No.: S266254

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

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

ANSWER TO AMICUS CURIAE BRIEFS

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ANSWER TO AMICUS CURIAE BRIEFS

I. INTRODUCTION

Real Parties in Interest hereby respond to the Amicus Curiae Briefs submitted by Amicus parties in support of Petitioner.[1] Nothing raised in the briefs by Amicus parties for Petitioner change the only reasonable conclusion that this Court can draw: that public school districts are not "business establishments" subject to Unruh Act liability, whether under subsection (b) or (f) of the Act. Public school districts are state actors entitled to governmental immunity as nothing in Civil Code Section 51, its Legislative history, or this Court's precedent,

[1] Disability Rights Education & Defense Fund (DREDF); Consumer Attorneys of California (CAOC); AIDS Legal Referral Panel, Arc of California, Association for Higher Education and Disability, California Association for Parent-Child Advocacy, Civil Rights Education and Enforcement Center, Communication First, Disability Rights Advocates, Disability Rights California, Disability Rights Legal Center, Impact Fund, Legal Aid at Work, Mental Health Advocacy Services, and Public Law Center); American Civil Liberties Union of Southern California, ACLU of Northern California, ACLU of San Diego and Imperial Counties, Alliance for Children's Rights, California Rural Legal Assistance, Collective for Liberatory Lawyering, East Bay Community Law Center, Equal Justice Society, Law Foundation of Silicon Valley, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Learning Rights Law Center, National Center for Youth Law, Neighborhood Legal Services of Los Angeles County, Public Advocates, Inc., Public Counsel, and Youth Justice Education Clinic-Loyola Law School.

support application of the Act (or its treble damages remedy) to public schools. The Act was always intended to apply only to privately held businesses that engage in transactions and services with the general public (i.e., places of public accommodation – which a public school district is not).

Federal district court cases interpreting the Unruh Act can be disregarded, as well as interpretations by other state agencies or private groups.[2] Before this Court is an issue of first impression, which only this Court can decide. This Court's precedent, and the Legislative history behind the creation and purpose of the Unruh Act, dictate that the Act must be interpreted to only apply to privately owned business establishments – not governmental entities. Public school districts act as public servants in the provision of free and public education and are a fundamental pillar in our State's infrastructure, carrying out a duty mandated by the California Constitution. Application of the Act to public schools would constitute an impermissible expansion of the statute, infringe on the State's sovereign immunity, and violate the public policies of this state.

As set forth herein, Real Parties in Interest respectfully request that this Court render an opinion that affirms the ruling of the First District Court of Appeal.

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[2] Also to be disregarded are prior settlements involving anti-discrimination claims and/or Unruh Act claims, as they have no bearing on the legal issues before this Court.

II. ARGUMENT

A. *Sullivan* and its Progeny Can be Rejected; The Act Only Applies to Facilities in Private Ownership.

While California's Attorney General in 1989 may have participated as Amicus Curiae in the *Sullivan* case (a 1990 federal district court case) and may have provided the federal district court with analysis on this issue (notably absent here), the district court ultimately rested its decision on the single admonition that the term "business establishment" be interpreted in the broadest sense possible. (*Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal. 1990) 731 F.Supp. 947, 952-3.) Aside from cursory reference to this Court's decisions in *Isbister* and *O'Connor*, no further analysis was set forth. (*Id.*) All subsequent federal district cases simply cite to *Sullivan* and contain no meaningful analysis – or no analysis at all. These federal district court cases that give flippant consideration of the issue are not binding and can be rejected.

While the term "business establishment" indeed must be interpreted in the broadest sense possible, this is to ensure that any and all *privately owned businesses* that engage in services and accommodations with the public are properly subject to the Act. As this Court stated in *Isbister,* "[t]he Act is this state's bulwark against arbitrary discrimination in places of public accommodation. **Absent the principle it codifies, thousands of facilities *in private ownership, but otherwise open to the public*, would be free under state law to exclude people for invidious reasons like sex, religion, age, and even race."**

(*Isbister v. Boys Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75-76)(emphasis added).)

