S 18-9663

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LORCAN KILROY
Plaintiff and Petitioner,

v.

Los Angeles Unified School District Board of Education, et al., Defendants and Respondents.

On Review From the United States Court of Appeals For the Ninth Circuit, Case No. 16-56484
After An Appeal From the United States District Court, Central District of California, Judge, Dolly M. Gee
Case Number Case No.: 2:13-CV-06373-DMG-(FFMx)

BRIEF IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS

HURRELL CANTRALL LLP
MELINDA CANTRALL, STATE BAR NO. 198717
COUNSEL OF RECORD
300 SOUTH GRAND AVENUE, SUITE 1300
LOS ANGELES, CALIFORNIA 90071
TELEPHONE: (213) 426-2000; FACSIMILE: (213) 426-2020
Attorneys for Defendants-Respondents, LOS ANGELES UNIFIED SCHOOL DISTRICT, STEVE ZIMMER, NURY MARTINEZ, MONICA GARICIA, TAMAR GALATZAN, JOHN DEASY, BENNETT S. KAYSER, JOHN BRASFIELD, JUDITH VANDERBOK, MARC STRASSNER, JANET KIDDOO, and RICHARD VLADOVIC

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INTRODUCTION

Respondents Los Angeles Unified School District, Steve Zimmer, Nury Martinez, Monica Garicia, Tamar Galatzan, John Deasy, Bennett S. Kayser, John Brasfield, Judith Vanderbok, Marc Strassner, Janet Kiddoo and Richard Vladovic, Defendants in the matter below ("Defendants"), submit the following opposition to the petition for extraordinary writ of mandamus submitted by *pro se* Petitioner Lorcan Kilroy, Plaintiff in the case below ("Plaintiff").

Defendants respectfully submit there are no grounds for the extraordinary remedy of a petition for writ of mandamus in this case. Moreover, Plaintiff's petition is based upon pure speculation and is not supported by the record below. Furthermore, Plaintiff has not set forth any legal issue which would warrant review by this Court. Accordingly, the petition should be denied.

STATEMENT

Following the dismissal of his First Amended Complaint with leave to amend certain claims, on December 9, 2014, Plaintiff filed his Second Amended Complaint ("SAC"), which included a cause of action against Defendants Steve Zimmer, Nury Martinez, Monica Garicia, Tamar Galatzan, John Deasy, Bennett S. Kayser, John Brasfield, Judith Vanderbok, Marc Strassner, Janet Kiddoo and Richard Vladovic (the "Individual Defendants") under 42 U.S.C. § 1983 based upon a denial of equal protection in violation of the Fourteenth Amendment. (7 ER[1] 1656-1756.) In addition, the SAC set forth a cause of action for a violation of § 504 of the Rehabilitation Act against Defendant the Los Angeles Unified School District

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[1] "ER" refers to the Excerpts of Record filed before the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

("LAUSD" or the "School District") alleging retaliation for advocating on behalf of disabled students, in addition to allegations of a *Monell* claim [based upon 42 U.S.C. § 1983]. (7 ER 1656-1756.)

In the SAC, Plaintiff admitted that on January 17, 2012, he wrote a letter to two parents telling them that the School District would be seeking to expel their respective teenage children, who were students at Van Nuys High School ("VNHS"). (7 ER 01676.) Plaintiff alleged the School District used this letter as a pretext to retaliate against him for being an advocate for disabled students. (7 ER 1711.) Plaintiff alleged he was improperly suspended for 11 days without pay, and further claimed that he was displaced into the contract teacher pool from his position at VNHS, allegedly as part of a reduction in force. (7 ER 01678-01680, 01699-01701.)

On December 23, 2014, the Defendants filed a motion to dismiss and strike portions of the SAC pursuant to *Federal Rules of Civil Procedure*, Rule 12(b)(6), (f), and (g).

