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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GILBERT WAYNE HEDGPETH et al., Plaintiffs and Appellants, v. CALIFORNIA STATE ATHLETIC COMMISSION et al. Defendants and Respondents.	B331090 (Los Angeles County Super. Ct. No. 18STCV05608)

APPEAL from judgment of the Superior Court of Los Angeles County, Kristin S. Escalante and Charles C. Lee, Judges. Affirmed.

Huarte Appeals and Anne M. Huarte for Plaintiffs and Appellants.

Rob Bonta, Attorney General, Iveta Ovsepyan, Acting Senior Assistant Attorney General, Catherine Woodbridge, Norman D. Morrison IV and Shirley R. Sullinger, Deputy Attorneys General, for Defendants and Respondents.

Three non-White boxing referees sued the State Athletic Commission (the commission) and its executive officer for discrimination under the Unruh Civil Rights Act (Civ. Code, § 51 et seq; the Act), alleging that the executive officer selected White referees for championship matches instead of the plaintiffs based on race. The trial court granted summary judgment for the defendants, concluding that the commission and its executive officer do not qualify as "business establishments" subject to the Act. The plaintiffs then sought leave to amend their complaint to substitute Government Code, section 11135 as the basis for their discrimination claim. The court denied leave to amend based on unreasonable delay. We conclude that the defendants are not business establishments within the meaning of the Act when selecting referees, and we find no abuse of discretion in the trial court's denial of the motion for leave to amend. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

1. Undisputed Material Facts

The commission is created by statute to regulate professional boxing and other martial arts. (Bus. & Prof. Code, §§ 18602, subd. (a), 18640.) It consists of seven members and "has the sole direction, management, control of, and jurisdiction over all professional and amateur boxing [and other] . . . martial arts, and matches or exhibitions conducted, held or given within this state." (Bus. & Prof. Code, §§ 18602.1, 18640.)[1] All events require "prior approval of the commission," and those who "engage in the promotion of, or participate in, a boxing or martial arts contest, match, or exhibition" must be licensed by the commission. (Bus. & Prof. Code, § 18640.) "Protection of the public" is the "highest priority for the [commission] in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Bus. & Prof. Code, § 18602.1.) The commission is housed in the Department of Consumer Affairs (Bus. & Prof., § 18602, subd. (a)), and is funded by fees taken from ticket sales and television broadcasting. The commission adopts regulations to carry out its functions, which regulations are set forth in Title 4, Division 2 of the California Code of Regulations (CCR). (Bus. & Prof. Code, § 18611.) Several employees work for the commission in an office in Sacramento.

Andrew Foster was appointed as the commission's executive officer in 2012. He "review[s] and approv[es] events held in this state," and has been delegated the authority from the commission to "assign officials, inspectors, timekeepers, and ringside physicians for all sporting events." (See Bus. & Prof. Code, § 18661 [authority of executive officer to oversee all licensing].) Foster is White.

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[1] Five members of the commission are appointed by the Governor, subject to Senate confirmation, one member is appointed by the Senate Committee on Rules, and one member is appointed by the Speaker of the Assembly. (Bus. & Prof. Code, § 18602, subd. (a).)

Gilbert Wayne Hedgpeth, Raul Caiz, Jr., and Raul Caiz, Sr., (plaintiffs) are boxing referees and judges, all members of the California Boxing Hall of Fame. Hedgpeth is Black; Caiz, Jr., and Caiz, Sr., are Latino.

2. Government Tort Claim, Complaint, and Demurrer

In May 2018, the plaintiffs presented a government tort claim to the Department of General Services alleging race discrimination in the assignment of boxing officials. The plaintiffs stated they would bring causes of action for discrimination based on violations of the Act, Government Code section 11135, and Civil Code section 43, as well as intentional infliction of emotional distress and other related causes of action.

In November 2018, the plaintiffs filed an action against Foster and the commission (defendants) for violation of the Act, as well as discrimination and retaliation in violation of the California Constitution, Article 1, sections 7 and 8. They alleged Foster disproportionately assigned White boxing officials, and not plaintiffs, to high-profile boxing matches. They also alleged that after complaining about the assignments, they faced retaliation. They did not allege a cause of action for violation of Government Code section 11135, Civil Code section 43, intentional infliction of emotional distress, or any other related cause of action.