The term "business establishment" cannot be interpreted so broadly as to encompass any and every entity of any kind whatsoever – as doing so would eviscerate the plain meaning of the term "business establishment," rendering the term meaningless and superfluous. If the Legislature intended for the Act to apply to any and all establishments and facilities, in public or private ownership, whether state actor or private actor (thereby creating a private right of action against the State), the Legislature would have clearly said so. Indeed, "[s]overeign immunity is the rule in California" and if the Legislature intended to create governmental liability, it would have created a statutory basis for it. (*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)* (2021) 64 Cal.App.5th 549, 554-555; *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.) Civil Code Section 51 contains no such language. And sovereign immunity "must be construed strictly in favor of the sovereign." (*United States v. Nordic Village Inc.* (1992) 503 U.S. 30, 34.)

Public entities, including public school districts, are entitled to immunity absent a statute specifically declaring them liable. (*San Mateo, supra,* at p. 427-428; Gov. Code § 815; see also, *Gates v Superior Court* (1995) 32 Cal.App.4th 481, 508-510

["[T]he general rule is that governmental immunity will override a liability created by a statute outside of the Tort Claims Act. Further, unless an immunity otherwise provides, the governmental tort immunities apply to intentional tortious conduct."].)

The immunities set forth in the Government Code, including Government Code Section 815, are applicable to the Unruh Act. (*Gates, supra,* 32 Cal.App.4th at p. 513.) Nothing in the Legislative history "suggests that any damage immunity in the Tort Claims Act is inapplicable to an Unruh Act claim" or that the Unruh Act overrides governmental immunity. (See *Id.*)

Moreover, the California Legislature and the California Courts have consistently sought to confine and limit potential governmental liability to rigidly delineated circumstances – not to impermissibly expand the rights of plaintiffs in suits against governmental entities, like public school districts. (*San Mateo, supra,* at p. 428, quoting *Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1214.)

B. Public Schools and Private Schools are Fundamentally Different; Only a Private School Can Be Subject to the Act

Public schools are state actors, run by the State, and exist to carry out a constitutional mandate. Private schools are private actors, in private ownership, and exist to serve their own economic interests.

Public schools provide free, public and compulsory education to any and all students within their geographical

boundaries, without exclusion. Private schools charge a tuition and are selective in their membership, free to exclude students whom they believe do not meet their qualifications.

Public schools must be secular and inclusive of all persons regardless of their religious values. Private schools can exist to promote and further a specific sectarian religious belief or a specific national culture, and can limit their membership or affiliations to only those persons with a corresponding religious belief or national derivation.

Private schools are businesses and certainly are encompassed by the term "business establishment." [3] This is

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[3] While *California Lutheran* held that a private *religious* school was not a business establishment, it was because the school inculcated religious values and did not sufficiently engage in business transactions or services with the general public. (*Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828.) The private religious school was treated just like the Boys Scouts, in that its primary purpose was the inculcation of a specific set of values, and its engagement with the general public was not sufficient to bring it within the purview of the Act. (*Id.* at 838-840.) In determining whether a particular business is subject to the Act, the analysis turns on the business's primary purpose and whether and to what extent the business engages in transactions with the general public. (*Id.* at 836-841.) Indeed, in the March 24, 1959 amendment, the Legislature stated that "institutions organized primarily for the purpose of, and which practice, the furthering of a specific sectarian religious belief or a specific national culture" are exempt from the Act as they are permitted to "limit their membership or affiliations to only those persons with a corresponding religious belief or national derivation."

It does not follow, however, that simply because a public school is non-selective and provides free and public education, it is subject to the Act. Petitioner and his Amicus parties urge that

confirmed in the Legislative history. The Legislature specifically limited the reference to "schools" to include only "schools which primarily offer business or vocational training" in the May 12, 1959 amendment and June 11, 1959 amendment (just four days prior to ultimately settling on the term "business establishments of every kind whatsoever"). The amendments reflect a purposeful and careful narrowing of the types of "schools" intended to be encompassed by the Act – a narrowing that specifically excludes public schools run by the State. This makes sense as the Act was always intended to be applied to privately owned institutions, not state actors.