(7 ER 01636-01655.) On August 14, 2015, the magistrate court issued a Report and Recommendation granting, in part, Defendants' motion, and recommending dismissal, without leave to amend, of Plaintiff's 42 U.S.C. § 1983 action against the Individual Defendants, and striking the *Monell* claim [42 U.S.C. § 1983] against LAUSD. (7 ER 01570-01590.) On September 28, 2015, the district court fully adopted the magistrate court's Final Report and Recommendation. (1 ER 00053-00054.)

On June 20, 2016, the School District filed a motion for summary judgment, separate statement of undisputed material facts, and other supporting documents. (4 ER 00891 - 5 ER 01149.) The School District argued there were no issues of triable fact as to Plaintiff's remaining causes of action against it. (5 ER 01117-01149.) In the motion, the School District established that on January 16, 2003, Plaintiff accepted a position as a probationary secondary visual arts and crafts teacher at VNHS. (4 ER 00892; 5 ER 01073-01076, 01126.)

Moreover, on or about March 29, 2010, Plaintiff filed a complaint with the United States Department of Education, Office for Civil Rights ("OCR") alleging that the School District (1) discriminated against students with disabilities at VNHS by restricting their access to elective coursework; (2) disproportionately assigned special needs students to certain fine arts electives; and (3) retaliated against Plaintiff for filing a prior complaint with the OCR. (1 ER 00002, 00010; 4 ER 00892-00893; 5 ER 01016-01022, 01126.) After an investigation, the OCR found that VNHS did not discriminate against special needs students in limiting the number and scope of elective courses available to them and that the School District did not retaliate against Plaintiff. (1 ER 00002, 00010; 4 ER 00893; 5 ER 01021-01022, 01126.)

On or about October 1, 2011, Plaintiff filed a complaint with the School District's Educational Equity Compliance Office ("EECO Complaint"). (1 ER 00002, 00010; 4 ER 00894-00895; 5 ER 01024-01027, 01127.) The EECO Complaint alleged that, during the 2011-2012 school year,

the School District discriminated against special needs students at VNHS by denying them equal access to elective coursework and by overcrowding them into a small number of electives. (1 ER 00002, 00010-00011; 4 ER 00895; 5 ER 01024-01025, 01127.) The EECO found no evidence of discrimination against special needs students regarding their choice of elective coursework. (1 ER 00002, 00011; 4 ER 00895; 5 ER 01030-01035, 01127.)

Moreover, the motion for summary judgment established that on January 17, 2012, Plaintiff sent a threatening and inappropriately worded letter ("Improper Letter") to the parents of two of his students at VNHS. (1 ER 00002, 00011; 4 ER 00899; 5 ER 01040-01042, 01009, 01128.) The Improper Letter was printed on the School District letterhead and sent without permission from any of the School District deans or administrators. (1 ER 00002, 00011; 4 ER 00899; 5 ER 01040-01042, 01066, 01128.) Excerpts from the Improper Letter include:

> [Your child] has been destroying the classroom environment by distracting others and rule breaking.
>
> You and your kid are part of a family and you are partly responsible for your kid's behavior. In terms of rule breaking or disturbing behavior in schools your kid does it because they want to…I've seen parents and kids stop the kid's behavior instantaneously when they want to. You can turn it off, and you can turn it off just like you turn off a light switch. I've seen it.
>
> Please do not respond to this letter by staging a conference to come dribble and whine like many do about you or your kid's personal difficulties or your hard life. Or manipulate things with accusations about me…Be prepared to take legal responsibility for your actions.
>
> If your kid is over 18 or has a previous record an immediate request will be made to legally remove you from the school. . . Any other available legal steps possible will be taken to request that you are legally removed. . . If your kid is on Probation their probation officer will be getting a copy of this and Juvenile court judge will be getting a copy.

(1 ER 00002, 00011-00014; 4 ER 00899-00901; 5 ER 01040-01042, 01128-01129.)