Defendants filed a demurrer. In April 2019, the trial court concluded that the plaintiffs had not alleged sufficient facts to show intentional discrimination, so sustained the demurrer to the claim for violation of the Act with leave to amend. The court sustained the demurrer to the constitutional claims without leave to amend. The court rejected an argument made in the defendants' reply brief, that the commission was not a "business establishment" under the Act, noting that the defendants had not provided legal authority or pertinent argument about their status as a business establishment.

3. Amended Complaint and Demurrer

Plaintiffs filed an amended complaint in May 2019, alleging a single cause of action for violation of the Act. The amended complaint set forth specific occasions on which Foster assigned a White referee over plaintiffs based only on race, despite requests by the athletes or the boxing associations for plaintiffs to serve as the referees.

The defendants demurred to the amended complaint on several grounds, including that the defendants are not "business establishments" within the meaning of the Act. The defendants also moved to strike the plaintiffs' claim for punitive damages.

In July 2019, the trial court overruled defendants' demurrer. The court concluded the plaintiffs had now alleged sufficient facts to show discrimination. Relying on the principle that the term "business establishment" is to be interpreted " 'in the broadest sense reasonably possible' " (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 76 (*Isbister*)), the court concluded that the defendants "may be acting as a business establishment when specifically assigning a particular official to a particular fight." The court granted defendants' motion to strike plaintiffs' claim for punitive damages with leave to amend, concluding that the conduct alleged did not rise to the level of despicable conduct for malice or oppression.

4. Second Amended Complaint, Petition for Writ of Mandate

Plaintiffs filed a second amended complaint in August 2019, alleging a single cause of action for violation of the Act. The defendants again moved to strike punitive damages from the complaint.

In September 2019, the defendants petitioned for writ of mandate in this court (B300936), asserting, among other contentions, that the defendants are not "business establishments" for purposes of the Act. Division Eight of this court summarily denied the petition in February 2020.

In August 2020, the trial court granted the motion to strike punitive damages without leave to amend.

5. Motion for Judgment on the Pleadings

In June 2021, the defendants moved for judgment on the pleadings based on *Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367, which the defendants relied on to argue that a public entity is not a "business establishment" within the meaning of the Act. In October 2021, the trial court denied defendants' motion for judgment on the pleadings because the

California Supreme Court had granted review of *Brennon B. v. Superior Court*, *supra*, 57 Cal.App.5th 367.

6. Motion for Summary Judgment

In December 2021, defendants moved for summary judgment on the ground that they are immune from tort liability under Government Code section 815. In their reply brief, the defendants noted that if the legislature had intended "

business establishments" under the Act to include government entities, it knew how to do so directly.

On March 14, 2022, the trial court denied the motion for summary judgment. The court found the defendants failed to meet their burden of proof to show Foster's assignment of boxing officials was subject to government immunity. In addition, the defendants did not provide sufficient legal authority or analysis as to whether the boxing matches were "business establishments" under the Act.

7. Second Motion for Summary Judgment

A jury trial was scheduled for August 15, 2022. On August 4, 2022, the Supreme Court issued its decision in *Brennon B. v. Superior Court* (2022) 13 Cal.5th 662 (*Brennon B.*), addressing whether a public school district qualifies as a "business establishment" under the Act when it provides education services to a student. In light of this new authority, the trial court continued the final status conference and the trial date to allow the defendants to file a second motion for summary judgment.

On August 26, 2022, the defendants filed a second motion for summary judgment, arguing that they are not "business establishments" under *Brennon B.*, *supra*, 13 Cal.5th 662. The defendants also reasserted that they are immune from liability under Government Code section 820.2, relying on a recent amendment to Business and Professions Code section 18613 providing that the executive officer's assignment of officials "shall be considered [a] discretionary act[]" subject to governmental immunity under Government Code section 820.2. (Bus. & Prof. Code, § 18613.)

On October 17, 2022, the plaintiffs applied ex parte to continue the hearing on defendants' motion for summary judgment and to reopen discovery related to "the constitutionality" of the recent amendment to section 18613 of the Business and Professions Code. The court allowed discovery on that limited issue and continued the hearing on the pending motion. Plaintiffs sought to depose Foster for a third time, and to depose Attorney General Rob Bonta and Assemblyman Jose Medina, but the defendants successfully moved to quash the additional discovery.

