No. A173289

IN THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

SAM CLEARE, SARAH KINCAID, JEREMIAH ROMM, AND HILDA CRISTINA HUERTA,

Plaintiffs and Appellants,

vs.

WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT, KENNETH CHRIS HURST, WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, JAMELA SMITH-FOLDS, DEMETRIO GONZALEZ HOY, OTHEREE CHRISTIAN, MISTER PHILLIPS, AND LESLIE RECKLER

Appellees and Respondents.

Appeal from Judgment
Superior Court, County of Contra Costa
(Case No.) N24-1353
The Hon. Terri Mockler
The Hon. Benjamin T. Reyes II

RESPONDENTS' BRIEF

LEONE ALBERTS & DUUS, APC
Katherine A. Alberts (212825)
1390 Willow Pass Road, Suite 700
Concord, CA 94520
Telephone: (925) 974-8600
Email: kalberts@leonealberts.com

Attorney for Appellees and Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

Other

I. INTRODUCTION

California is currently facing a teacher shortage, and has been for a number of years, that has and is impacting the District's ability to hire permanent teachers for every teaching position in the District. In 2023, in enacting Senate Bill 765, the California Legislature found:

> (a) California's public education system was, prior to the COVID-19 pandemic, experiencing a severe educational workforce shortage, especially in regard to the recruitment and retention of teachers.
>
> (b) The challenges California has been experiencing is not limited to California. Across the country, states and school districts have been struggling to fill vacant teaching positions.
>
> (c) With the onset of the COVID-19 pandemic in early 2020, the state's teacher shortage has been vastly exacerbated, in large part due to a greater percentage of teachers choosing to leave the profession.
>
> (d) According to the California State Teachers' Retirement System (CalSTRS), in the last six months of 2020, after the pandemic began, there were 5,644 teacher retirements, a 26-percent increase over the same period from the previous year.
>
> (e) By the end of the 2020-21 school year, 12,785 teachers had retired and another 11,754 teachers retired after the 2021-22 school year.
>
> (f) According to a February 2022 national poll conducted by the National Education Association, 90 percent of its members said that feeling burned out is a serious problem, 86 percent said they have seen more educators leaving the profession or retiring early since the start of the pandemic, and 80 percent reported that unfilled job openings led to more work obligations for those who remained teaching.

2023 Bill Text CA S.B. 765

Moreover, State Superintendent of Public Instruction Tony Thurmond stated in 2023 that:

> According to the California Department of Education, there were more than 10,000 teacher vacancies during the 2021-22 school year, particularly concentrated in rural communities, communities of color and low-income communities, as well as a 16% reduction in new teacher credentials, the first decline in nearly a decade.
>
> … A recent nationwide survey [by the National Education Association] found that 1 in 3 teachers say they are likely to quit in the next two years.

"Want to solve the teacher shortage? Starting with increasing salaries," Tony Thurmond, *EdSource*¸ December 4, 2023, https://edsource.org/2023/want-to-solve-the-teacher-shortage-start-with-increasing-salaries/701802

The teacher shortage explains why despite all the recruitment efforts detailed below, the Respondent, West Contra Costa Unified School District ("District") has been unable to hire permanent teachers for all teaching positions in past school years and for this current school year - and why for the District, which is comprised mainly of students of color and students from low-income communities, it is harder for to get teachers to apply for its open positions - there are not enough available teachers, who want to work in the District, to fill the many teacher vacancies across the District.

In the trial court below, Appellants sought a writ of mandate compelling the District to comply with Education Code §35186, the Williams Act, by assigning a fully credentialed teacher to every class at three schools in the District, Stege Elementary School, Helms Middle School, and Kennedy High School. The trial court denied the Petition for Writ of Mandate finding that the District was doing everything it could to remedy the teacher vacancies at these schools and across the District, but its ability to do so was dependent on the independent discretionary decisions of persons outside of its control – namely job applicants and teachers already employed by the District who had to consent to the use of various reassignment methods. Thus, any order compelling the District to fill the teacher vacancies at issue would be impossible for the District to comply with. It would be futile and meaningless to order the District to comply with the Williams Act, i.e. to do all the things it is already doing to try to fill the vacancies when despite its best-efforts vacancies still exist. Thus, under the doctrine of impossibility, the trial court exercised its discretion and denied the Petition for Writ of Mandate.

Appellants have framed this case as one involving a rogue the trial court that strayed from the law to create an impossibility

exception to the Williams Act and state credentialing statutes, when no such exception is found or supported by the text of these statutes or the statutory framework. Appellants claim that this erroneous decision is harming the vulnerable students of the District by subjecting them to unqualified bad teachers. Both of these arguments, however, lack merit and are disingenuous.

First to ease the Court's mind, just because a teacher is only authorized to serve as substitute teacher does not mean he or she is unqualified or a bad teacher. Under Cal. Code Regs., Tit. 5, §80025(a), an authorized substitute teacher must meet three requirements: 1) possess a baccalaureate or higher degree from a regionally accredited college or university, 2) pass the California Basic Educational Skills Test (CBEST), and 3) receive clearance from the CTC along with Application for Character and Identification and fingerprinting. Education Code section 44252.5 establishes that CTC shall administer a basic skills proficiency test to assess reading, writing, and mathematics, i.e. the CBEST.

Similarly, Cal. Code Regs., Tit. 5, § 80021.1(a), which governs Provisional Internship Permits ("PIP") states that to get a PIP the applicant must possess a baccalaureate or higher degree from a

regionally accredited college or university with completion in specific number of units of course work related to subject area they intend to teach and demonstrate proficiency in basic reading, writing and mathematics. Moreover, a person authorized under a PIP is not required to enroll in a teacher credentialing program, but the District is required to inform him or her of the requirements to earn a credential. 5 CCR §80021.1(a)(5)(F).

As such, both substitute teachers and those teaching under a Provisional Internship Permit must possess a baccalaureate degree and show proficiency in basic reading, writing, and math. Petitioners claim that substitute teachers are somehow inferior to the other "emergency-style" teaching permits is not factually supported.

Moreover, the District treats the substitutes in these classrooms as full time regular teachers who are an equal member of the staff entitled to and required to attend department and faculty meetings and professional development training. They are supported just like any other teacher at their school. (AA, 155) Therefore, the unsupported generalization that students assigned to a classroom with a substitute are being harmed is factually and legally reckless.

Next as to Appellants' contention that the trial court improperly created an exception to the Williams Act, this argument misconstrues the trial court's order. The trial court did not apply the impossibility maxim to read into the statutory text an exception applicable in all or even most situations. Rather the trial court used the impossibility maxim, which is a law of equity that also applies to writs of mandate, and used it to guide its rightful exercise of discretion in deciding whether to issue the requested writ. Based on its findings of impossibility, the trial court then declined to issue a writ compelling compliance when it was impossible for the District to comply. For any such order would be futile – an order that is impossible or impractical with which to comply.

On the record before it, the trial court found any order it issued would be nearly impossible for the District to comply with, because despite its many and varied efforts to find and hire teachers authorized to teach in a classroom for the entire school year, it could not force such teachers to apply for its many openings and to accept any offered position. Placing the District in a position of violating a Writ when it was not solely responsible for complying with the court's order would

be to require an impossible and futile act – one beyond the court's equitable powers.

California is currently facing a teacher shortage that is impacting all school districts in California, including the District. (RT153.) While there was a shortage of teachers prior to the pandemic, the pandemic exacerbated the shortage as many veteran teachers left teaching and not enough people are going into teaching to fill all the vacant positions across the Bay Area and the State. (*Id*.) Nevertheless, the District is using every means available to it to recruit teachers and fill all vacancies. (AA154.) These means include, but are not limited to, multiple job posting across numerous platforms, attending job fairs, partnering with Teach for America, partnering with universities to recruit teachers, reaching out to retirees, taking advantage of exceptions and allowances under the Education code, developing a Teacher in Residency Program, using the Commission on Teacher Credentialing's intern programs, using a Provisional Internship Program, utilizing Short Term Staff Permits, and reassigning credentialed staff. (RT0154-155.) Nevertheless, the District still struggles with vacancies.

Appellants brought this writ seeking an order from the court to compel the District to hire full-time credentialed teachers for its vacancies at three schools in the District, Stege Elementary School, Helms Middle School, and Kennedy High School. The District presented evidence to the trial court regarding its extensive and continuing efforts to fill teacher vacancies. Additionally, the District acknowledged that when there are no other options, the District will place a long-term substitute teacher, who has a substitute teacher credential, in a vacancy to provide students consistency until a credentialed teacher can be hired.

It is a basic standard of public policy and common sense that the District cannot force someone to work for it. The District cannot hire a permanent teacher to fill vacancies unless a qualified third party decides to apply for the District's open positions, and then if offered a position, decides to accept that position. The District is actively recruiting to fill these positions with permanent teachers and will hire a qualified applicant who accepts a job offer. However, remedying the teacher vacancies is not possible if qualified individuals do not apply for the positions or do not accept offers of employment for a particular vacancy. Therefore, the trial court correctly determined that

the relief requested was an impossibility and denied Appellants requested relief.