The Administration at VNHS learned of the Improper Letter due to complaints from multiple parents. (1 ER 00002, 00014; 4 ER 00901; 5 ER 01066, 01129.) Plaintiff's action in sending out the Improper Letter constituted misconduct meriting discipline by the School District. (4 ER 008902; 5 ER 01066, 01129-01130.) In response to the Improper Letter, Plaintiff was reprimanded at a conference held on January 24, 2012. (1 ER 00002, 00014; 4 ER 008902; 5 ER 01044-01046, 1066, 01130.) Moreover, on March 12, 2012, another conference took place with Plaintiff regarding his misconduct in sending out the Improper Letter. (1 ER 00002, 00014; 4 ER 00903; 5 ER 01066, 01130.) At this conference the School District served Plaintiff with a Notice of Unsatisfactory Act and Notice of 11-day Suspension. (1 ER 00002, 00014; 4 ER 00903; 5 ER 01066, 01130.) The School District disciplined Plaintiff with an 11-day suspension based upon his misconduct in sending out the Improper Letter. (4 ER 00903; 5 ER 01066-01067, 01130.)

Nearly a year later, on May 10, 2013, the School District sent notice to Plaintiff to advise he was being displaced from his position as an art teacher at VNHS, effective on June 11, 2013. (1 ER 00002, 00016; 4 ER 00905; 5 ER 01052, 01130-01131.) The School District displaced Plaintiff because it was reducing the number of fine arts teachers throughout the district and at VNHS due to student loss, and Plaintiff was the fine arts teacher at VNHS with the least seniority. (1 ER 00002, 00016; 4 ER 00905; 5 ER 01052, 01067, 01131.) The motion for summary judgment established the School District displaced Plaintiff for the 2013-2014 school year because the number of students at VNHS was decreasing and the School District policy required the displacement of elective teachers before the displacement of teachers for core curriculum, like math and science. (1 ER 00002, 00016; 4 ER 00905-00906; 5 ER 01067, 01131.) On May 22, 2013, Plaintiff filed a Displacement Grievance challenging his displacement from VNHS. (1 ER 00002, 00016; 4 ER 00906; 5 ER 01131.)

Pursuant to the Collective Bargaining Agreement with the UTLA, the School District administrators held a "Step 1" Grievance Hearing with Plaintiff on June 3, 2013 and a "Step 2" Grievance Hearing on August 14, 2013. (1 ER 00002, 00016; 4 ER 00906; 5 ER 01006-01007, 01131.) After considering all of the evidence presented by Plaintiff, the School District issued a letter to Plaintiff dated August 15, 2013 denying his grievance and holding that his displacement was proper. (1 ER 00002, 00016; 4 ER 00906; 5 ER 01007 01131.)

A separate grievance hearing was held with Plaintiff on June 3, 2013 regarding Plaintiff's appeal of his 11-day suspension for sending out the Improper Letter. (1 ER 00002, 00016; 4 ER 00906-00907; 5 ER 01006, 01066, 01131.) In a letter dated June 4, 2013, the School District informed Plaintiff that it upheld the 11-day suspension. (1 ER 00002, 00016; 4 ER 00907; 5 ER 01006, 01131.) Imposing an 11-day suspension was appropriate under the circumstances due to the severity of Plaintiff's misconduct in

sending out the Improper Letter. (1 ER 00002, 00016; 4 ER 00907; 5 ER 01006, 01066, 01131.) In a notice dated July 29, 2013, the School District informed Plaintiff that he would be serving his suspension between the dates of August 13, 2013 and September 23, 2013. (4 ER 00907; 5 ER 01012, 01131.)

After the School District displaced Plaintiff from his teaching position at VNHS in June of 2013, the School District placed him, along with other displaced teachers, into the contract teacher pool. (1 ER 00002, 00016; 4 ER 00907-00908; 5 ER 01052, 01131-01132.) As a teacher in the contract teacher pool, Plaintiff remained fully employed with the School District. (1 ER 00002, 00016; 4 ER 00908; 5 ER 01052-1063, 01083, 01132.) Plaintiff received assignments at the School District campuses through the contract teacher pool until Plaintiff was ultimately terminated on or about February 17, 2016. (1 ER 00002, 00016; 4 ER 00908; 5 ER 01054-01063, 01083, 01132.) Plaintiff's termination stemmed from separate allegations of sexual misconduct against Plaintiff in relation to his subsequent assignment at

Millikan Middle School, and was not related to the claims set forth in Plaintiff's SAC. (4 ER 00908; 5 ER 01109-01113, 01132.)