The term "business establishment" correctly reflects the Legislature's intent for the Act to apply only to any and all

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public schools are "places of public accommodation" because they are free, non-selective and provide public education. (*See* ACLU Brief, pp. 29-31.) However, Amicus parties also acknowledge that "not all members of the public are welcome on campus." (*See* DREDF Brief, pp. 43 and 49.) Indeed, a public school is not a place of public accommodation because it is not open to the public at large, members of the general public are not welcome on campus at their leisure, it does not engage in sufficient business transactions with members of the general public (and when it does, it is not in support of its primary purpose for existence), and the students it serves are legally required to be there. Nothing in the Legislative amendments indicate or suggest that the Legislature intended to subject public schools to Unruh Act liability, nor any other governmental, public entity. Thus, both private religious schools and public schools are exempt from the Act, but for very different reasons.

businesses in private ownership that provide services and accommodations to the public.

C. Subsection (f) of the Unruh Act Was Intended to Capture Architectural Barrier Access Cases Brought Under Title III of the ADA

The Unruh Act requires proof of intentional discrimination, which is virtually impossible to establish in an architectural barrier access case. Thus, to allow recovery under Unruh in cases involving architectural barriers that limit or exclude access by disabled individuals, such plaintiffs may rely on subsection (f). As this Court explained in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 669-670 and 673:

> "The ADA's public accommodations provisions are contained in title III of that law (42 U.S.C. §§ 12181–12189). This part of the ADA prohibits, among other things, the "failure to remove architectural barriers ... in existing facilities ... where such removal is readily achievable." (42 U.S.C. § 12182(b)(2)(A)(iv).) Intentional discrimination need not be shown to establish a violation of the ADA's access requirements, for Congress, in the ADA, sought to eliminate all forms of invidious discrimination against individuals with disabilities, including not only "outright intentional exclusion," but also "the discriminatory effects of architectural, transportation, and communication barriers" and the "failure to make modifications to existing facilities." (42 U.S.C. § 12101(a)(5) [congressional finding]; see *Lentini v. California Center for the Arts* (9th Cir. 2004) 370 F.3d 837, at pp. 846–847.) Although the Attorney General of the United States may seek damages on the aggrieved person's behalf, in a private action for violation of title III no damages—only injunctive relief—are available. (42 U.S.C. § 12188(a), (b)(2)(B); *Wander v. Kaus* (9th Cir.2002) 304 F.3d 856, 858.)

> "With this background on the statutes involved, the issue is easily framed: May an Unruh Civil Rights Act plaintiff relying on subdivision (f) of section 51 obtain damages for denial of full access to a business establishment in violation of the ADA and the Unruh Civil Rights Act without proof the denial involved intentional discrimination? We conclude that a plaintiff proceeding under section 51, subdivision (f) may obtain statutory damages on proof of an ADA access violation without the need to demonstrate additionally that the discrimination was intentional."
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> ***
>
> "The ADA, as explained above, permits a disabled individual denied access to public accommodations to recover damages in a government enforcement action only, not through a private action by the aggrieved person. But by incorporating the ADA into the Unruh Civil Rights Act, California's own civil rights law covering public accommodations, which does provide for such a private damages action, the Legislature has afforded this remedy to persons injured by a violation of the ADA."

This does not mean that *any* violation of the ADA is actionable under Unruh. As this Court explained in *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 77, and *Isbister, supra,* 40 Cal.3d at p. 83, fn. 12, a violation of Title I of the ADA (which governs employment discrimination) is *not* actionable under Unruh. None of these cases have been overruled.

Reading the above cases together with *Munson* confirm that not all violations of the ADA are incorporated into the Unruh Act. The Ninth Circuit agrees that not any or every violation of the ADA is per se a violation of Unruh. (*Bass v. County of Butte* (9th Cir. 2006) 458 F.3d 978, 982.)

The interpretation urged by petitioner and his Amicus support (that any and all violations of the ADA are actionable under Unruh) would, "*as to disability discrimination only*, 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." (*Brennon B. v. Superior Court* (1st Dist. 2020) 57 Cal.App.5th 367, 400.) This is not what the Legislature intended. The Legislature did not intend to "profoundly change[ ] the substantive reach of the Unruh Act" and "as to disability discrimination (and only disability discrimination)," disconnect the Act from discrimination by business establishments. (*Id.* at 399.)