Appellants then moved for a new trial and presented evidence, by way of declarations, to attempt to refute the District's evidence regarding the ability to fill vacancies. The court determined that Appellants' evidence was not "newly discovered evidence" presented with due diligence and the evidence, if considered, would not lead to a probable different result on retrial. As such, the motion for a new trial was denied.

Appellants now present this appeal of the trial court's denial of their request for mandamus, arguing that the there is no impossibility defense and even if there was, Appellants' evidence submitted *after* trial would show that the trial court's ruling was a legal error. However, where no error appears in the determination of any fact, a new trial should not be granted on the ground that the decision is "against law." (*Renfer v. Skaggs* (1950) 96 Cal. App. 2d 380, 384.) Appellants cannot show any errors by the trial court as to determinations of any fact and as such, the judgement of the trial court must be affirmed.

II. FACTUAL AND PROCEDURAL HISTORY

A. Respondent West Contra Costa School District

West Contra Costa Unified School District is a district which serves nearly 30,000 students in 54 schools with approximately 3,400 employees. (AA448, ln. 26-27.) The District serves the cities of Richmond, El Sobrante, Pinole, Hercules, and El Cerrito, as well as unincorporated areas of western Contra Costa County. Almost 90% of the District's students are students of color, over 30% are English Learners, and over 60% are socioeconomically disadvantaged. California Department of Education, School Dashboard for West Contra Costa Unified School District, Enrollment Demographics, available on the School Dashboard website at: https://www.caschooldashboard.org/reports/07617960000000/2024

B. The California Teacher Shortage and Vacancies at the District.

California is currently facing a teacher shortage that is impacting all school districts in California, including the District. (AA153, ln.10-11.) While there was a shortage of teachers prior to the pandemic, the pandemic exacerbated the shortage as many veteran teachers left teaching and not enough people are going into teaching

to fill all the vacant positions across the Bay Area and the State. (*Id*. at ln 11-13.) The teaching shortage has hit the District particularly hard and for the past few school years, it has not been able to fill all of its teaching positions with teachers authorized to be assigned to a class for the entire school year under the state teacher credentialing statutes and regulations.

C. Appellants' Williams Act Complaints.

It was within the context of this teacher shortage that Appellants submitted to the District Williams Act complaints regarding teacher vacancies. Under the Williams Act, when a fully credentialed teacher is not assigned to a class for the entire school year, a vacancy occurs. When such vacancies exist, the Williams Act authorizes the filing of an administrative complaint with the school district. Upon receipt of the complaint, the district has 30 days to determine if the vacancy actually exists and to "remedy" it. Given that the Williams Act defines a teacher vacancy as a teaching position to which a fully credentialed teacher is not assigned for the entire school year, it is reasonable to infer that "remedying" a vacancy means assigning to the class at issue a teacher, who is authorized under the credentialing statutes to teach the class for the entire school year.

On or about January 31, 2024, Appellants submitted to the District Williams Act complaints regarding fourteen (14) vacancies at three schools, Stege Elementary School, Helms Middle School, and Kennedy High School. (AA048-067.)

On or about April 10, 2024, the District responded to the Complaints by acknowledging that it was out of compliance, but explaining that it could not remedy the vacancies, despite its best efforts to do so, due to the teacher shortage. It also explained that it had availed itself of the alternatives to fully credentialed teachers to fill vacancies, when those provisions applied to the teacher or candidate at issue. (AA069.)

Thereafter, Appellants appealed the District's response to the District's School Board. (AA091). The District denied the appeal again stating that it was using its best efforts to remedy the vacancies at issue but was prevented from doing so by the lack of applicants and the unavailability of teachers willing to or qualified to utilize the alternative options, such as local assignments, emergency permits, and waivers. (AA087.)

The 2023-2024 school year ended on or about June 7, 2024. The 2024-2025 school year started on or about August 19, 2024.

D. Appellants' Writ of Mandate was Denied

Appellants filed a petition for a Writ of Mandate on August 30, 2024, to compel Respondents to take certain actions allegedly required by Education Code section 35186, the Williams Act. Appellants claimed that three schools, "Stege Elementary, Helms Middle, and Kennedy High are plagued by numerous teacher vacancies from Kindergarten to 12th Grade across a wide variety of subjects." (AA108). Appellants' Verified Petition stated that there were "a total of 12 vacancies at Stege Elementary, Helms Middle, and Kennedy High School." (AA029.) [1]

Appellants sought an order compelling the District to:

> 1) Hire a full time single designated certificated teacher for each teacher vacancy at Stege Elementary School, Helms Middle School, and Kennedy High School;
>
> 2) Refrain from filling any teacher vacancy at these schools with substitute teachers for longer than authorized or lined up sequentially so that no single teacher is assigned to a class or classroom for the full year or by using other teachers at the school site to cover a class or classroom on a day to day basis in addition to their own classes; and
>
> 3) Send Petitioners and the Court a written report about how it intends to hire a full time single designated certificated teacher of each teacher vacancy at these three schools.

[1] By the District's count, Appellants complained of 14 total vacancies in their Williams Complaints.

In opposition to the Petition for Writ of Mandate, the District presented evidence updating the status of the vacancies at the three schools and across the District, of its efforts to recruit and hire teachers to fill the vacancies, its use of the alternative credential options available listed to remedy the vacancies, and why despite doing so, it was unable to remedy all vacancies due to the teacher shortage and fact that compliance was not fully within its control and was dependent on the discretionary acts of applicants and teachers beyond the District's control.

Respondents filed their Opposition on September 26, 2024 and updated Appellants and the trial court about the status of the vacancies at issue in the Petition for Writ of Mandate. Given that since the filing of the Willaims Act complaints, a new school year had begun many of the vacancies no longer existed in the new school year as of September 26, 2024. The following table provides the status of the teacher assignments for those positions at issue in the Petition for Writ of Mandate at Stege, Helms, and Kennedy.

VACANCY	CURRENT STATUS
Stege Kindergarten	Permanent Teacher
Stege 2-3 combo	No combo class this year
Stege 3rd Grade	Permanent Teacher
Stege 4th Grade	Permanent Teacher

Helms 8th Grade Science	Permanent Teacher
Helms 8th Grade Math	**Substitute Teacher**
Helms 8th Grade Math	Permanent Teacher
Helms 8th Grade English	**Substitute Teacher**
Helms 7/8 Newcomers	No such position this year
KHS English Development	**Substitute Teacher**
KHS 12th Grade Expository Reading	No such class this year
KHS P.E.	Permanent Teacher
KHS Music	No such position this year
KHS Music	No such position this year

(AA153.) Of the fourteen (14) vacancies at issue in the Petition, only three (3) vacancies remained as of September 26, 2024 for the 2024-2025 school year.

In their Petition, Appellants sought relief as to all current vacancies at Stege, Helms, and Kennedy. Therefore, without admitting Petitioners' right to such relief, and in the spirit of transparency, the District also acknowledge that other vacancies existed as of September 26, 2024 at Helms and Kennedy. There were no teacher vacancies at that time.

VACANCY	CURRENT STATUS
Helms 8th Grade Science	Substitute Teacher
Helms 7th Grade Math	Substitute Teacher
KHS 9-12th Grade English Language Arts	Substitute Teacher

(AA153-154.) Moreover, the District presented evidence that in addition to the six (6) vacancies at Helms and Kennedy, thirty-nine (39) other teacher vacancies existed at the other schools across the District. (AA154.)

Evidence of efforts to remedy by hiring fully authorized teacher.

In addition to presenting evidence regarding the then current District-wide vacancies, the District also submitted evidence of its efforts to remedy those vacancies through recruiting and hiring teachers and using the alternative assignment options available under the Education Code. First the District presented evidence of its recruitment efforts, because with 39 vacancies to fill, and having used all available alternative assignment and credentialing options it could, the only way the vacancies were going to be filed was through new hires.

Through the testimony of its Assistant Superintendent for Human Resources, Dr. Camille Johnson, the District submitted the following evidence regarding recruitment. During the 2023-2024 school year in preparation for the 2024-2025 school year and during the summer leading up to this school year, the District engaged in many varied recruiting activities and programs to fill all teaching

positions across the District with permanent teachers. (Johnson Dec., ¶6.) The District lists all its openings on multiple job sites, such as Edjoin, Indeed, LinkedIn, EdCal, and EdWeek, and uses paid advertising on social media. (Id.) To recruit for the 2024-2025 school year, District staff attended thirty-seven (37) job fairs. (Id.) The District also has a partnership contract with Teach for America to attract teachers leaving this program to the District. (Id.) The District has partnership contracts with thirty-five (35) universities whereby it attempts to recruit students to teach in the District. (Id.) The District also actively reaches out to and advertises for credentialed retirees to return to the classroom. (Id.)