On July 8, 2016, Plaintiff filed his opposition to the summary judgment motion and separate statement, and other supporting documents. (3 ER 00539 – 4 ER 00890.) On July 21, 2016, the School District filed its reply (3 ER 00359-00538), along with evidentiary objections (2 ER 00251-00358.)

On August 18, 2016, the magistrate court issued its Report and Recommendation recommending that the district court grant the summary judgment motion in its entirety. (1 ER 00009-00030.) With respect to the Plaintiff's retaliation claims under § 504 of the Rehabilitation Act and Title II of the ADA, the magistrate court found there was no evidence linking the adverse employment actions suffered by Plaintiff to any of his protected activities, and that Plaintiff could not establish causation. (1 ER 00020-00025 (citing *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 472

(9th Cir. 2015), cert. denied sub nom. *San Diego Unified Sch. Dist. v. T.B.*, 136 S. Ct. 1679 (2016)("*Brenneise*").) Moreover, the magistrate court found the evidence showed that the School District had legitimate grounds for imposing adverse employment actions against Plaintiff, and that Plaintiff could not establish pretext. (1 ER 00022-00024.) The magistrate court also sustained many of the School District's evidentiary objections. (1 ER 00003-00008.)

On September 28, 2016, the district court fully adopted the Report and Recommendation and accepted the findings of fact, conclusions of law, and recommendations of the magistrate court. (1 ER 00002.) Accordingly, the district court ordered that judgment be entered granting summary judgment in favor of the School District and dismissing the action with prejudice. (1 ER 00002.)

Judgment was entered on September 28, 2016. (1 ER 00001.) On October 7, 2016, Plaintiff filed a notice of appeal of the judgment and order adopting the Report and Recommendation. (2 ER 00087-00097.)

On March 29, 2019, the Ninth Circuit issued an unpublished memorandum, affirming the defense judgment. Dckt.[2] No. 33. The Court held the district court properly granted summary judgment on Plaintiff's claims of retaliation in violation of Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act, as he failed to raise a genuine issue of material fact regarding causation or pretext. *Id.*

REASONS FOR DENYING THE PETITION

I. PLAINTIFF'S PETITION DOES NOT MEET THE REQUIREMENTS FOR THE EXTRAORDINARY REMEDY OF A WRIT OF MANDAMUS.

A petition for a writ of mandamus is a drastic remedy, reserved for "really extraordinary causes," and this Court

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[2] "Dckt." refers to the docket for the United States Court of Appeals for the Ninth Circuit.

will not use them as a substitute for an appeal. *Ex parte Fahey*, 332 U.S. 258, 260 [67 S.Ct. 1558, 1559, 91 L.Ed. 2041] (1947). A petition for a writ of mandamus requires a showing of a "clear and indisputable" right to the issuance of the writ. *Miller v. French*, 530 U.S. 327, 339 [120 S.Ct. 2246, 2254, 147 L.Ed.2d 326] (2000). Where a court exercises its jurisdiction to decide issues properly before it, the remedy is not a petition for writ of mandamus, regardless of whether the petition claims the district court exceeded its legal powers or erred in making its ruling. *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382–383 [74 S.Ct. 145, 147–148, 98 L.Ed. 106] (1953) (the trial court's decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power).

Here, Plaintiff does not argue the Ninth Circuit exceeded its jurisdiction in ruling on Plaintiff's appeal from the final district court judgment. In this regard, there is no basis for an extraordinary writ of mandamus in this case. Moreover, there is absolutely no basis for Plaintiff's claims in

the petition that the Ninth Circuit aided California officials "to protect figurehead Democrat politician and now presidential candidate Sen. Kamal Harris from exposure for aiding and abetting" in corruption. Pet., at p. iii. Certainly, Plaintiff has not shown a ***clear and indisputable right*** to issuance of a writ.