After full briefing and a hearing, the trial court issued its ruling on February 28, 2023, granting the defendants' motion for summary judgment. The court concluded, based on *Brennon B.*, *supra*, 13 Cal.5th 662, that the Act does not apply to the defendants because the commission is not a business establishment. As an independent basis for summary judgment, the court also ruled that defendants are immune from liability under Government Code sections 820.2 and 815.2, subdivision (b), based on the newly amended Business and Professions Code section 18613, subdivision (b)(2).

8. Motion for Leave to File Third Amended Complaint

On March 8, 2023, the plaintiffs filed a motion for leave to file a third amended complaint to "substitute" Government Code section 11135 as the basis of their discrimination claim instead of the Act.[2] The plaintiffs argued the amendment was based on the same underlying factual allegations, no new discovery was required, and the defendants would not be prejudiced. The plaintiffs attached a proposed third amended complaint alleging a single cause of action for discrimination under Government Code section 11135 and seeking general damages, special damages, punitive damages, and attorney fees. The plaintiffs did not seek injunctive relief.

The trial court entered judgment in defendants' favor on March 15, 2023, but later vacated the judgment because it had been entered prematurely.

The defendants opposed the plaintiffs' motion for leave to amend on the grounds that: the plaintiffs' delay was unwarranted and prejudicial; the plaintiffs failed to explain when the facts were discovered and why the amendment was not requested earlier; the trial court lacked jurisdiction to entertain the amendment because it had entered judgment while the

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[2] Government Code section 11135 provides, in relevant part, "(a) No person in the State of California shall, on the basis of . . . race, color, . . . ethnic group identification . . . , be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."

motion for leave to amend was pending, although the judgment had since been vacated; and amendment was futile, because the action was barred by the statute of limitations, and because Government Code section 11139 provides that a private right of action based on an alleged violation of section 11135 is limited to injunctive and equitable relief only, which plaintiffs did not seek.

The plaintiffs filed a reply that did not address relief under Government Code section 11139, but instead argued they could pursue damages based on the general principles of Civil Code section 3523. The plaintiffs attached a substantially similar version of their proposed third amended complaint, which omitted the claim for punitive damages, but otherwise sought the same relief as the prior version. The proposed third amended complaint did not request injunctive relief.

After a hearing on April 6, 2023, the trial court denied the motion for leave to amend as untimely and unreasonably delayed. The court entered judgment in the defendants' favor on April 25, 2023.

The plaintiffs filed a timely notice of appeal.

DISCUSSION

1. Standard of Review

We conduct an independent review of the trial court's order granting summary judgment (*Bennett v. Ohio National Life Assurance Corp.* (2023) 92 Cal.App.5th 723, 728), as well as issues of statutory interpretation, such as whether a defendant is a "business establishment" within the meaning of the Act

(*Brennon B.*, *supra*, 13 Cal.5th at p. 670; *Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 152).

We review a trial court's order denying leave to amend for an abuse of discretion. (*McMillin v. Eare* (2021) 70 Cal.App.5th 893, 909.)

2. Summary Judgment

The plaintiffs argue that the trial court erred in granting summary judgment because (1) the commission served as the "functional equivalent of a commercial enterprise" in appointing referees and therefore qualified as a "business establishment" under *Brennon B.*, *supra*, 13 Cal.5th 662, and (2) the amendment to Business and Professions Code section 18613, subdivision (b), enacted after plaintiffs filed their action, does not apply retroactively to immunize defendants from their alleged misconduct. Because the first issue is dispositive, we decline to reach the second.

A. "Business Establishment" Under the Act

Civil Code section 51 provides, in relevant part: "All persons within the jurisdiction of this state are free and equal, and no matter what their . . . race . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) The Act does not define the term "business establishment" (see Civ. Code, § 51), and our Supreme Court has cautioned that the usual meaning of the term is not invariably dispositive. (*Brennon B.*, *supra*, 13 Cal.5th at p. 674.)