The District also has developed its own programs to assist people in becoming credentialed teachers. (AA154.) For example, the District has a Teacher in Residency Program through which an applicant with a bachelors' degree who applies for and enrolls in a credential program at one of the District's partner universities is provided with tuition and living expenses support, a yearlong placement with an experienced mentor teacher, and ongoing support during the first years of teaching. (Id.) Through this program, a person can earn a general education credential in a year or a special education

credential and Masters' Degree in two years. (Id.) The District had an employee to oversee this Program, the Coordinator of the Teacher in Residency Program. (Id.) The Coordinator also recruits and assists any District classified employee who wants to become a credentialed teacher. (Id.)

However, despite all these efforts, forty five (45) vacancies existed across the District as of September 26, 2024, because the ability to hire a qualified teacher was in large part dependent on the discretionary acts of the potential employee. The District cannot force an individual to apply for its many vacant positions. (AA155.) Moreover, if the District makes an offer of employment to a candidate, the District cannot force the candidate to take the job. (Id.) People who want to teach have lots of options for employment in the Bay Area. (Id.) Applicants have the discretion to apply where they want and to accept or not accept any offered positions. (Id.) As such, the ability to hiring new employees to fill the District's many vacancies is largely out of the District's control.

Evidence of Use of Alternative Credentialing Options

In addition to these recruitment efforts, the District also presented evidence that it utilized the alternatives to a fully

credentialed teacher available under the Education Code and cited by Appellants in its Petition to fill vacancies when the situation or the teacher candidate met the requirements of the particular statutory alternative.

First, the District took advantage of the Commission on Teacher Credentialing's intern programs. (AA155.) The CTC allows students who have completed a certain amount of their credentialing program to serve as full time classroom teachers on an intern credential through an internship program at their credentialing school. (Id.)

Moreover, the District used Provisional Internship Permits ("PIP") that allow credential students who do not meet the requirements to enter an internship program to teach for one year as a provisional intern. (AA291.) Prior to requesting a PIP from the CTC, the District must verify that a diligent search has been made, and a fully credentialed teacher cannot be found. A PIP is issued for one year only. (Id.)

The District also used the CTC's Short Term Staff Permit, which allows an individual who has the required level of subject matter course work to fill an acute staff needed. (Id.) An acute staffing

need is defined as when the District needs to fill a classroom teaching position immediately based on an unforeseen need, including, enrollment adjustments requiring an additional teacher, inability or unavailability of the applicant to enroll in an internship program, or leave or illness of the assigned teacher, who then cannot finish the school year. (Id.) A Short Term Staff Permit expires at the end of the school year in which it is granted and cannot be renewed. (Id.)

The District also took advantage, as much as possible, of the exceptions and allowances in the Education Code for teachers to teach outside of their credential permissions to fill vacancies. (Id., ¶6 & Ex. C.) However, the special assignment authorization statutes in the Education Code and Code of Regulations, Education Code §§44256(b), 44258.2, 44258.3(a), 44258.7(c),(d), 44263 and 5 CCR 80027(a)(6), require the teacher to consent to the assignment or special credential authorization. Therefore, the District's ability to use special assignments to remedy vacancies is dependent upon consent of teacher to be reassigned.

The same is true with the Article 14, Sections 3 & 5, the involuntary transfer provisions, of in the Memorandum of Understanding ("MOU") between the District and the teachers' union,

United Teachers for Richmond ("UTR") – when the District could invoke these provisions to remedy vacancies, it did. (AA242.) However, but again, the teacher has choice in which vacancy he or she wants to be reassigned to, so long as they are qualified for the position. (AA156.). Article 3 of the Transfer provisions allows the District to involuntarily transfer a teacher in certain circumstances, such as low enrollment in their assigned class at the beginning of the school year. (AA338.)

In their correspondence with the District and in the Petition, Petitioners argue that the District can reassign credentialed administrators and teachers on assignment to the classroom for the year to fill vacancies. Doing so, however, is untenable. (AA155.) If the credentialed administrator or teacher on assignment is reassigned, then their former position is empty, and their work is not done. (Id.) For example, the District has teachers on assignment who are developing and implementing the District's early literacy program. (Id.) If these teachers agreed to return to a classroom, there would be no one to do the essential and valuable early literacy work. (Id.) Moreover, there are not enough credentialed administrators and

teachers on assignment to fill the District's forty-five open teacher positions. (Id.)

Lastly, the District submitted evidence that when possible it applied for Variable Term Waivers for teachers assigned to vacancies. (AA 268-69; 283-284; 296-328.) Variable Term Waivers require that the applicant be enrolled in or attest that they plan to enroll in a credentialing program. (AA200; 203; 207; 210.)

The District produced evidence that the three remaining vacancies at these schools as of the trial of the three Petition of Writ were staffed with substitute teachers who could not obtain a Variable Term Waiver or a PIP or any other authorization, but met all necessary requirements to substitute teach, because one did not have the required amount of college credits, one had not enrolled in a credential program, and the remaining was unwilling to enroll in a credential program. (AA268-69.) The District also produced evidence that they utilize every single avenue possible for every position before using a substitute. (AA279, ln19-24.)

Appellants filed their Reply on October 4, 2024. In their Reply, Appellants argued that the District should reassign teachers without their consent. (AA186-87.) Further, the Appellants claimed that

whether or not teachers will apply for jobs or consent to reassignment is not relevant. (AA188.) Ignoring that the District had provided evidence of its unrelenting and continual efforts to hire full time credentialed teachers and apply for any applicable credentialling alternative, Appellants mistakenly claimed that the District had not demonstrated that it had exhausted all available options. (*Id*.)

This matter came before the Court on October 11, 2024. The court, having read all the papers before it, noted that is saw the issue "as a lot more complicated than apparently the petitioners see it." (RT010, ln. 17-18.) The court questioned if it even had the ability to grant the relief the petitioners requested in mandating the District fill vacancies, noting that the court cannot force people to get credentials, apply for jobs, or force them to work in classroom. (RT010-11, ln. 22-2.)

The District explained that it had been doing everything it could and as soon as there was a teacher who was qualified for year-long assignment, they would fill vacancies but until then, the District was doing what it could to ensure students had consistent and qualified substitute teachers. (RT027, ln. 7-13.) The District's efforts to fill vacancies included the use of provisional internship permits when

available. (RT024, ln10-18.) The District used short-term temporary permits but these permits are restricted to times when a teacher goes on leave, where there is an unexpected rise in enrollment, or when an applicant is not yet ready for a credential program. (RT024-25, ln. 19-1.) The District also used variable term waivers. (RT025, ln. 2-9.) The District also explained that the Memorandum of Understanding with the union had restrictions on involuntary assignments, including that the assignments could only happen where there is a school closure or an enrollment issue and even then, the teacher would get to consent to which opening to fill. (RT025, ln. 10-19.) In spite of its efforts, the District still had vacancies and was faced with filling the vacancies on a rotating 30-day basis with a new substitute teacher, or maintaining consistency with a certificated substitute teacher. (RT026-27, ln.7-6.)

The petitioners claimed that all the District had to do is "Get the waiver, and then they're certificated, and then they comply with the Williams statute." (RT030, ln.18-20.) Petitioners further claimed that, "the answer is just to get different substitutes who are qualified." (RT030, ln.8-9.)

The District responded that the criteria for the waivers, which Petitioners claimed the District should get to comply with the statute,

required candidates to meet three requirements and that the District is not able to force the candidates to take the CBEST test, or to enroll in a credentialling program, or affirm that they have enough units to complete credentialing requirements. (RT031-32, ln. 18-19.)

When faced with these facts, Petitioners' counsel proposed that the trial court do the following: "So one way of going about this, your Honor, is law and remedy of vacancies, and if it's actually impossible, then they can ask for relief under the order and say we have tried. Now we have tried to go hire the substitutes, and we are not able to hire a substitute that we are able to qualify for a waiver. . . **And if it's actually impossible**, **we don't dispute if it's outside their control, then they can't be held accountable for it,** but that may be one way to proceed with respect to the teachers. (RT 34:24-34:9 (emphasis added).) Now despite this admission that the District cannot be held accountable for compliance that is outside its control, Appellants claim that no such excuse for noncompliance and accountability exists as a matter of law.

Following this statement, the District's counsel and the trial court pointed out that this is what the District has been saying through the proceedings – impossibility excuses compliance and

accountability, especially when the District does not control its ability to comply. (RT35:10-37:24)

The court considered the petitioners' complaints regarding teacher vacancies and determined that the District was not refusing to comply with the law, nor was the District refusing to fill vacancies. (RT058, ln.16-19.)

