as does the Unruh Civil Rights Act. However, the Court of Appeal held the Education Code statutes are "somewhat more generous than the Unruh Civil Rights Act in that they do not require a plaintiff to prove "intentional" discrimination, generally required under the Unruh Civil Rights Act. The Court of Appeal also held that the education code is "less generous than the Unruh Civil Rights Act in that they do not provide for treble damages, statutory penalties, punitive damages, or statutory attorney fees. (Compare Civ. Code, § 52, subd. (b) with Ed. Code, § 262.3, subd. (b).) "This difference is not quite as significant as might first appear, as Government Code section 818 bars punitive damages against "public entit[ies]," which include public school districts. (Gov. Code, § 818; *see Visalia Unified School Dist. v. Superior Court* (2019) 43 Cal.App.5th 563, 570.)" (*Brennon B., supra,* 57 Cal. App. 5th at pp. 396-97.)

Thus, reference of the Unruh Act did not incorporate the Act, its elements, nor it damages. It only took the same position as Unruh against discrimination.

### D. Application of the Unruh Act's Damage Provisions upon a Public School would Violate Government Code Section 818's Prohibition against Exemplary Damages against a Public Entity.

Exemplary or punitive damages beyond a plaintiff's actual damages cannot be assessed against a public entity. (Gov. Code § 818.) To do so would punish taxpayers who provide the operational funding to public schools. Exemplary damages are awarded after a plaintiff has first proven tortious conduct leading to harm and been awarded compensatory or nominal damages. (The Wolters Kluwer Bouvier Law Dictionary.)[1]

Here, Civil Code section 52, subdivision (a) states that a party who engaged in discrimination under the Unruh Act is liable for the actual damages of the plaintiff as well as additional damages in "any amount that may be determined by a jury, or a court sitting without a jury" up to a maximum of treble the plaintiff's actual damages. As this act imposes exemplary damages beyond a plaintiff's actual proven damages, if applied to a public entity it would provide for exemplary damages, which would violate Government Code section 818.

The Court of Appeal and Respondent District raised this point in support of the position that the Legislature did not intend the Unruh Act to apply to governmental entities as punitive or exemplary damages cannot be assessed against such entities.

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[1] In some jurisdictions punitive damages are labeled exemplary damages. The term is interchangeable. (*Ibid.*)

In response, Petitioner Brennon argues the Court of Appeal is wrong because these additional damages in section 52(a) in excess of a plaintiff's actual damages are not exemplary damages barred by the Government Code but are instead a civil penalty, which can be recovered from a public entity. (Petitioner's Reply Brief at p.25). The problem with this argument is as drafted, section 52(a) is distinct from the features of other civil penalty statutes, such as the penalty statute in the case cited by Petitioner, *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139. It also requires this Court to ignore the rest of section 52 – to only look at 52(a) and pretend 52(b) does not exist.

**1. Section 52(a) does not include the language that other statutes clearly imposing civil penalties possess nor does 52(a) operate in the same manner.**

The question of whether section 52(a) is a civil penalty is not as clear cut as Petitioner presents. A civil penalty is a monetary penalty or fine imposed by a government agency as restitution or for wrongdoing. "A civil penalty is a civil remedy sought by a government, or occasionally by a private plaintiff in the shoes of the government, from a person or entity who has violated a statute or regulation." (Wolters Kluwer Bouvier Law Dictionary.)

Although Petitioner relies on *Kizer v. County of San Mateo* for his argument that section 52(a) is a civil penalty, the question of whether the damages at issue in *Kizer* were civil penalties was never even analyzed in that case. Under the health act at issue in

*Kizer,* it was clear that the damages at issue were a civil penalty. A review of *Kizer* demonstrates that section 52(a) is distinct from the statutes providing a civil penalty in that case. In *Kizer,* the State Department of Health inspected a healthcare facility for compliance with the Long-Term Care, Health, Safety, and Security Act. Under that Act, there is a civil penalty statutory scheme which sets civil penalties or fines for non-compliance with the Act. It includes an enforcement mechanism whereby the Attorney General can seek civil penalties; the penalties paid for violations are provided to the State Health Department to offset its enforcement costs. (*Kizer, supra,* 53 Cal.3d at p. 142.)

The health act in *Kizer* expressly stated it was imposing a "civil penalty". It also provided a set range of specific penalties. (Health & Saf. Code, §1424.) The citations are classified according to the seriousness of the violation, and a set penalty range is prescribed for each class. For instance, a class AA violation, the most serious class, is a determination by the Department that a violation was "a direct proximate cause of death of a patient." The penalty for a class AA violation is not less than $5,000 and not more than $ 25,000. The ranges reduce for class violations with less serious conduct. Class A violations are in a range of not less than $1,000 and not more than $10,000, Class B violations penalties are not less than $100 and not more than $1,000. In *Kizer*, the Department of Health determined the health care facility violated multiple regulations and issued citations for a class AA and two class As. The State then

assessed penalties within the set civil penalty ranges of $5,000 - $ 25,000, $1,000-$10,000 and $100 - $1,000.