Some entities that would not be considered "business establishments" in the traditional sense should be considered business establishments within the meaning of the Act. (*Ibid.*)

In *Brennon B.*, a special needs student sued a public school district alleging a violation of the Act (in addition to negligence-related claims) after he was sexually assaulted by students and a staff member. (*Brennon B.*, *supra*, 13 Cal.5th at pp. 668, 671.) The trial court sustained a demurrer to the claim under the Act, and the appellate court denied the ensuing writ petition. (*Ibid.*) Our Supreme Court granted review and held that public school districts are not business establishments under the Act "when they are acting to fulfill their educational role." (*Id.* at pp. 669, 680–681.) In reaching this conclusion, the Court surveyed its prior decisions (*Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468–469 (*Burks*) [developer who built and sold tract houses operated a "business establishment"]; *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795–796 [condominium owners' association was a "business establishment," given function to protect and enhance project's economic value]; *Isbister*, *supra*, 40 Cal.3d at pp. 76–77, 81 [boys' club operating permanent physical recreational facilities was a "business establishment" despite nonprofit status]; *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 598–599 (*Warfield*) [private country club deriving significant revenue from members and nonmembers was a "business establishment"].) The principle common to each of these decisions was that "in order to be a 'business establishment under the Act[,] an entity must operate as a business or commercial enterprise when it discriminates." (*Brennon B.*, *supra*, 13 Cal.5th at p. 679.) The *Brennon B.* court explained that "[i]n parsing the boundaries of what constitutes a 'business establishment,' our cases have focused on attributes—performing business functions, protecting economic value, operating as the functional equivalent of a commercial enterprise, etc.—that are not shared by public school districts engaged in the work of educating students." (*Id*. at p. 681.) Such work "is fundamentally different from what could fairly be described as a 'regular business transaction[].' " (*Ibid*.)

The *Brennon B.* court also relied on legislative history, observing that the Act evolved "in response to the curtailment of the federal government's ability to legislate on the conduct of *private entities*." (*Brennon B.*, *supra*, 13 Cal.5th at pp. 678–679.) It further noted that the Act " 'contains no words or phrases most commonly used to signify public school districts, or, for that matter, any other public entities or governmental agencies,' " even though the Act was drafted by the same Legislature during the same session as the California Fair Employment and Housing Act, which applied explicitly to state and local governmental entities. (*Id*. at pp. 678–679.) The court in *Brennon B.* emphasized that its task was purely one of statutory interpretation, and that resolution of whether the public entities at issue were business establishments did not turn on the court's view of the wisdom or morality of whether the anti-discrimination provisions of the Act should extend to those entities. (See *id.* at p. 669.)

B. Analysis

The commission is a state regulatory entity whose express purpose is to protect the public in serving its licensing, regulatory, and disciplinary functions. (Bus. & Prof. Code,

§ 18602.1.) We conclude application of the Act to defendants' appointment of boxing referees is not supported by the language of the Act, the legislative history, or the relevant case law.

Although the commission receives fees from television networks and event promoters,[3] rather than support from the State's general fund, there is no dispute that the commission *does not* transact business with the public or engage in any advertising. (Cf. *Isbister*, *supra*, 40 Cal.3d at pp. 76–77, 81 [boys' club offered basic recreational facilities to broad segment of population]; *Warfield*, *supra*, 10 Cal.4th at pp. 598–599 [private country club transacted with members of the public, which was "integral" part of its operations].) The commission's purpose in collecting fees is merely to support its primary purpose of regulating professional boxing and other martial arts. (See *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 699–700, [although Boy Scouts transact business with nonmembers, including in its retail stores, such transactions are "distinct from the Scouts' core functions"].)

Plaintiffs contend the commission is a "business establishment" because the commission has a staff and an office in Sacramento. Although having a staff and a physical office are "businesslike attributes," such features alone are not sufficient to bring an entity within the Act's ambit. *Isbister*, which the plaintiffs cite, is readily distinguishable because, unlike the commission here, the defendant boys' club's primary function was to operate recreational facilities for patrons to use at their convenience. (*Isbister*, *supra*, 40 Cal.3d at p. 81.)

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[3] The dollar amount of fees on admissions revenues and exploitation of broadcasting rights are strictly limited and capped by statute. (See Bus. & Prof. Code, § 18824.)

We do not go so far as to say the commission could never, under any circumstances, qualify as a business establishment; but to qualify as a "business establishment" under the Act, the "entity must operate as a business or commercial enterprise *when it discriminates*." (*Brennon B.*, *supra*, 13 Cal.5th at p. 679 (italics added); see *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500 ["there is no indication that the Legislature intended to broaden the scope of [Civil Code] section 51 to include discriminations other than those made by a 'business establishment' in the course of furnishing goods, services or facilities to its . . . customers"].) The generation of revenue to fund the commission and the maintenance of a physical office are distinct from the commission's role in appointing referees, which is the conduct plaintiffs allege was discriminatory here .