The court found that the teacher shortages was a chronic issue and that the District, located in West County of Contra Costa, was going to have even greater issues because teachers would prefer to teach in places like Lafayette and San Roman and Moraga and Orinda. (RT035, ln.14-25.) The court found from the evidence submitted by the District that the District was doing the best it could with a limited pool of substitutes and teachers. (RT036, ln.6-9.) With respect to substitute teachers, the court determined the District was in a position of either providing no teacher or filling a vacancy with a provisionally qualified teacher who could at least provide a modicum of education. (RT037, ln.13-19.) The court found that despite the evidence submitted by Petitioners, there was no showing that a Writ of Mandate could compel the District to do anything it wasn't already doing. (RT037, ln. 20-24.) The court determined that the District was doing

the best it could to fill teacher vacancies and did not see a basis for a Writ of Mandate. (RT058, ln.19-21.)

The Court's Minute Order stated, "As stated on the record, the Court having heard a lot of arguments from both counsels denies the Writ of Mandate. The Writ of Mandate is denied. The teacher vacancies writ of mandate is denied. Further, the Court does not see a basis for the Writ of Mandate." (AA343.)

E. Appellants' Request for a New Trial Was Denied

On December 23, 2024, Appellants filed a Motion for a New Trial. Appellants argued that the Writ of Mandate had been improperly denied based on Subsections (4), (6), and (7) of Section 657. In support of their motion for a new trial, Petitioner's included two declarations prepared after the trial: 1) Mary Vixie Sandy, Ed.D, the Executive Director of the California Commission on Teacher Credentialing and 2) Mark Erwin Mitchell, the executive director of the UTR. (AA345, ln. 13-16, and AA346, ln. 3-6.) The declarations were submitted with the motion to allegedly correct the false record created by Respondents' alleged misstatements. Respondents opposed the motion for new trial and that matter came for hearing before the court on March 19, 2025. (AA345, ln.18-21.)

In their motion for new trial, Appellants attempted to introduced evidence not produced at trial regarding the District's actions after trial, "just this past month, the District contradicted its own protestations of impossibility by announcing it will involuntarily transfer 40 teachers from non-teaching positions to fill vacancies." (AA351, ln. 24-26.) Appellants also point out that the vacancies at issue in the writ petition were still not filled. (Id. at ln.27-28.) Appellants also attempted to introduce evidence that the CTC and State Board of Education can waive certification provisions of the Education Code. (AA352, ln.10-14.)

The District opposed Appellants' motion and "newly discovered evidence," pointing out that the evidence did not meet the standard for newly discovered evidence which requires 1) the evidence, not merely its materiality, is newly discovered, 2) the evidence is not cumulative of the evidence presented to the Court, 3) the evidence leads to a probable different result on retrial, 4) the evidence is such that the party could not, with reasonable diligence, have discovered and produced it at the trial, and 5) these facts must be shown by best evidence that the case admits. (*Philpott v. Mitchell* (1963) 219 Cal. App. 2d 244, 248-249.) Additionally, the new

evidence must relate to events and facts that took place prior to the original trial. (*Aron v. WIB Holdings* (2018) 21 Cal. App. 5th 1069, 1079.)

Additionally, the District refuted the Appellants' evidence, showing that the involuntary transfers (which took place *after* the trial) that the District enacted under the MOU still prevented the District from placing teachers without their consent. (AA441, ln. 2-10.) The District involuntarily transferred twenty educators. (AA447, ln. 8-9.) The District showed evidence that despite Appellants' complaint that these transfers did not fill the vacancies at issue in the writ, the District was faced with situations where there were thirteen math vacancies and only four educators qualified to fill the vacancies and the District and Union worked together to prioritize vacancies at high schools. (*Id*. at ln.14-26.) The District also showed that Appellants' evidence regarding waiving credential provisions was undermined by the evidence that Appellants submitted at trial, "Petitioners in their Reply Brief argued and admitted that the requirements for obtaining a variable term waiver include that "the individual . . . *has "commit[ted] to completing requirements for the appropriate credential*." (Case Docket, Reply Brief, p. 12:10-15

[emphasis added].)" (AA440, ln. 16-19.) The court reviewed the District's evidence on these points and stated, "The Court does not take into consideration these post-hearing facts, as they are not determinative regarding Petitioners' Motion for a New Trial. The Court notes only that Respondents appear to address post-hearing actions raised by Petitioners, which this Court does not find relevant for the purposes of deciding this Motion." (AA492.)

With respect to the Declaration of Dr. Mary Sandy, the court found Petitioner did not establish why it could not have submitted her opinion at trial and, therefore, Dr. Sandy's opinions were not newly discovery evidence as defined by Code of Civ. Proc. § 667. (AA491.) For Mr. Mitchell's Declaration, the court found that the facts were either cumulative or were facts that were discovered after the trial and not related to events and facts that took place prior to the trial. (*Ibid.*)

As such, the court determined that Petitioners did not present any "newly acquired evidence" which could not have been produced at the hearing and even if it was viewed as newly discovery, the evidence would not have lead to a probable different result at trial. (AA492.) The court also held that there were not any errors of law as the record was devoid of any facts to support an error of law. (*Ibid*.)

III. STANDARD OF REVIEW

In reviewing the trial court's ruling on a traditional writ of mandate pursuant to Code of Civil Procedure 1085, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. (*Saathoff v. City of San Diego* (1995) 35 Cal. App. 4th 697, 700-01 (citing *Rodriguez* v. *Solis* (1991) 1 Cal. App. 4th 495, 50.)) The trial court's factual findings are reviewed under the substantial evidence standard. (*Id.* at 700.) However, issues of statutory interpretation, which is a question of law, are reviewed under the independent, or de novo, standard of review. (*Sutter's Place, Inc. v. California Gambling Control Com.* (2024) 101 Cal.App.5th 818, 832; *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal. App. 4th 578, 584.).

Appellants argue that the trial court's denial of the Petition for Writ of Mandate in its entirety should be reviewed de novo. (AOB, p. 36-37.) First, they contend that the "availability of the impossibility defense to the District's statutory duties" is an error of law that requires de novo review. Then, Appellants argue that the trial court's "erroneous conclusion that the District had established it was

impossible to comply with the Education Code" must also be reviewed under the de novo standard.

The District agrees that the question of whether the equitable maxim of "the law never requires impossibilities" can in proper situations excuse noncompliance with a statutory duty such that a writ should not issue compelling compliance is a question of law for the Court to review de novo. But whether this case is one of those situations in which it is proper not to issue a writ compelling compliance to excuse non-compliance is not subject to the de novo standard.

Appellants contend that the trial court's finding that it was impossible for the District to remedy the vacancies at issue is a mixed question of law and fact that is predominantly legal in nature, and therefore, reviewed under the de novo standard. (AOB, p. 37.) Appellants' basis for reviewing the District's evidence of impossibility as a legal question is because it purportedly requires interpretation of teacher certification laws, the Williams Act, and the transfer provisions of the District's MOU with UTR. This is only true if one ignores the actual factual evidence presented to the trial court

by the District and the trial court's findings of fact, as Appellants do here.

As shown above and by the trial court's findings in denying Appellants' Petition, the teacher credentialing requirements set forth in the Education Code and Code of Regulations, and even the transfer provisions of the MOU between the District and UTR, were not disputed issues. No one contended they were ambiguous or did not mean what they said. The question was if the trial court issued the writ requested by Appellants and ordered the District to remedy the vacancies at issue with a teacher authorized under the credentialing laws to be placed in a classroom for a full year, would it be impossible or impracticable because of extreme and unreasonable difficulty for the District to comply with that order. The trial court based its finding that it was impossible in this case on the District's factual evidence regarding the teacher shortage in California, the number of vacancies at the three schools at issue and across the District, and District's efforts to attract and hire qualified candidates to fill those vacancies, and its use, when possible, of every alternative credentialing option and the transfer provisions in the MOU. These are factual findings,

not legal questions. As such, they are subject to the substantial evidence standard.

> Deference is given to the trial court in considering the relevant factual findings: the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.

People v. Aguilera (2020) 50 Cal.App.5th 894, 908.

Additionally, in cases involving mixed questions of law and fact, where the basic facts are undisputed, but the trial court's inferences and judgments drawn from them are at issue, the substantial evidence standard, not the de novo standard, applies. For example, in *Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700-701, the issue was whether a contract between the City of San Diego and a paramedic service was a franchise or a regular contract for services. In reaching making this decision, the Court had to review not only the terms of the contract at issue, but it had to rely on case law regarding the factors used to determine whether a contract grants a franchise. Despite the importance of legal issues to the decision, the Court held that the substantial evidence standard applied.

> Here, the pertinent facts are essentially undisputed. However, as we shall explain, the resolution of whether a franchise was created in this case requires the drawing of inferences from the presented facts, i.e., to determine whether the paramedic agreement carries the indicia of a franchise to such an extent as to compel the city to create a franchise rather than a mere contract. Accordingly, since we are not presented purely with a question of law, we shall apply the substantial evidence test and give deference to the inferences in support of a finding that the agreement need not be deemed a franchise as a matter of law[, which was the finding of the trial court].