However, here section 52(a) is lacking these key features of a civil penalties statute. Section 52(a) does not state it is imposing a civil penalty or citation, unlike *Kizer*. Section 52(a) does not impose a set range of a specific penalty according to the seriousness of the violation, unlike *Kizer*. Section 52(a) merely says a plaintiff can recover treble their actual damages. However, this amount would vary wildly depending on each plaintiff's actual damages according to the severity of the conduct, any counseling costs or future care costs. The ultimate treble exposure amount is unknown from reading the statute.

Furthermore, courts have recognized that treble damages are punitive damages. (*Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1112 [Recognizing a statute imposing treble damages is a "punitive scheme"]; *Texas Industries, Inc. v. Radcliff Materials, Inc.* (1981) 451 U.S. 630, 639 ["The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."].)

On the contrary, looking to the next paragraph - section 52(b), it is clearly a civil penalty statute. Section 52(b) of the Unruh Act states:

> **(b)** Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages

> suffered by any person denied that right and, in addition, the following:
>
> > **(1)** An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
> > **(2) A civil penalty** of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.
> > **(3)** Attorney's fees as may be determined by the court.

Section 52(b), just as the Health and Safety Act at issue in *Kizer,* expressly states it is imposing a civil penalty. It also provides a set amount for the penalty of $25,000. It includes all the hallmarks of a civil penalty statute which section (a) is lacking. It also begs the question of why the Legislature chose not to include the phrase "civil penalty" in section 52(a) when it clearly chose to do so in the following paragraph of 52(b).

### 2. Petitioner also ignores the fact section 52(b) of the Unruh damages statute expressly states "exemplary damages" are recoverable.

Even assuming arguendo that section (a) did have the key features of a civil penalties statute, the second provision of the Unruh damages statute, section 52(b), states whoever is denied

certain anti-discrimination rights, cannot only recover their actual damages and the civil penalty discussed above but exemplary or punitive damages:

> **(b)** Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:
>
> > **(1)** An amount to be determined by a jury, or a court sitting without a jury, for **exemplary damages**.

Therefore, regardless of section 52(a), if a plaintiff brings a claim against a public entity under section (b) for violations of sections 51.7 (the civil right to be free from violence and intimidation for membership in a social group) or 51.9 (discrimination based on sexual harassment), which plaintiffs are currently doing in California in sexual harassment cases, this is a clear violation of Government Code §818.

At one point in the Reply, Petitioner apparently recognizing this issue, argues in the section concerning 'functional equivalent' under *Warfield* - and not the exemplary damages discussion - that section 51.7 is the Ralph Act and therefore, not applicable to the Unruh Act. (Reply Brief at p. 12, fn. 6.) As a passing note, it is interesting that the Legislature specifically chose in enacting the Ralph Act to incorporate the damages under the Unruh Act – something the Legislature chose not to do with the Education Code. Regardless, section 51.9 (sexual harassment) is part of the

Unruh Act. In 1994, the Legislature amended the Unruh Act to include a prohibition against sexual harassment in business relationships. Section 51.9 provides that damages for violations of this section of the Unruh Act for sexual harassment fall under section 52(b) – which unequivocally allows for exemplary damages against a defendant.

Therefore, if exemplary damages could be brought against a public entity for an Unruh Act claim for sexual harassment, this would violate Government Code §818. This supports the position of the Appellate Court and the Respondent District that the Legislature did not intend the Unruh Act to apply to governmental entities as that would allow for the imposition of exemplary damages against a public entity – something which the Legislature has clearly stated is not possible.

### E. Public Policy Supports the Denial of Another Expansion of Liability for California Public Schools.

Unlike a business, it is not an option for the California public school system to simply go out of business. However, the exponential increase in the size of verdicts over the last few years and the stress placed on the already thinly stretched finances of public schools by the unfunded liabilities created by the recent passage of Assembly Bill 218 has put their financial future in a perilous position. School districts are facing the very real possibility of not being able to procure insurance and for small districts, not being able to compensate plaintiffs and the related possibility of the State of California having to do so and then take

over operating that district. Districts throughout the State of California were already struggling to secure insurance before the passage of AB 218 and the Covid pandemic. Many school districts are self-insured. A further imposition of the Unruh Act and its treble damages provision above the remedies already provided by the Education Code for discrimination claims would further stress this already difficult situation.