The boxing referees eligible for appointment by the commission are a select few who the commission has licensed, subject to a detailed set of requirements that include specified experience, proficiency in training sessions overseen by the commission, physical and mental fitness, and passing a written examination. (CCR § 371.) Further, the commission or its authorized representative selects and assigns all referees, subject only to the filing of a written protest by a licensee that is resolved in a hearing before the commission or its authorized representative. (CCR § 370.) Plaintiffs offer little argument as to how defendants are operating as a business establishment when selecting a referee for a match, saying only that the referees are already licensed and can only be paid if selected. We are unpersuaded by these points. Rather, appointment of referees appears to fall squarely within defendants' paramount role of protecting the public as part of its licensing, regulatory, and disciplinary functions. Referees are not akin to the public or the large swath of the population who had access to the amenities offered by the defendants in *Isbister* and *Warfield*. Nor do referees have a proprietor-customer relationship with defendants; the relationship is much more analogous to one of employment. (Compare *Payne v. Anaheim Memorial Medical Center* (2005) 130 Cal.App.4th 729, 748 [defendant hospital who provided facilities to plaintiff physician was a business establishment subject to the Act, not an employer, because hospital provided no compensation and exercised no control over physician's practice], with *Johnson v. Riverside Healthcare System, LP* (9th Cir. 2008) 534 F.3d 1116, 1124–1126 [defendant hospital was not a business establishment subject to the Act because it compensated the plaintiff physician, maintained control over his activities, and required him to remain a staff member in good standing]; see also *Strother v. Southern California Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 874–875 [plaintiff physician was more like an employee than a client, patron or customer for purposes of the Act].)

Plaintiffs argue that the trial court's characterization of *Brennon B.*'s holding was too broad. We decline to evaluate the trial court's characterization of *Brennon B.* because "we review the ruling of the trial court, not its rationale." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 630.) Plaintiffs also attempt to distinguish this case from *Brennon B.* because the provision of a public education is fundamentally different from professional boxing, which people watch for recreation. Although we agree that boxing and public education are very different enterprises, this does not impact our analysis or our narrow holding that the commission, which serves a primarily regulatory function, does not act as a "business establishment" when it assigns referees to boxing matches.[4]

3. Leave to File Third Amended Complaint

Plaintiffs contend that the trial court abused its discretion in denying them leave to amend to substitute Government Code section 11135 as the basis for their discrimination claim. We find no abuse of discretion has been shown.

California has a "policy of liberality in permitting amendments at any stage of the proceeding." (*P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345 (*P&D Consultants*).) But trial courts nevertheless possess "wide discretion" in deciding whether to grant a plaintiff leave to amend. (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746 (*Huff*); *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.) In exercising that discretion, courts are to consider a number of factors—among them, whether the defendant would be prejudiced by the amendment (through delay in a trial, added costs of preparation, or increased discovery), whether the amendment states a potentially viable claim in the proper form, and whether the amendment was delayed without sufficient explanation or excuse. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613 (*Leader*); *Miles v. City of Los Angeles* (2020) 56 Cal.App.5th 728, 739; *P&D Consultants*, *supra*, 190 Cal.App.4th at p. 1345.)

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[4] We decline to reach plaintiffs' challenge to the trial court's evidentiary rulings because they are not material to our analysis.

Prejudice "can include the time and expense associated with opposing a legal theory that a plaintiff belatedly seeks to change." (*Payton v. CSI Electrical Contractors, Inc.* (2018) 27 Cal.App.5th 832, 849; *Melican v. Regents of the University of California* (2007) 151 Cal.App.4th 168, 175–176 (*Melican*) [no abuse of discretion to deny plaintiffs' request at summary judgment hearing to add new breach of contract claim]; *Huff, supra*, 138 Cal.App.4th at p. 746 [no abuse of discretion to deny request made days before summary judgment hearing to amend complaint to add legal theories of recklessness or intentional conduct].) " 'The law is well settled that a long-deferred presentation of a proposed amendment without a showing of excuse for the delay is *itself* a significant factor to uphold the trial court's denial of [an] amendment. [Citation.]' " (*Leader*, *supra*, 89 Cal.App.4th at p. 613, emphasis added.) Even a good amendment, proposed in proper form, may be denied for unwarranted delay. (*P&D Consultants, supra*, 190 Cal.App.4th at p. 1345; *Huff, supra*, 138 Cal.App.4th at p. 746.)