Id. at 701 [citation omitted].[2]

As in *Saathoff*, the issue in this case at the end of the day is a factual one – could the District have complied with an order to fill the vacancies with a teacher authorized to teach for the full school year or would compliance with such an order have been an impossibility or an

[2] This holding correlates with and is supported by the standard of review for conflicting inferences, which is "even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the trial judge. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment.' Even if this court were of the opinion that that determination was wrong, it would not have the power to substitute its deductions for those of the trial court. For, as has so often been said, when opposing inferences may reasonably be drawn from the facts in a case, the finding of the trial court will not be set aside." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 633 [internal citations omitted].)

impracticability. Similar to *Saathoff*, answering this question did involve some legal questions, such as what are the requirements under the Education Code for a Variable Term Waiver or for a Short Term Waiver. But also as in *Saathoff,* the question was not purely legal and ultimately came down to the trial court's weighing the evidence presented by both sides, making interferences and judgments from that evidence, and reaching conclusions of fact that lead it to find that, in this particular case, granting the writ would be ordering an impossibility and that in this instance on these fact a writ compelling compliance with the Williams Act should not issue. Given that this is a factual determination based on evidence, this Court should review this finding by the trial court under the substantial evidence standard.

In applying the substantial evidence standard, "the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [italics omitted]. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed. (*Winograd v. American Broadcasting Co.*, *supra*, 68 Cal.App.4th at p. 632.) The Court also "must infer, following a bench

trial, that the trial court impliedly made every factual finding necessary to support its decision," unless a party timely files objections identifying omissions or ambiguities. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 48). These implied factual findings are also reviewed under the substantial evidence standard. (*Id.* at p. 60.)

Under this standard, the Court reviews the entire record but does not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. (*In re Collin E.* (2018) 25 Cal.App.5th 647, 661.) "Rather, [the Court] draw[s] all reasonable inferences in support of the findings, view[s] the record favorably to the [trial] court's order, and affirm[s] the order even if there is other evidence to the contrary. *Id.;* see *Durante v. County of Santa Clara* (2018) 29 Cal.App.5th 839, 842 ["'findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings'"]; *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 ["It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility."].)

Appellants have the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

To meet this burden, Appellants must fairly summarize the facts in the light favorable to the judgment." (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1667, citation omitted.) "To overcome the trial court's factual findings," Appellants are "required to set forth in [their] brief all the material evidence on the point and *not merely* [*their*] *own evidence*. Unless this is done the error is deemed to be [forfeited]." (*Symons Emergency Specialties v. City of Riverside* (2024) 99 Cal.App.5th 583, 598; see *Verranzono v. Gehl Co.* (2020) 50 Cal.App.5th 636, 652 [The failure to set forth all material evidence forfeits any substantial evidence claim.]).

In their Standard of Review section, Appellants argue that the Court can properly consider the arguments and evidence raised by the parties in the Motion for New Trial, despite the trial court's ruling that it could not consider the evidence because Appellants had not meet their burden of proof as to "newly discovered evidence" and thus, the new evidence was not properly before the trial court. In support of this contention, Appellants cite to *Reyes v. Kruger* (2020) 55

Cal.App.5th 58, 71. However, this case does not hold that the evidence submitted in support of motion for new trial, but not at the trial, may be considered by the appellate court in determining the appeal of the issues at trial. All this case stands for is the rule that the order on a motion for new trial is not independently appealable but can be reviewed by the appellate court in a timely appeal from the underlying judgment or appealable order. *Id.* Therefore, Appellants contention that the excluded after submitted evidence is part of the factual record at trial is unsupported.[3]

IV. ARGUMENT

A. The Trial Court's Determination that the Equitable Maxim of Impossibility Could Excuse Noncompliance and Justify Denial of a Writ of Mandate Was Not an Error of Law.

In denying the Petition for Writ of Mandate and in denying the Motion of New Trial, the trial court held that where compliance with a writ commanding statutory compliance is impossible, the court may refuse to issue the writ pursuant to the equitable maxim that "The law never requires impossibilities." (See Civil Code §3531.)

[3] However, in case the Court decides to consider such evidence, the District has referenced the evidence it submitted in opposition to the Motion for New Trial where relevant.

It is an equitable maxim codified in Civil Code section 3531 that "The law never requires impossibilities." (Civ. Code, § 3531.) "Impossibility means not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. [Citation] Consistent with this maxim, the law recognizes exceptions to statutory requirements for impossibility of performance." (*People v. Lake County* (1867) 33 Cal. 487, 492 [impossibility of performance makes mandatory statutory duty directory]; *County of San Diego v. Milotz* (1953) 119 Cal.App.2d Supp. 871, 883-884; see 73 Am.Jur.2d, Statute, § 15, p. 278 ["[W]here strict compliance with the terms of a statute is impossible, compliance as near as can be has been permitted on the principle that the law does not require impossibilities."].)

A writ of mandate is an action in equity that is subject to equitable maxims such as this one. For as the California Supreme Court long ago concluded:

> Our conclusion, therefore, as to the second proposition stated above, is that the defendant district recognizes the duty imposed upon it by the statute and is endeavoring to comply with the requirements of said statute. While it has not succeeded in discharging this duty to its fullest extent, it has done all that could reasonably be required of it with the money available for that purpose, and which the resources of the district will permit. Under

> such a state of facts, the writ of mandate will not lie. The writ is an equitable remedy and will not always issue as a matter of right. As was said in *Gammon* v. *McKevitt*, 50 Cal. App. 656, 665 [195 Pac. 726], " The writ of *mandamus* is not wholly a writ of right, but lies to a considerable extent within the sound judicial discretion of the court where the application is made; and no court should allow a writ of mandate to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law".

(*Sutro Heights Land Co. v. Merced Irrigation Dist.* (1931) 211 Cal. 670, 704-705.) Moreover, "[a]s a general proposition courts will not issue a writ of mandate to enforce an abstract right of no practical benefit to petitioner, or where to issue the writ would be useless, unenforceable or unavailing." (*Kirstowsky v. Superior Court of Sonoma County* (1956) 143 Cal. App. 2d 745, 749.; see also *Wilson v. Blake* (1915) 169 Cal. 449, 454, [The Supreme Court has stated that a writ of mandate should be issued "to compel the performance not only of a public duty but of a useful public duty… .*[A court] will exercise its power to issue the writ only when some useful purpose may be accomplished thereby.*" (citations omitted, emphasis added)].) Where it is impossible for a respondent to comply with a writ compelling compliance, the writ is not only useless and essentially unenforceable, but it also provides no practical benefit to the petitioner.

Moreover, the equitable maxim of impossibility is reflected in the requirements for pleading a cause of action for a writ of mandate under Code of Civil Procedure §1085, which are: (1) the respondents has a clear duty; (2) the petitioner has a beneficial interest in the respondent's performance of that duty; ***(3) the respondent has the ability to perform the duty***; (4) the respondent has failed to perform the duty or has abused its discretion in performing the duty; and (5) the petitioner has no other plain, speedy or adequate remedy. (*Riddick v. City of Malibu* (2024) 99 Cal.App.5th 956, 966, fn. 7; *Los Angeles Waterkeeper v. State Water Resources Control Bd.* (2023) 92 Cal.App.5th 230, 265; *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 915; *Agricultural Labor Relations Bd. v. Exeter Packers, Inc.* (1986) 184 Cal.App.3d 483, 489; *Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 193). A respondent, such as the District, may have the theoretical ability to perform, but when such performance is impossible despite its best efforts to comply, or taken out of its control by persons not before the court, then a writ should not issue to compel performance. Such a writ is futile and an absurdity, because based on the facts presented to the court, the respondent cannot comply with the writ, and even if found in

contempt, absent a change in circumstances beyond its control, the respondent still would not be able to comply despite its desire to do so. Such a writ does not bring relief to the petitioner, does not effectuate the purpose of the statute at issue, and therefore, is futile. Consequently, if such impossibility exists, the court is within its discretion to deny the petition for writ of mandate. (*Sutro Heights*, *supra,* 211 Cal. at 705 ["As in other cases, the propriety of issuing a mandatory writ is determined according to the particular circumstances, and issuance of it rests in the sound discretion of the court." (citation omitted)].)

In new arguments presented for the first time on appeal, Appellants argue, relying on *National Shooting Sports Fund, Inc. v. State* (2018) 5 Cal.5th 428, 433 ("*NSSF*"), that "if 'neither the text nor the purpose of the statute contemplates a showing of impossibility,' courts lack the power to 'independently carve out exceptions for impossibility.' (*Id.* at p. 463.)" (AOB, p. 47.) Appellants then launch into an eleven page argument intended to show that neither the text nor purpose of the teacher credentialing statutes and Williams Act can be interpreted as containing an exception based on impossibility of compliance. They also argued that reading an impossibility exception

to these statutes conflicts with the waiver authority given to the CTC and SBE by the Legislature. As such, Appellants argue, the trial court erred in creating an exception to the credentialing statues and the Williams Act based on impossibility.