The financial impact of imposing Unruh Act damages on the public school system is of course unknown. However, there is data available for the impact of AB 218, a law which essentially erases the statute of limitations for sexual abuse claims for three years. Suits are currently being brought against public entities including public school districts for alleged conduct ranging back decades even into the 1970s. When it was passed, public schools opposed AB 218 due to the difficulty of investigating and defending such old claims when witness may be unavailable, insurance may no longer be available and the cost of defending the actions could be astronomical and prevent the already impacted districts from being able to support their main work. It was noted in the Fiscal Comments of the Senate Amendments that according to the Senate Appropriations Committee the potential costs on school districts were:

> Unknown, potentially-major out-year costs to local entities and school districts to the extent litigation is successfully brought outside the current statute of limitations and/or the entities are liable for damages. If payouts are large enough,

> this measure could lead to cost pressures to the state to stabilize a local jurisdiction or district.
>
> Additionally, to the extent an extended statute of limitations affects liability insurance premiums, school districts could experience unknown, potentially-significant costs related to procuring liability insurance, apart from any specific claims. (Local funds)

(2019 Legis. Bill History, A.B.218, Assembly Bill Analysis, August 30, 2019.)

The "potentially-major" projection in costs to school districts proved correct. It is only halfway through the 36-month retroactive period of AB 218 and already the conservative cost estimate assessed by school district insurance pools in California associated with just K-12 alone is $290 million. By the time the retroactive period ends, this new legislation expanding liability against public school districts will be several hundred million dollars more.

The Reply brief makes it clear that the desire to allow Unruh Act claims against public schools is to provide the added financial remedies of attorney fees and treble damages. With Education Code section 200, et seq., the Legislature already has a statute in place to address discrimination claims in the public school system with the remedies it deemed appropriate for public schools. As discussed by the Appellate Court, this is in addition to the panoply of other antidiscrimination statutes such as Government Code section 11135, as well as federal constitutional

mandates (actionable under 42 U.S.C. § 1983), and statutes such as Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), Title II of the ADA (42 U.S.C. § 12131 et seq.), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794).

In extending a public entities' liability to the potentially major cost expenditures for attorney fees and treble damages under the Unruh Act will further stress the already crippled ability for school districts to even find insurance or to cover the costs of claims themselves. With these barriers, the diversion of funding needed to educate students and serve communities to instead financing increasing costs related to attorney fees and treble damages is a very real possibility.

## CONCLUSION

The American ideal is built on the entrepreneurial 'can do' spirit of its people and its business enterprises. But the need to recognize the unique mission and purpose of our public school system which transcends that of an ordinary business trying to make a buck to better the lives of their families and employees is inescapable. Public education has been recognized – from the moment of our founding – as the key to ensuring the future of our democracy.

We need today's students to be educated so they can be the lawyers of the future. For all the lawyer jokes, lawyers and jurists remain the last vanguard against societal anarchy and chaos. This does not even touch upon the societal need for educated doctors, engineers and artists. We need our seven-, ten- and fourteen-year-olds to be armed with the knowledge to debate

the big legal issues of the future, issues that may be the tipping point between whether some school districts are finally forced into insolvency. What will guarantee, regardless of personal financial background, that the citizens and lawyers of tomorrow are instilled with the knowledge to debate and decide the problems of their day and ensure the rights of Americans and Californians continue? Public schools and their teachers.

Dated: September 15, 2021

**MATHENY SEARS LINKERT & JAIME, LLP**

By: */s/ Richard S. Linkert*
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Attorneys for Real Party in Interest West Contra Costa Unified School District

## CERTIFICATE OF WORD COUNT

The text of this brief is **13-pt Century Schoolbook**. According to Word, the computer program used to prepare this brief, this brief contains **7,620** words, excluding the cover page, 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: September 15, 2021

**MATHENY SEARS LINKERT & JAIME, LLP**

By: */s/ Richard S. Linkert*
RICHARD S. LINKERT, ESQ.,
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## PROOF OF SERVICE

I am a resident of the United States and employed in Sacramento County. I am over the age of eighteen years and not a party to the within entitled action. My business address is 3638 American River Drive, Sacramento, California.

September 15, 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:

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT**

| | |
|---|---|
| Hon. Charles Treat<br>Department 12<br>Contra Costa County<br>Superior Court<br>725 Court Street<br>Martinez, CA 94553 | California Solicitor General<br>1515 Clay Street<br>Oakland, CA 94612-1499<br>(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 Sacramento, California.

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

Executed on September 15, 2021, at Sacramento, California.

*/s/ Nicole Gilzean*
Nicole Gilzean

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

9/15/2021

Date

/s/Nicole Gilzean

Signature

Simmons, Madison (292185)

Last Name, First Name (PNum)

Matheny Sears Linkert & Jaime

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