D. References to Unruh in an Assembly Bill and One Section of the Education Code Are Not Dispositive of the Issue

While Assembly Bill 302,[4] in its introduction, makes passing reference to Unruh's potential application to public schools, the reference was mere dicta, not germane to the Bill's purpose, which was to enact Education Code Section 222 (requiring that reasonable accommodations be made for lactating students). Nothing in Education Code Section 222 makes reference to the Unruh Act. Moreover, nothing in the Bill Analysis history mentions the Unruh Act or its application to public schools. Further, the Legislature took no action to amend or clarify the scope of the Unruh Act within the Civil Code.

[4] Stats. 2015, Ch. 690, Sec. 222.

The Bill's reference to Unruh is similar to the reference made in Education Code Section 201(g), in that the Legislature intended for the State's anti-discrimination statutes to be interpreted consistently with one another in their protection of vulnerable populations. Neither the Assembly Bill, nor Section 201(g), are dispositive of the issue before this Court, and their passing references should not be given undue weight.

E. Treble Damages are Punitive and Barred from Recovery Against Public Schools; Treble Damages Were Intended to Only be Recovered Against Privately Owned Business Establishments

Amicus parties in support of Petitioner argue that treble damages are not punitive and thus not barred by Government Code Section 818 – in direct contravention of numerous case authorities. (See Gov. Code § 818; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1193-1196; *Los Angeles Unified School District v. Superior Court (Doe)* (2021) 64 Cal.App.5th 549; 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.)

As recently as September 2021, the Court of Appeal once again held that treble damages are punitive damages, barred by Government Code Section 818, and are not recoverable against a public entity even where the plaintiff is a victim of childhood sexual assault. (*X.M. v. Superior Court of San Bernardino County (Hesperia Unified School District)* (September 16, 2021) 68 Cal.App.5th 1014.) The Court of Appeal further confirmed, in reliance on this Court's decision in *Harris v. Capital Growth*

Investors XIV (1991) 52 Cal.3d 1142 and numerous federal district court decisions, that the treble damages recovery under the Unruh Act, specifically, is punitive and that Government Code Section 818 immunizes public agencies, including public schools, from treble damages under the Unruh Act. (*Id.* at p. 1024.)

In enacting the Unruh Act and its treble damages provision, the Legislature never intended the Act to be applied to public agencies, including public school districts. Moreover, imposing Unruh on public schools and exposing them to treble damages recoveries would infringe on the State's sovereign powers. (*Los Angeles Unified School District v. Superior Court (Doe)* (2021) 64 Cal.App.5th 549; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, pp. 1193-1196.).

F. Statistical/Demographic Information Only Emphasizes the Importance of Allocating and Preserving Public School Resources

Amicus parties in support of Petitioner point to various statistical and demographic information regarding the vulnerable populations that public school districts serve. While none of this information addresses or bears on the legal question before the Court (i.e., whether public school districts are "business establishments" subject to the Act), the information strongly supports the dire need for allocation and preservation of financial resources for public schools, which are indisputably severely underfunded (a further point to which all Amicus parties agree).

G. Numerous Legal Remedies Exist for the Protection of Vulnerable Student Populations in Public Schools; the Unruh Act is Not One of Them

All parties, including all Amicus parties, agree that discrimination against our State's most vulnerable populations is repugnant. Our State's desire to eradicate such reprehensible conduct is codified in numerous state statutes, including within the Education Code and the Government Code – both of which apply to public schools. These statutory frameworks provide generous remedies for victims of discrimination and protect victims of discrimination. No victim of discrimination at a public school is without redress, including monetary relief.

III. CONCLUSION

Real Parties in Interest respectfully urge this Court to rule that the Unruh Act does not apply to public school districts because public schools are not, and have never been, "business establishments" subject to Unruh Act liability. Public school districts are state actors – they are public, governmental entities carrying out a constitutional mandate and act as public servants in doing so.

Only a "business establishment" is subject to the Act. Further, under subsection (f) of the Act, only a violation of the ADA *by a "business establishment"* is actionable.

Real Parties in Interest respectfully request that this Court AFFIRM the Court of Appeal's well-reasoned decision.

Respectfully submitted,

Dated: November 15, 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 **3,246** words, excluding the cover, tables, signature block, this certificate and proof of service.

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: November 15, 2021 By: /s/ Cody Lee Saal

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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 November 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:

ANSWER TO AMICUS CURIAE BRIEFS

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/s/ Cody Lee Saal
Cody Lee Saal

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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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.

11/15/2021

Date

/s/Cody Lee Saal

Signature

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