Appellants' arguments and reliance on *NSSF* are misplaced and unavailing. The foundational basis of their argument is that the trial court created an explicit exception to these statutes when none exists in the text. They contend the trial court read into these statutes an exception that would allow any school district to ignore the Williams Act and the credentialing laws and hire anyone off the street to teach, such as "parents, undergraduates, [and] classroom aides without college degrees" – if the district concludes it is "too difficult" to find authorized teachers. (AOB, p. 11, 68.) However, this is not what the trial court held, and it is not the effect of the order below.

The trial court did not create an explicit exception to the credentialing statutes or the Williams Act. It acknowledged that the District was not in compliance with the Williams Act, because it had classroom vacancies at one of the schools at issue where the teachers in those classrooms only had a substitute teacher credential and were not legally authorized to teach the class for the full year. The trial

court also recognized that the Williams Act required the District to "remedy" those vacancies within 30 days of submission of a complaint about those vacancies. The District does not dispute this noncompliance and neither did the Court.

Instead, the Court exercised the discretion vested in it under the laws of equity, which govern writs of mandate, and decided not to issue a writ compelling the District to comply with the Williams Act by remedying those vacancies, based on the District's showing that it would be impossible for it to comply with any such order. The trial court did not interpret the statutes at issue as allowing noncompliance when it was too difficult for a district to comply. It declined to exercise its discretionary authority to force compliance when doing so would be futile. At most, it excused noncompliance in this case by rightfully refusing to issue a writ compelling compliance. This is a distinction with great meaning that is supported by the case law.

For example, Appellants' case, *NSSF,* involved a challenge to the Unsafe Handgun Act that designated as unsafe and illegal all semi-automatic pistols that were not designed and equipped with dual placement microstamping on each cartridge fired from the gun. *NSSF, supra,* 5 Cal.5th at 431. National Shooting Sports Fund filed a

declaratory and injunctive relief action seeking a declaration that this provision of the Unsafe Handgun Act was unenforceable and invalid under Civil Code §3531 – "the law never requires impossibilities" -- because it was impossible to implement dual placement microstamping technology. (Id. at 432.) The trial court granted the State's motion for judgment on the pleadings without leave to amend on separation of powers grounds. (Id.) On appeal, however, the Court of Appeal held that "the judiciary can invalidate legislation if these is some overriding constitutional, statutory or charter proscription." (Id.) It then held that the impossibility maxim in Civil Code §3531 was such an overriding statutory proscription, such that the judiciary could invalidate the microstamping provision of the Unsafe Handgun Act if compliance was shown to be impossible. (Id.) The Supreme Court granted review, and the only issue before the Court was whether a court could invalidate a statute based on Civil Code §3531. (Id.)

The Supreme Court first examined the purpose of Civil Code §3531, which as expressed in Civil Code §3509, is "an interpretative canon for construing statutes, not a means for invalidating them." (Id. at 433.) It then went on to state that "[i]mpossibility can ***occasionally excuse noncompliance with a statute***, but in such circumstances, the

excusal constitutes an interpretation of the statute in accordance with the Legislature's intent, not an invalidation of the statute." (Id. [emphasis added]).

The Supreme Court then examined the cases in which the impossibility maxim has been applied and affirmed that Civil Code §3531 allows courts to construe an *implied* exception to compliance with statutory requirements for impossibility of performance in certain situations. (Id. at 434 [quoting *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 300.]) For "[i]mpossibility, as an aid to statutory interpretation, is akin to the absurdity canon, which counsels courts to "avoid any [statutory] construction that would produce absurd consequences." (*NSSF, supra,* 5 Cal.5th at 433 [quoting *Flannery v. Prentice* (2001) 26 Cal.4th 572, 578].)

The Court then affirmed its ruling in *Sutro Heights* as a proper application of the impossibility maxim in Civil Code §3531 stating:

> In that case, we excused compliance with a state statute requiring drainage efforts that would have brought "financial ruin" and "irreparable injury" to an irrigation district and its landowners. (*Id*. at p. 703.) Our reasoning made clear that in so holding, we were interpreting, not invalidating, the statute: "We do not believe that, under this state of facts, it was ever intended by those responsible for the enactment of the Drainage Act of 1907, that an irrigation district, situated as is the defendant in this action, should be compelled to work its

> own destruction by undertaking to provide drainage facilities for the district, the expense of which is beyond its financial ability to meet or pay for."

NSSF, supra, 5 Cal.5th at 434 [quoting *Sutro Heights, supra,* 211 Cal.670, 703.

As *NSSF* and *Sutro Heights* demonstrate, the trial court did not read into the Williams Act or the credentialing statutes an exception applicable in all situations, or even to most – contrary to Appellants' arguments. Instead, in line with these Supreme Court precedents, by implying an exception to compliance by refusing to issue a writ upon a showing of impossibility, the trial court was only excusing compliance in limited circumstances.

Here, the trial court found that such circumstances existed, and it is to the propriety of that determination that this appeal actually turns.

B. Substantial Evidence Supports The Trial Court's Conclusion that It Would Be Impossible for the District to Comply With An Order Compelling It to Remedy the Vacancies At Issue.

1. Appellants Waived Any Argument that the Trial Court's Factual Findings of Impossibility Constitute Error.

As discussed in the Standard of Review section, supra, the trial court's findings of fact supporting its conclusion of impossibility of compliance in this case are reviewed under the substantial evidence standard. To prevail on their contention that the District failed to carry its burden of proof on impossibility, Appellants have the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings. (*In re L. Y. L., supra,* 101 Cal.App.4th at 947.) To meet this burden, Appellants must fairly summarize the facts in the light favorable to the judgment." (*Boeken, supra,* 127 Cal.App.4th at 1667 [citation omitted].) Specifically, "[t]o overcome the trial court's factual findings," Appellants are "required to set forth in [their] brief all the material evidence on the point and *not merely* [*their*] *own evidence*. Unless this is done the error is deemed to be

[forfeited].” (*Symons Emergency Specialties, supra,* 99 Cal.App.5th at 598.)

As demonstrated by the Factual and Procedural Background section, supra, Appellants in their Opening Brief ignored all of the evidence the District submitted to the trial court regarding its efforts to fill the vacancies with teachers authorized to be assigned to a class for a full year, including the evidence showing that when a teacher or an applicant meets the requirements for an internship, a PIP, a reassignment, a Variable Term Waiver, or a Short Term Waiver, the District utilizes those options to fill as many vacancies as it can. The evidence submitted also showed, however, that despite using these options whenever possible and going to great lengths to recruit teachers to apply for its many open teaching positions/vacancies, the District was simply not able to assign a fully authorized teacher to every class in the District. In fact, as of the trial in October 2024, there were 45 vacancies District wide. And, as of the filing of this Brief, with school starting on August 19, 2025, there are 69 vacancies across the District’s 55 schools.

Appellants fail to mention any of this evidence – as it would support the District’s position and not theirs. Moreover, inclusion of

such facts completely undermines their argument that this appeal solely turns on legal questions. In an effort to negate the District's evidence and the trial court's actual findings, Appellants simply argue repeatedly that options exist in the credentialing statutes, in the MOU with UTR, and through waivers from the CTC and the SBE to provide fully authorized teachers for the vacancies at issue – and then they inexplicably argue that the District provided no evidence that it availed itself of these options – or they point selectively to the District's use of involuntary transfers under the MOU to contend, without legal or factual support, that the District simply could have reassign teachers to fill the vacancies at Stege, Helms, or Kennedy. By failing to provide the Court with a full and accurate summary of all the evidence presented below, and by instead cherry picking only the evidence they believe support their arguments, Appellants have waived any argument that the District did not meet its burden of proof on impossibility or that the trial court's findings of fact were in error. *Symons Emergency Specialties, supra,* 99 Cal.App.5th at 598; *Verranzono, supra,*50 Cal.App.5th at 652 [The failure to set forth all material evidence forfeits any substantial evidence claim.]).

2. Substantial Evidence Supports the Trial Court's Finding that the District Tried to Remedy the Vacancies Through Hiring and The Alternative Credentialing Options

If Appellants have not waived the challenge to the Court's finding of impossibility, substantial evidence exists to support the trial court's factual findings that the District was not refusing to comply with the law or refusing to fill the vacancies at issue. They were doing the best they could, through all of their efforts to recruit and attract qualified applicants and their use of all the alternatives to a fully credentialed teacher whenever possible. As shown below, given the substantial evidence presented by the District, the trial court's finding that the District used the alternatives available, when the requirements for such alternatives were met was supported by substantial evidence and therefore, must be upheld on appeal. *Foreman & Clark, supra,* 3 Cal.3d 875 at 881; *Winograd v. American Broadcasting Co.*, *supra*, 68 Cal.App.4th at p. 632 [If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed].)