Plaintiffs do not dispute that they knew Government Code section 11135 was a potential basis for their discrimination claim when they filed this action in 2018; indeed, plaintiffs cited the statute in their administrative claim they submitted before filing suit. Rather than including both legal theories in their original, first amended, and second amended complaints, however, plaintiffs kept the cause of action in their proverbial back pocket until 2023. It was only after they lost summary judgment on their Unruh case that they sought to substitute in a claim under Government Code section 11135. Plaintiffs have proffered no explanation for their delay beyond what we might infer on our own—namely, that the Unruh Act provides more favorable relief (treble damages and attorney fees versus the solely "equitable relief" available with a Government Code section 11135 claim). (Compare Civ. Code, § 52 with Gov. Code, § 11139.) Plaintiffs' tactical decision to hold on to the possibility of later filing a Government Code section 11135 claim does not excuse them from the consequences of their substantial delay; permitting the amendment would result in prolonged piecemeal litigation prejudicial to defendants. (See *Melican, supra*, 151 Cal.App.4th at p. 176 [trial court properly denied request to amend complaint made during summary judgment hearing where plaintiff knew about underlying facts for five years and amendment would have required defendants to shoot at a " 'moving target' "]; *Burks*, *supra*, 57 Cal.2d at p. 470 [plaintiff may proceed to trial on alternative causes of action if properly pleaded].)

The change in legal theories is particularly prejudicial here, because plaintiffs never proposed to the trial court that they were interested in seeking the "equitable relief" provided for in Government Code section 11139. Indeed, it was not until their reply brief on appeal that plaintiffs first acknowledged the limitations on remedies available to them based on a violation of Government Code section 11135. Plaintiffs concede that they have never even indicated "what potential injunction" they might seek through further proposed amendments to the complaint, and that the litigation to date has not yet addressed "whether harm is ongoing" or how it might be remedied. The prejudice to defendants of having to start over to develop and litigate the factual and legal issues involved in newly pleaded equitable claims provides ample basis to deny leave to amend.

Due to the unexplained delay and prejudice, we cannot say on this record that the trial court abused its discretion in denying plaintiffs leave to amend to assert a claim under Government Code section 11135.

DISPOSITION

The judgment is affirmed. Respondents the California State Athletic Commission and Andrew Foster are awarded their costs on appeal.

NOT TO BE PUBLISHED.

MOOR, J.

I CONCUR:

HOFFSTADT, P. J.

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BAKER, J., Dissenting

Many aspects of professional boxing matches in this state are controlled by a single man: Andrew Foster (Foster). He is the Executive Officer for the State Athletic Commission (the Commission), and by delegation from the Commission, he alone is responsible for (among other things) picking the referee and judges that will be assigned to officiate a boxing contest in this state. The plaintiffs in this case, hall of fame Latino and Black boxing referees and judges available to work professional bouts, allege Foster discriminates on the basis of race when wielding his nearly unfettered discretion to choose referees and judges. The majority, however, is uninterested.

By refusing to give this state's civil rights act a broad interpretation, the opinion for the court affirms the trial court's conclusion that plaintiffs should have no opportunity to prove at trial that they have been sidelined in the boxing business because of their race. And by refusing to permit plaintiffs to amend their complaint to bring a cause of action that even the Attorney General concedes is the appropriate means to test their claim that boxing in California has been rigged against minority referees and judges, the majority declares that finding the truth must take a backseat to the workloads of the state's lawyers that would otherwise have to defend Foster's referee-assigning practices. I am not on board with either conclusion.

I

California's civil rights law, the Unruh Act (the Act), states in pertinent part that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) Under recent and controlling precedent, courts are to interpret the statute's reference to all business establishments of every kind whatsoever "as broadly as reasonably possible." (*Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 678; see also *id.* at 674 ["'[T]he reach of section 51 cannot be determined invariably by reference to the apparent "plain meaning" of the term "business establishment."' [Citations.] Instead, some entities that would not ordinarily 'be thought of as . . . "traditional" business establishment[s]' should be considered business establishments for purposes of the . . . Act. [Citation.] And more generally, whether or not an entity is 'generally thought of as a traditional business establishment is not, in itself, necessarily determinative of whether such an entity falls within the aegis of the act'"].) The majority does not give the Act this requisite broad interpretation.

