Case No. S266254

SUPREME COURT OF THE STATE OF CALIFORNIA

BRENNON B., *Plaintiff, Appellant, and Petitioner,* vs. SUPERIOR COURT, CONTRA COSTA *Defendant and Respondent,* WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT, et al. *Real Parties in Interest.*	First Appellate District, Division One No. A157026 Contra Costa Superior Court No. MSC16-01005

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF DISABILITY RIGHTS EDUCATION & DEFENSE FUND (DREDF) IN SUPPORT OF PLAINTIFF AND PETITIONER BRENNON B.; AND PROPOSED DREDF *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF AND PETITIONER

First Appellate District, Division One No. A157026
On Review of an Order Sustaining a Demurrer
Contra Costa Superior Court, No. MSC16-01005
The Honorable Charles Treat, Judge

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I hereby certify that no entity or person has an ownership interest of 10 percent or more in proposed *amicus curiae* Disability Rights Education & Defense Fund (DREDF). I further certify that I am aware of no person or entity, not already made known to the Justices by the parties or other *amici curiae*, having a financial or other interest in the outcome of the proceedings that the Justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

Executed on September 15, 2021, in California.

/s/ Linda D. Kilb
Linda D. Kilb

Disability Rights Education & Defense Fund (DREDF)

Attorney for Proposed *Amicus Curiae* (DREDF)

CERTIFICATE OF AUTHORSHIP AND FUNDING

Pursuant to California Rules of Court, Rule 8.250(f)(4), I hearby certify that no party or counsel for any party, other than counsel for Proposed *Amicus* DREDF, has authored the proposed brief in whole or in part or funded the preparation of the brief.

Executed on September 15, 2021, in California.

/s/ Linda D. Kilb

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.520(f), proposed *amicus curiae* Disability Rights Education & Defense Fund (DREDF) ("Proposed *Amicus* DREDF") respectfully requests permission to file the attached *amicus* brief in support of plaintiff and Petitioner *Brennon B.*

INTEREST OF PROPOSED *AMICUS*

Based in Berkeley, California, Proposed *Amicus* DREDF is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, Proposed *Amicus* DREDF remains board- and staff-led by members of the communities for whom it advocates. It pursues its mission through education, advocacy and law reform efforts. It is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, including the California Unruh Act.

PURPOSE OF PROPOSED *AMICUS* BRIEF

For over three decades, Proposed *Amicus* DREDF has received funding from the California Legal Services Trust Fund (IOLTA) Program as a Support Center. As such, Proposed *Amicus* DREDF provides consultation, information, training and representation services to legal services offices throughout the state as to disability civil rights law issues. Given its role within the formal California legal services system, Proposed *Amicus* DREDF is aware of practical and legal issues facing front-line legal services offices throughout the state, and the client communities that they serve.

Undersigned counsel Linda D. Kilb has been an attorney with Proposed *Amicus* DREDF since 1989. Ms. Kilb has directed DREDF's IOLTA Support Center Program since the 1990s. In that capacity, she is active in policy, legislative and litigation work to preserve and enforce California's expansive civil rights protections. She was involved in the passage process leading to the Prudence K. Poppink Act of 2000 (AB 2222), which is relevant to understanding the interplay between federal and California civil rights laws, and to Unruh Act interpretation.

Proposed *Amicus* DREDF has participated as *amicus* and

amicus counsel in numerous cases addressing the scope of federal and California civil rights laws. Undersigned counsel Ms. Kilb has undertaken some of that *amicus* work herself, most recently co-authoring an *amicus* brief in *White v. Square, Inc.* (2019) 7 Cal. 5th 1019, in which this Court confirmed broad Unruh Act standing as to claims involving websites. Ms. Kilb also provided appellate counsel party representation in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, assisting this Court in understanding the breadth of California's expansive and independent laws, and their interactions with federal authority.

Of particular relevance here, Proposed *Amicus* DREDF and Ms. Kilb were party counsel for Plaintiff Christine Sullivan in the U.S. District Court proceedings in *Sullivan v. Vallejo City Unified Sch. Dist.* (E.D.Cal. 1990) 731 F. Supp. 947 ("*Sullivan* case"). The *Sullivan* case was cited and discussed in the First Appellate District's *Brennon B.* decision below. The *Sullivan* case was also cited and discussed in briefing on the merits filed in this Court by both Petitioner Brennon B. and Real Parties in Interest West Contra Costa Unified School District, et. al. ("Real Parties in Interest"). As a direct participant in the *Sullivan* litigation, Ms. Kilb is well positioned to assist this Court in understanding the

Sullivan case, and its place in the broader context of federal and California civil rights history.

CONCLUSION

For all the foregoing reasons, *Amicus curiae* respectfully request that the Court grant *Amicus curiae's* application and accept the attached brief for filing and consideration.

Dated: September 15, 2021

Respectfully submitted,

/s/ Linda D. Kilb

Linda D. Kilb

Disability Rights Education & Defense Fund (DREDF)

Attorneys for Proposed *Amicus Curiae* DREDF

Case No. S266254

SUPREME COURT OF THE STATE OF CALIFORNIA

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PROPOSED *AMICUS CURIAE* BRIEF OF DISABILITY RIGHTS EDUCATION & DEFENSE FUND IN SUPPORT OF PLAINTIFF AND PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

State Statutes

Civ. Code

Educ. Code

Gov. Code

State Statutory Record

Federal Statutes

Additional Authorities and Sources

INTRODUCTION AND SUMMARY OF ARGUMENT

In granting review, this Court has specified two issues to be addressed:

(1) Is a public school district a "business establishment" within the meaning of the Unruh Civil Rights Act (Civ. Code, § 51)?