II. PLAINTIFF'S PETITION SHOULD BE DISREGARDED AS PLAINTIFF MISREPRESENTS THE PROCEEDINGS BELOW AND HIS CLAIMS ARE UNSUPPORTED BY THE RECORD.

Without any citation to the record and without any support other than his own mere speculation, Plaintiff claims the Ninth Circuit's decision affirming the defense judgment was infected by the Ninth Circuit's "Democratic bias" to protect Kamala Harris. See Pet., at p. iii. ***There is absolutely nothing in the record to support Plaintiff's speculative statements to this Court***.

Preliminarily, Ms. Harris is not a party to this lawsuit. Rather, this case stems from Plaintiff's former employment as an art teacher with LAUSD. Plaintiff contends the School District took adverse employment actions against him in retaliation for his advocacy on behalf of students with disabilities attending VNHS, in relation to the elective coursework available to them. The adverse employment actions alleged by Plaintiff were an 11-day suspension, and displacement from his regular position to the contract teacher pool. In actuality, as shown above, the undisputed evidence shows Plaintiff was properly suspended as he admittedly wrote a completely inappropriate letter to certain parents (1 ER 00002, 00016; 4 ER 00907; 5 ER 01006, 01066, 01131), and he was placed into the contract teacher pool because fewer students were attending the high school and Plaintiff was the art teacher with the least amount of seniority (1 ER 00002, 00016; 4 ER 00905-00906; 5 ER 01067, 01131). On appeal, the Ninth Circuit properly affirmed the trial court's decision, as Plaintiff failed to

demonstrate any error by the court below. Dckt. No. 33.

Importantly, an appellate court will not consider any claims that are not supported by the record. *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997); FED. R. APP. P. 28(a)(8)(A). Moreover, *pro se* litigants are required to follow court rules. *See Wilcox v. C.I.R.,* 848 F.2d 1007, 1008 n.2 (9th Cir. 1988) (citations omitted). In *Acosta-Huerta v. Estelle*, 7 F.3d 139 (9th Cir. 1992), the Ninth Circuit found the *pro se* petitioner had abandoned his claims on appeal, stating:

> The federal rules require the brief to contain the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on. Fed. R. App. P. 28(a)(4).

Id. at 143 (citations omitted). Throughout his petition, Plaintiff improperly makes factual representations that are unsupported by the record. See e.g., Pet., at pp. ii-iv, 3-13, 16-28. In this regard, his petition should be denied.

Moreover, Plaintiff argues the Ninth Circuit's unpublished decision was based upon "Democratic political bias," while at the same time arguing he "cannot discern whether thee two republican appointed judges whose names appear on the opinion could not see the bias," or if "staff fabricated the names of the two republics appointed judges . . . as having authorized the unpublished circuit opinion in this pro se case." Pet., at p. 19. There is nothing to support Plaintiff's theory that the Ninth Circuit's ruling on appeal was the result of any alleged "Democratic political bias," or that the panel decided the matter based on their alleged political affiliations, or that the staff fabricated the names of any of the judges assigned to the panel in this case. Plaintiff further contends "politically infected Defendants in the Ninth Circuit" have "fabricated mid-case sexual misconduct against Petitioner for political ends, to stymie and smear this litigation, and to camouflage the illegal acts of Kamal Harris," which Circuit jurists have "ratified." Pet., at p. 26 (original in caps). Again, the foregoing allegations

are completely unsupported, and have nothing to do with the Plaintiff's allegations in the SAC. Respectfully, as the claims in Plaintiff's petition are based solely upon his own speculation and are completely unsupported by the record in this matter, his petition must be denied.