The majority holds plaintiffs' claim under the Act fails solely for a legal reason: according to the majority, the Commission, acting through its designee Foster, was not acting as a private business establishment when assigning referees and judges to boxing matches. That is wrong in my view, and the reason why is not complicated.

There can be no question that boxing promoters (by that I mean those who arrange and exhibit a fight) qualify as a business establishment under the Act. If, for instance, boxing promoters refused to admit anyone other than White men to an arena where a fight was being held, I have no doubt that any court would conclude that is a violation of the Act giving rise to civil liability. The business establishment question for our purposes is of course different, but I submit it is equally straightforward: does an entity that supplies a necessary ingredient for a business establishment to operate (here, for a boxing contest to take place), and that receives a percentage cut of the revenue the establishment produces, qualify as a business establishment too? The answer to that question has to be yes, and that is exactly what the Commission (again, through Foster) does.

It is undisputed that a professional fight cannot take place without a referee and judges. The record establishes the Commission and Foster license and select the referees and judges without which the business of boxing cannot take place. The record further establishes that when the fight is over, the Commission takes a percentage of the ticket sales receipts and broadcast revenue.[1] (Bus. & Prof. Code, § 18824.) That means

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[1] The majority highlights the statutory cap on the percentage of revenue that the Commission takes from every fight. (Bus. & Prof. Code, § 18824, subds. (a)(2), (3).) That cap is irrelevant. At most, it establishes the Commission is a business establishment that has no incentive to maximize revenue beyond a certain point. But it is still a business establishment all the same.

the Commission is a business establishment, albeit a component establishment of a larger business enterprise. It's as simple as that.

The facts here are therefore distinguished from those in *Brennon B.*, where our Supreme Court held public school districts do not qualify as business establishments. (*Brennon B.*, *supra*, 13 Cal.5th at 668; see also *id.* at 681 ["In parsing the boundaries of what constitutes a 'business establishment,' our cases have focused on attributes—performing business functions, protecting economic value, operating as the functional equivalent of a commercial enterprise, etc.—that are not shared by public school districts engaged in the work of educating students. When acting in their core educational capacity, public school districts do not perform 'customary business functions,' nor is their '*overall function* . . . to protect and enhance . . . economic value'"].) The key difference between *Brennon B.* and this case is that boxing is very much a business in a way that school districts providing a free education are not. Through necessary participation in the business of boxing and sharing in the revenue it produces, the Commission itself acts as a "business establishment[ ] of [any] kind whatsoever" (Civ. Code, § 51, subd. (b)) and the sole basis for the grant of summary judgment evaporates. I would therefore reverse the trial court's summary judgment ruling even on the existing operative complaint.

The majority also emphasizes that an entity must operate as a business establishment when it discriminates. As I have explained, the Commission, through Foster, does just that; it discriminates—or so plaintiffs allege—when supplying the necessary licensed referees and judges for the business of boxing.

II

In the trial court, plaintiffs submitted a late but still cognizable request to amend their complaint (accompanied by a proposed amended pleading) to allege a claim for relief under Government Code section 11135 (section 11135). Section 11135, subdivision (a) provides: "No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."[2] The trial court denied the request to amend "on [the] grounds set forth in [the Commission and Foster's] opposition papers" and commented the request was "untimely" and "unreasonably delayed."[3]

At oral argument, the Attorney General's deputy who appeared as counsel for Foster and the Commission was asked

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[2] Relatedly, Government Code section 11139 states, "This article [including section 11135] and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies."

[3] Notably, the Commission and Foster's opposition to the request for leave to file a further amended complaint did not argue they would be prejudiced by the late amendment. Instead,

whether the Attorney General's position in this litigation means Foster can discriminate without civil recourse. Specifically, counsel was asked, "If . . . Foster . . . didn't assign Latino and Black referees to title fights because he was just an avowed racist, and there was no question about that, is the Attorney General's position there's no civil remedy for that—he gets to discriminate all he wants?" The Attorney General's deputy answered "no," and when asked what the remedy would be, counsel stated, "The remedy would be Government Code section 11135, but that would be equitable relief against the state agency [i.e., the Commission] and not the individual [i.e., Foster]."[4] (Rec. of Oral Arg. 18:00-18:36.)