The trial court's finding, regardless of whether it was explicit or implied, that the District was doing all it could to attract teaching applicants to apply for jobs in the District is also supported by

substantial evidence. At trial, the District presented evidence that it was "using every means available to [it] to recruit teachers and fill all vacancies across the District, including listing its openings on multiple job sites, using paid advertising on social media, attending job fairs, partnering with Teach for America and 35 universities whereby it attempted to recruit teachers and students to teach in the District, and actively took steps to get credentialed retirees to return to the classroom. (AA155-56.) Additionally, the District submitted evidence that it even developed its own programs to assist people in becoming credentialed teachers, such as a Teacher in Residency Program. (AA154-55.) Again, Appellants did not offer any evidence to contradict the District's efforts to recruit new teachers.

Regarding alternatives available to the District to remedy the vacancies when a fully credentialed teacher was unavailable, the District, and Appellants, presented substantial evidence below that the District used each of these alternatives when the candidate or the situation meet the requirements of those options.

Appellants, in their Petition and Opening Brief, discuss the legal obligation of school districts to provide fully prepared teachers. (AA, 0094-0097; AOB, p. 16.) Appellants then set forth the steps a

school district must follow where a fully prepared, i.e. fully credentialed, teacher cannot be assigned to fill a vacancy. Education Code §44225.7, Appellants argue, sets up a hierarchy of alternative for situations in which a fully credentialed teacher is not available. (AOB, p. 17).

First, Appellants contend that the District must attempt to assign to the vacancies to candidates enrolled in an internship program. (Education Code §44225.7(a)(1) The District presented evidence that it hires teachers in internship programs. (AA 154-155) Appellants did not dispute this fact; they just argued that the District should use this option.

Next, Appellants state that if an intern is not available, Education Code §44225.7(a)(2) requires the District to hire a "candidate who is scheduled to complete preliminary credential requirements in six months." The District presented evidence that it has partnered with 35 university teaching programs to recruit students and interns. (AA154.)

Appellants, then argue, that if the interns and teaching program students are not available, the District should reassign teachers through special assignments under the Education Code or involuntary

transfers under the MOU with UTR. (AOB, p. 17-18.) The District submitted evidence to the trial court that it utilized both special assignments and MOU transfers. (AA154-55; 446.) Moreover, Appellants submitted additional evidence of the District's use of involuntary transfers to fill vacancies as well. (AA481-82.) Therefore, substantial evidence exist to find that the District availed itself of these options for remedying vacancies.

If reassignment or transfer do not remedy the vacancies, the Appellants argue that the District must avail itself of emergency style permits, such as Short Term Staff Permit and PIPs. (AA154-155.) Again, the District presented evidence that when a candidate or situation met the statutory requirements for these Permits, it applied for them and obtained them. (AA155, AA278:14-280:21; 289-294.)

One of the last resorts are waivers, Short Term Waivers and Variable Term Waivers, issued by CTC waiving certain credentialing requirements for applicants to meet the statutory requirements. Again, the District submitted substantial evidence that it applied for these waivers whenever an applicant or teacher met the qualifications for them. (AA280:22-282:9; 295-328.)

If these steps do not work, Appellants note a "safety-valve" option of applying to the CTC for a waiver of the certification requirements as outlined in Education Code section 44225(m)(1). (Ibid.) Finally, Appellants argue that if all else fails the school district could seek a waiver from the State Board of Education under Education Code section 33050(a).

Appellants' contention that Education Code section 44225(m)(1)'s waiver authority allows the CTC waive any credentialing requirement, including the requirement a waiver applicant be enrolled or plan to enroll in a credentialing program, is without legal support. The general grant of waiver authority in Education Code § 44225(a) is further explained and delineated in the Code of Regulations, which clearly forecloses the waiver of the requirement that an applicant be enrolled or plan to enroll in a credentialing program. 5 CCR § 80120(b) states that Variable Term Waivers effectuate the waiver authority granted in Education Code §44225(m)(1). Then, 5 CCR § 80122(g) expressly states that an applicant for a Variable Term Waiver must commit to obtaining a teacher credential or a course of study leading to full certification. Then, the CDE Waivers Guidebook clearly states that if any of the

eligibility requirements are not met, the application for the variable term waiver will be denied automatically. (AA209.) 5 CCR § 80122(g) is one of those eligibility requirements. As such, it strains credibility to contend that this eligibility requirement, which dictates automatic denial if not met, would be waived by the CTC. Appellants' argument that the District could obtain waivers from the CTC for its substitutes that do not want to enroll in a credentialing program is meritless.

As to Appellants' claim that the District has one final last-ditch effort to apply to the State Board of Education for a waiver from the Williams Act pursuant to Education Code §33050. However, waivers from credentialing requirements are exempted from the State Board of Education's waiver authority by Education Code §44225(m)(2), which states, "No provision in this chapter shall be waived under Sections 33050 and 33051, after June 30, 1994, by the state board." While the Williams Act is not explicitly listed as a statute that cannot be waived by the SBE, in essence the District would be seeking a waiver of the 30-day limitation on substitute teachers to allow them to teach in their assigned class for the full school year, or for a waiver of the credential enrollment requirement for variable term waivers.

Therefore, given that credentialing limitations are exempt from SBE waiver authority, the SBE does not have the power to waive any Williams Act provision that concerns credentialing requirements, such as allowing a substitute teacher to serve beyond their 30-days for the entire school year or the requirements for a variable term waiver.

Given this substantial evidence, the Court should uphold the trail court's finding that the District used its best efforts and all available means to hire or assign a fully authorized teacher to remedy the vacancies at issue. *Foreman & Clark, supra,* 3 Cal.3d 875 at 881; *Winograd v. American Broadcasting Co.*, *supra*, 68 Cal.App.4th at p. 632 [If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed].)

3. Substantial Evidence Supports the Trial Court's Finding that the Teacher Shortage and the District's Inability to Control Applicants and Employees Vested with Discretion Rendered Compliance with the Williams Act Impossible in this case.

Appellants for the most part did not contradict any of the District's regarding its efforts to comply with the Williams Act – rather they merely argued that given the availability of the alternatives, it could never be impossible to comply with the Williams

Act. The District just had to find new substitutes that met the requirements for a Variable Term Waiver or a PIP. Or alternatively, the District was obligated to involuntarily transfer teachers or administrators to fill the vacancies until a fully authorized teacher could be hired even if that meant for the full school year.

Appellants argue that the duty in §35186 to remedy teacher vacancies by assigning permanent teachers to those positions is mandatory and not subject to an exception for impossibility, because the statute does not give the District any discretionary leeway not to somehow find a permanent teacher to fill vacancies. Appellants cite *Doe v. Albany Unified School District* (2010) 190 Cal.App. 4th 668 to argue that the fact that the District has discretion as to how it goes about remedying the vacancy does not make discretionary the duty to remedy the vacancy by designating a single credentialed teacher for the school year. In *Doe v. Albany*, the statute at issue required school districts to provide 200 minutes of P.E. during each 10 school days. The court determined that the statute created a mandatory duty for the school district to provide physical education instruction as specified. (*Id*. at 676-677.) In that case, however, the school district alone had the ability to fulfill the statutory mandate. It had the power to alter its

school schedules such that students participated in 200 minutes of P.E. every 10 school days. No other entities' or persons' discretionary cooperation was needed to comply with the statute. For this reason, *Doe v. Albany* does not apply to the case at hand.

Here, Appellants sought to enforce the duty to remedy teacher vacancies through an order compelling the District to hire permanent teachers for each teacher vacancy at the three schools at issue. These vacancies, however, were just a handful out of the dozens of vacancies that existed District-wide. The District did not have spare fully authorized teachers that it could simply assign to Stege, Helms, or Kennedy.[4] Therefore, to fill these vacancies with someone other than a substitute teacher, the District needed to hire people who were fully credentialed or who qualified for an internship, PIP, or waiver.

However, the act of hiring someone is at its core an exercise of discretion, not only on the part of the District as the employer, but more importantly, on the part of any potential new employee or potential reassigned employee, who the Court cannot compel to apply

[4] Appellants argue the District could have reassigned administrators or credentialed teachers not assigned to classrooms. The District did this to the extent it could, and it still had vacancies at Stege, Helms, and Kennedy and vacancies District-wide.

for a position at the District or accept any offer of employment or The District also presented evidence that the ability to hire new fully qualified teachers was not within its full control. As Dr. Johson testified that the District cannot force an individual to apply for its many vacant positions. (AA, 156, ¶11.) Moreover, if the District makes an offer of employment to a candidate, the District cannot force the candidate to take the job. (See Civil Code §3390.) (Id.) People who want to teach have lots of options for employment in the Bay Area. (Id.) Applicants have the discretion to apply where they want and to accept or not accept any offered positions. (Id.) Thus, the ability to hire new teachers is largely outside of the District's control.