Also, it should be noted that under Supreme Court Rule 20(2)(b), a petition for writ of mandamus shall be served on every party to the proceeding with respect to which relief is sought. According to the Proof of Service filed with this Court, it does not appear Plaintiff served the petition to the Ninth Circuit judges against whom he claims bias.

III. THE PLAINTIFF CANNOT CHALLENGE THE COURT'S RULINGS WHICH ARE NOT IN EXCESS OF ITS AUTHORITY, BY WAY OF A PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS.

A. THE NINTH CIRCUIT HAD JURISDICTION TO RULE ON PLAINTIFF'S APPEAL IN ITS UNPUBLISHED MEMORANDUM.

A petition for a writ of mandamus is used to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308–309 [109 S.Ct. 1814, 1822, 104 L.Ed.2d 318] (1989). A petition must demonstrate the lower court committed an extraordinary act, such as the usurpation of the judicial power. *Id.* (citations omitted). "To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek . . . and carry 'the burden of showing that [their] right to issuance of the writ is

'clear and indisputable.'" *Id.* Extraordinary writs cannot be used as substitutes for an appeal. *Id.*; *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–381 [124 S.Ct. 2576, 2587, 159 L.Ed.2d 459] (2004) (a petition for a writ of mandamus cannot be used as a substitute for the regular appeals process).

Based upon the foregoing, it is improper for Plaintiff to attempt to challenge the merits of the Court of Appeals' decision by way of a petition for an extraordinary writ of mandamus. Thus, the petition should be denied.

B. PLAINTIFF SETS FORTH NO ISSUES APPROPRIATE FOR SUPREME COURT REVIEW.

Even if Plaintiff had properly challenged the decision, the issues raised by Plaintiff do not meet the requirements to secure review by this Court. Plaintiff has not shown a conflict or that the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or that the Ninth Circuit has decided

an important federal question in a way that conflicts with relevant decisions of this Court.

Rather, Plaintiff merely contends well-established cases by this Court are incorrect, without any meaningful argument to support review. Specifically, Plaintiff states the test for causation set forth by this Court in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 342 [133 S.Ct. 2517, 2522, 186 L.Ed.2d 503] (2013) should be reconsidered. However, Plaintiff sets forth no grounds to support reconsideration of the case.

In *Nassar*, this Court held that retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action. *Nassar,* 570 U.S. at 360. This Court set forth policy reasons as to why the "but-for" standard of causation should apply to retaliation claims. *Id.* at 358. For example, this Court noted the rising numbers of retaliation claims being filed with the EEOC. *Id.* Moreover, a less burdensome causation standard for retaliation claims could contribute to the filing of

frivolous claims, proving harmful to the employers, administrative agencies and courts. *Id.* There is an incentive for an employee who knows that he is about to be fired for poor performance to forestall that lawful action by making an unfounded charge of discrimination, and then, when the unrelated employment action occurs, he turns around and alleges the conduct was retaliatory. *Id.* This Court further noted that retaliation claims are distinct, in that they are often alleged against different wrongdoers, and the proof required for each claim will differ. *Id.* Hence, if a but-for standard did not apply, an employer could improperly be liable even when the adverse action would have been taken anyway. *Id.*

In addition, Plaintiff has not shown a conflict regarding the Ninth Circuit's unpublished memorandum. To the contrary, in *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015), cert. denied sub nom. *San Diego Unified Sch. Dist. v. T.B.*, 136 S. Ct. 1679 (2016) the Ninth Circuit stated, "other circuit and district

courts have applied *Nassar* to ADA retaliation claims, and we do as well." Moreover, Plaintiff failed to raise a triable issue of fact to show causation or pretext (Dckt. No. 33), and his claims fail under any causation standard based upon his admitted conduct and the undisputed evidence establishing why the adverse employment actions were taken against him. (1 ER 00002, 00016; 4 ER 00905-00907; 5 ER 01006, 01066-01067, 01131.)