Although the Attorney General has therefore conceded plaintiffs' request to amend their complaint to allege a section 11135 claim for equitable relief would be a viable and appropriate means to test their allegations that they are being discriminated against on the basis of their race, the majority still refuses to allow them to plead the claim and gives only one reason for doing so. The majority cites Court of Appeal cases holding Foster and the Commission would be prejudiced by the mere "'time and expense associated with opposing a legal theory that a plaintiff

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they argued only that unwarranted delay in seeking to amend was alone sufficient to deny the request.

[4] The Attorney General's deputy further represented that her office would not take the position that the Commission would be immune from such a claim. (Rec. of Oral Arg. 18:37-18:42.)

belatedly seeks to change.'" There are at least two problems with this.

First, and most fundamentally, the majority's time and expense prejudice cases are just one side of the story. The other side of the story, as our Supreme Court has explained, is that the law has a preference for resolving cases on their merits—even when a proposed amendment to a pleading should have come earlier. (See, e.g., *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 342-343 ["Our case law reflects a preference for the resolution of litigation and the underlying conflicts on their merits by the judiciary"]; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 5; see also *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1385 ["[A] request for leave to amend a complaint need not be made before a hearing on a motion for summary judgment; rather, it may be made at the hearing or any time before entry of judgment. [Citation.] Denial of leave to amend a complaint is an abuse of discretion unless the complaint shows on its face that it is incapable of amendment to state a viable cause of action"]; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663 ["[I]f summary judgment is granted on the ground that the complaint is legally insufficient, but it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action, the trial court should give the plaintiff an opportunity to amend the complaint before entry of judgment"].) In this case, I would adhere to the established preference for merits resolution; there exists a concededly viable cause of action and these plaintiffs, boxing aficionados, and Californians generally have an interest in knowing whether the racial fix is in when fight referees and judges are being assigned.

Second, even on the majority's own terms, there is no reason to think there would be significant time and expense associated with permitting plaintiffs to add a section 11135 equitable relief claim. As the majority acknowledges, Foster and the Commission have known about the potential section 11135 claim for a long time—even *before* plaintiffs filed suit—and the evidence to prevail on such a claim overlaps substantially if not completely with the evidence already developed in this litigation. In fact, when asked at oral argument whether Foster and the Commission would have approached discovery differently had the section 11135 claim been pled from the outset, counsel stated they would not have gone to the trouble of doing the statistical analysis of referee assignments and depositions that her office completed had this case involved only an equitable relief claim. (Rec. of Oral Arg. 27:23-28:06.) It perhaps goes without saying, but time and expense prejudice—even if that were enough here—is not shown by adding a claim that is closely related to a claim already plead and would overall require markedly *less* discovery than the discovery that was actually pursued and completed in this litigation.

III

There is an expression that I imagine is common in the boxing world: put up or shut up. Foster and the Commission prevented plaintiffs from doing the former by filing a summary judgment motion that got plaintiffs' lawsuit thrown out on (erroneous) legal grounds rather than on the factual merits of their race discrimination claims. So it should be no surprise if, after today's opinion, plaintiffs refuse to do the latter and continue to complain racial discrimination is occurring. In other words, if referee and judge-assigning practices in this state continue as they have in the past, and if plaintiffs continue to believe they have a good faith basis for alleging those practices are infected by racial bias, we can expect another lawsuit like this in the future that pleads the equitable relief section 11135 cause of action that the Attorney General has conceded would be viable.[5] Indeed, that is the real irony of today's decision. The majority says plaintiffs should not be permitted to amend their complaint merely because that would draw out the proceedings and compel the state's lawyers to do additional work on this case, but the upshot of today's opinion may well be to prolong this dispute far beyond when it would have been resolved had the majority allowed

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[5] If these or other plaintiffs were to file such a lawsuit, they would have to contend with enactment of Business and Professions Code section 18613, a statute that purports to shield the Commission's Executive Officer (but not the Commission) from liability for discretionary acts. Business and Professions Code section 18613 does not apply to this case because the statute took effect after this lawsuit was filed (Bus. & Prof. Code, § 18613, subd. (b)(1)(B) ["*This paragraph* is declaratory of existing law and does not constitute a change in existing law"], italics added), and because the issue is not now presented, I express no view on how that statute might or might not apply in future litigation. The Attorney General's concessions in this case, however, do suggest the statute would not be a bar to relief.

plaintiffs to amend now and have their contentions resolved on the merits.

I dissent from affirmance of the judgment.

BAKER, J.