The ability to hire new teachers is further impacted and complicated by the teacher shortage that has been ongoing for years but was exacerbated by Covid. To prove these facts, the District submitted the testimony of its Assistant Superintendent of Human Resources, Dr. Camille Johnson, who has personal knowledge of the teacher job market and available applicant pools as she works every day to hire qualified teachers to fill the District's many vacancies. (AA153, ¶1) Moreover, the District also directed the trial court to findings of fact by the California Legislature in enacting Senate Bill

765 in 2023, legislatively declaring the existence of the teacher shortage, that it had gotten worse since COVID, and was likely to get worse due to the increasing number of teachers likely to retire in the upcoming years. (AA135-136) Lastly, the District provided statements by the State Superintendent of Public Instruction Tony Thurmond that according the California Department of Education, there were more than 10,000 teacher vacancies during the 2021-22 school year, particularly concentrated in rural communities, communities of color and low-income communities, as well as a 16% reduction in new teacher credentials, the first decline in nearly a decade. (Id. at AA136.) As Appellants have pointed out, the vast majority of the District's students, especially at Stege, Helms, and Kennedy, are students of color and/or from low-income communities. See also *CDE School Dash Board, supra*. As such, according to the CDE, it is even more difficult for the District to hire teachers, as compared to other central and east county school districts.

Appellants offered no evidence at trial to refute the District's evidence of a teacher shortage. As such, given the substantial evidence presented by the District, the trial court's finding that a teacher shortage exists and impacts the District's ability to attract

teaching applicants to apply for jobs in the District is supported by substantial evidence and cannot be overturned by this Court.

Appellants final salvo as to error by the trial court is that given the District's ability and past history of involuntarily transferring teachers pursuant to the MOU to fill vacancies, impossibility does not exist because the District has full control over remedying the vacancies at issue at Stege, Helms, and Kennedy. Appellants' argument, however, misinterprets the District's MOU with UTR, and misrepresents the District's past use of involuntary transfers.

First, Article 14, Section 3 of the UTR MOU, under which the District reassigned teachers at the beginning of the 2024-2025 school year (see AA 190-191, 239-246), allows the District to involuntarily transfer teachers due to declining enrollment and/or school closure. While it has a few requirements, the one relevant to this case is paragraph 4, "Educators transferred under this Section shall have the right to indicate preferences from a list of vacancies and shall be assigned pursuant to qualifications listed in Section 2.4 of this Article." (AA268, ¶7, 338.) Consequently, under Section 3, the District can only involuntarily reassign teachers when there is declining enrollment or a school closure, and then it cannot force them

to fill certain vacancies. They have the right to choose, from among those they are qualified for. As such, Appellants' contention that Section 3 allows the District to transfer a teacher to Stege, Helms, or Kennedy in its sole discretion, is false.

The other involuntary transfer provision in the UTR MOU is Article 14, Section 5, "Administrative Transfers for Cause (Employer Initiated)" (AA 229-240.) It was a long-held interpretation by UTR and the District that this Section only allowed transfers due to discipline. (AA 446, ¶11, 14-15, AA 465-466.) Then in the light of the large number of vacancies District-wide at the start of the second semester of the 2024-2025 school year, new Interim Superintendent Kim Moses decided to invoke Section 5 pursuant to Education Code §35035(e) and its own terms that transfer could be made for the "welfare of the District." (AA 339, 446.) However, contrary to Appellants' assertions the District's ability to transfer a teacher to specific vacancies is not unfettered. Under the law, the teacher must have the right credential for the vacancy to which he or she is transferred. And just as importantly, Section 5, paragraph d gives the transferred education the right to apply to any subsequent vacancy for which he or she is qualified. (AA 340). When dozens of vacancies

exist across the District when the transfers are taking place, this provision prevents the District from requiring that the teacher transfer to a particular school, when more than one vacancy exists for which he or she is qualified. This was the case when the District used this Section to fill vacancies in January 2025 and why the Helms vacancies were not remedied through the transfers. (AA 447-449.)

Substantial evidence supports the finding of the fact that the District's ability to remedy the teacher vacancies with permanent teachers is completely dependent on third parties applicants and employees, beyond its or the Court's control.

As demonstrated above, the District has used many varied methods of recruiting and programs to attract new teachers to the District. It has employed all means available to it under the Education Code to fill each open position with a designated teacher for the school year, including internship programs, Provisional Intern Permits, Short Term Staffing Permits, retired teachers, and Local Assignment Options pursuant to Education Code section 44258.3 and other statutes. It has also created its own program, the Teacher in Residency Program, to attract and support newly enrolled credentialing students to fill vacancies. (AA155-157.) The District has

not given up on hiring teachers to fill these open positions and continues to actively recruit to fill any and all vacancies across the District.

However, given the District's dependence on third parties to fill these vacancies with a single designated teacher, the teacher shortage, and the existence of remaining vacancies despite active and diligent efforts to fill these positions, any order compelling the District to assign a single designated teacher to the Helms and Kennedy vacancies would "require impossibilities" or "impracticability because of extreme and unreasonable difficulty." (*McMahon*, *supra*, 219 Cal. App. 3d at 299-300.)

C. The Trial Court Did Not Abuse Its Discretion in Denying Appellants' Motion for New Trial.

The trial court denied Appellants' Motion for New Trial on the grounds that Appellants did not meet the requirements of Code of Civil Procedure §657 for a new trial based on newly discovered evidence and because the trial court found no errors of law in its decision denying the Petition for Writ of Mandate.

Denial of a motion for new trial based on newly discovered evidence is reviewed for abuse of discretion. To be entitled to a new

trial based on newly discovered evidence, Petitioners must show that: 1) the evidence, not merely its materiality, is newly discovered; 2) the evidence is not cumulative of evidence already presented to the Court; 3) the evidence leads to a probable different result on retrial; 4) the evidence is such that Petitioner could not, with reasonable diligence, have discovered and produced it at the trial; and 5) these facts must be shown by best evidence that the case admits. (*Philpott v. Mitchell* (1963) 219 Cal. App. 2d 244, 248-249.) Moreover, the new evidence must relate to events and facts that took place prior to the original trial. (*Aron v. WIB Holdings* (2018) 21 Cal. App 5th 1069, 1079.)

The trial court properly determined that Appellants' "newly discovered" evidence was not newly discovered but cumulative of evidence and argument made at trial and that Appellants proffered no facts demonstrating due diligence in bringing the evidence to the court at trial. (AA430-438.)

Additionally, where no error appears in the determination of any fact, a new trial should not be granted on the ground that the decision is "against law." (*Renfer v. Skaggs* (1950) 96 Cal. App. 2d 380, 384.) Appellants cannot show any errors by the trial court as to

determinations of any fact and as such, the judgement of the trial court must be affirmed.

IV. CONCLUSION

Therefore, the trial court properly exercised its discretion under the law governing writs of mandate to excuse compliance in this case by refusing to issue a writ seeking compliance that was impossible.

Dated: August 15, 2025

/s/ Katherine Alberts
KATHERINE A. ALBERTS
Attorneys for Respondent
WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court, rule 8.204(c)(1), I certify that this Respondent's Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 13,699 words according to the word count feature of Microsoft Word.

DATED: August 15, 2025

/s/ Katherine Alberts
KATHERINE A. ALBERTS
Attorneys for Respondent
WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT

Re: Cleare, et al. v. West Contra Costa Unified School District, et al.
Court of Appeal Case No.: A173289

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the City of Concord, State of California. I am over the age of 18 years and not a party to the within cause; my business address is 1390 Willow Pass Road, Suite 700, Concord, California.

On August 15, 2025, I served the following documents:

APPELLANT'S OPENING BRIEF

on the following interested party(s) in said cause:

COUNSEL FOR PLAINTIFF
Dane P. Shikman, Esq.
Kyra Schoonover, Esq.
Laura Perry, Esq.
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Tel: (415) 512-4000
E-mail: dane.shikman@mto.com; kschoonover@mto.com; lperry@mto.com

CO-COUNSEL FOR PLAINTIFF
John T. Affeldt, Esq.
Karissa A.D. Provenza, Esq.
Public Advocates, Inc.
131 Steuart Street, Suite 300
San Francisco, CA 94105
Tel: (415) 431-7430
Email: jaffeldt@publicadvocates.org; kprovenza@publicadvocates.org

The Hon. Terri Mockler
The Hon. Benjamin T. Reyes II
Contra Costa County Superior Court
725 Court Street
Martinez, CA 94553

Trial Court
[Unbound Brief Only Via U.S. Mail]

VIA MAIL - CCP §§ 1013(a), 2015.5

☒ By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above and placing each for collection and mailing on

that date following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at Concord, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

☐ By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and depositing each envelope(s), with postage thereon fully prepaid, in the mail at Concord, California.

VIA ELECTRONIC MAIL TRANSMISSION - CCP §1010.6

☒ By electronic transmission via email to the authorized electronic service address(es) listed above.

VIA HAND-DELIVERY - CCP §§ 1011, 2015.5

☐ By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and causing each envelope(s) to be hand-served on that day by ONE HOUR DELIVERY in the ordinary course of my firm's business practice.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 15, 2025, at Concord, California.

KATHERINE ALEXANDER