Furthermore, Plaintiff states he is seeking to challenge this Court's holding in *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 595 [128 S.Ct. 2146, 2149, 170 L.Ed.2d 975] (2008) prohibiting "class of one" claims by public employees. Pet., at p. ii. However, the district court struck Plaintiff's attempt to add *Monell* allegations against LAUSD, and Plaintiff did not challenge that ruling on appeal.[3]

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[3] Of note, school districts in California are immune from claims for monetary damages under 42 U.S.C. § 1983 claims by virtue of Eleventh Amendment immunity. See *Corales v. Bennett*, 567 F.3d 554, 573 (9th Cir. 2009).

Additionally, the district court found the Plaintiff failed to state a cause of action against the Individual Defendants, and dismissed Plaintiff's SAC against them without leave to amend. (1 ER 00053-00052, 00063-00073, 00075.) Again, on appeal to the Ninth Circuit, the Plaintiff failed to argue that the Individual Defendants should not have been dismissed from the case. Thus, the Plaintiff waived any argument that the Individual Defendants were not entitled to judgment in their favor on Plaintiff's Fourteenth Amendment equal protection claim. *Independent Towers of Wash. v. State of Wash.*, 350 F.3d 925, 929 (9th Cir. 2003); *United States v. Brooks*, 610 F.3d 1186, 1202 (9th Cir. 2010) ("Generally, an issue is waived when the appellant does not specifically and distinctly argue the issue in his or her opening brief.").

Moreover, Plaintiff's Notice of Appeal and Representation Statement before the Ninth Circuit did not reference the Individual Defendants as parties to the appeal. (2 ER 00087-00097); *Compare D-Beam, Ltd. P'ship v. Roller Derby Skates, Inc.,* 366 F.3d 972, 974 (9th Cir. 2004) (*pro se*

litigant's Notice of Appeal could not also be construed as appeal on behalf of his corporation where the Notice of Appeal only indicated it was made on behalf of the individual plaintiff and did not specifically indicate appeal was also on behalf of corporation). Thus, Plaintiff waived any argument that the dismissal of the Individual Defendants was in error, and there is simply no basis for the Plaintiff to pursue the arguments in the petition. Any challenge to their dismissal was not properly presented to the Court of Appeals, and there is no basis to support review of any such issue from the Ninth Circuit's decision in this case.

Additionally, the district court relied upon *Engquist* as authority for its findings that a plaintiff in an a public employment case could not pursue a class-of-one theory of liability based upon the equal protection clause of the Fourteenth Amendment, but noted that Plaintiff did not allege that he was treated differently for others not similarly situated in any event. (1 ER 64.) In his petition, Plaintiff

argues that his allegations were sufficient to state a class-of-one equal protection claim. Pet., at p. 16. Again, however, Plaintiff did not address the lower court's findings regarding the sufficiency of his equal protection claim against the Individual Defendants on appeal to the Ninth Circuit, and any such argument has been waived. Also, the Individual Defendants would be entitled to qualified immunity from any such claims, in any event. (7 ER 01650-01651.)

Furthermore, Plaintiff has not shown review should be granted to challenge this Court's established ruling in *Engquist*, and the issue is not appropriate for review by this Court under the established factors. As this Court found in *Engquist*, "ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly 'constitutionalize the employee grievance.'" *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 607 [128 S.Ct. 2146, 2156, 170 L.Ed.2d 975] (2008) (citations omitted). Thus, this Court determined the federal courts are not the appropriate forum in which to review the multitude of personnel

decisions that are made daily by public agencies. *Id.* "Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

DATED: July 15, 2019

Respectfully submitted,

HURRELL CANTRALL LLP

By: /s/ Melinda Cantrall
MELINDA CANTRALL
Attorneys for Defendants-Respondents, LOS ANGELES UNIFIED SCHOOL DISTRICT, STEVE ZIMMER, NURY MARTINEZ, MONICA GARCIA, TAMAR GALATZAN, JOHN DEASY, BENNETT S. KAYSER, JOHN BRASFIELD, JUDITH VANDERBOK, MARC STRASSNER, JANET KIDDOO, and RICHARD VLADOVIC