(2) Even if a public school district is not a "business establishment" under that Act, can it nevertheless be sued under the Act when the alleged discriminatory conduct is actionable under the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.)?

Over 30 years ago, it was already clear that the Unruh Civil Rights Act ("Unruh Act") was comfortably broad enough to cover California public schools. Between 1897 and 1990, the California Legislature had repeatedly acted to confirm and expand the scope of this pivotal state statue.

The California Attorney General has participated in litigation addressing the first question at issue here. In an *amicus* brief filed in 1989, the state's top lawyer and law enforcement official urged—and in 1990 a federal district court concluded—that California public schools are indeed directly covered by the Unruh Act. (See *Sullivan v. Vallejo City Unified School Dist.* (E.D.Cal. 1990) 731 F. Supp. 947.) The history of the

Sullivan case belies the First Appellate District's characterization of *Sullivan* analysis as "bereft of any depth," and contrary to legislative intent. (*Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367, 393.)

Moreover, developments since 1990 have reinforced the *Sullivan* holding that the Unruh Act directly covers public schools, pursuant to Civil Code section 51, subdivision (b) (specifying that all those within California jurisdiction "are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.") ("direct coverage"). While it may not seem that a public school is a "business establishment" within the conventional or intuitive meaning of that phrase, the long-standing and compounding authority discussed below make it clear that "business establishment" is a unique term of art under California law.

Given this direct coverage, this Court need not reach the second question. However, if the Court does take up the second issue, public schools are also covered by the Unruh Act via California's incorporation of the federal Americans with Disabilities Act (ADA) into state law. (See Civ. Code, § 51, subd.

(f) ("federal incorporation").)

ARGUMENT

I. THE 1990 *SULLIVAN* DECISION WAS CORRECTLY GROUNDED IN EXPANSIVE CALIFORNIA CIVIL RIGHTS LAW AUTHORITY UP TO THAT DATE

A. *Sullivan* Statutory Causes of Action

Plaintiff Christine Sullivan was a California public high school student who used a wheelchair for mobility, and a service dog to assist her with physical tasks, such as picking up dropped items. Filed in 1989, the *Sullivan* case involved one federal claim under Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. § 794). While the federal Americans with Disabilities Act (ADA) was being considered by the U.S. Congress at the time, it was not enacted until 1990. (See Pub.L. No. 101-336 (Jul. 26, 1990) 104 Stat. 327-378.) Public schools are included in the nondiscrimination provision covering state and local government entities. (See 42 U.S.C. § 12132.) That particular portion of the ADA did not go into effect until 18 months after enactment. (See Pub.L. No. 101-336, § 205(a) (Jul. 26, 1990) 104 Stat. 338, 42 U.S.C. § 12131 note.)

In addition to her Section 504 claim, Plaintiff Sullivan also

asserted pendent California state law claims, including an Unruh Act claim, as well as claims under the California Disabled Persons Act (CDPA), specifically, Civil Code section 54.1 (prohibiting disability discrimination in public accommodations) and section 54.2 (entitlement to be accompanied by a service animal in public accommodations).

As relevant here, discussion of *Sullivan* is focused on analysis addressing the Unruh Act claim under Civil Code section 51, although as explained below, the section 54.2 portion of the *Sullivan* decision is also informative as to section 51.

B. The Unruh Act History and Authority Briefed and Reviewed in *Sullivan* Had Been Consistently Broadened Between 1897 and 1990, and Contradicts the First Appellate District Analysis

While three decades have elapsed since *Sullivan* was decided, the Unruh Act legislative history, case law and overall historical context briefed and reviewed in *Sullivan* remains relevant. As discussed below in Arguments II and III, subsequent developments are also relevant, and have reinforced the *Sullivan* holding. But even when examination is limited to events up to and including 1990, the correctly reasoned *Sullivan*

analysis contradicts the First Appellate District's view of the origins and scope of the Unruh Act.

1. The California Legislature's Mid-20th Century View of *Brown v. Board of Education* Must Be Analyzed in Context

In its analysis of the important interplay between federal and California law, the First Appellate District below gives significant emphasis to the fact that "by the time the Unruh Act was enacted, the United States Supreme Court had already held racial discrimination in the public schools unconstitutional and repudiated the pernicious notion that segregated schools provided a separate but equal education." (*Brennon B. v. Superior Court, supra,* 57 Cal.App.5th at p. 378 [citing *Brown v. Board of Education of Topeka, Kansas* (1954) 347 U.S. 483, 495 (*Brown I*)].) In distinguishing public versus private education, the appellate court reasoned:

> Thus, while there was a pressing need for state legislation to prohibit discrimination by private schools, and particularly vocational and technical schools that offered a path to employment, charged tuition, and offered their services to the general public, there was not a correlative need with respect to state public school systems.

(*Id.* at pp. 378-379.) Recognizing the crucial flaw in this analysis, the lower court anticipated and dismissed arguments as to the

potential inadequacies of *Brown I* in a brief footnote, asserting that what counts is the clarity of the federal constitutional mandate, irrespective of what it posits to be practical (rather than legal) difficulties. (*Id.* at p. 379, fn.7.)[1]

This analysis overlooks two critical considerations. First, by 1959, the impediments to implementation of *Brown I* were legal as well as practical. Specifically, in its 1955 reconsideration of educational integration mandates, the U.S. Supreme Court tasked lower courts with entering orders and decrees "necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases." (*Brown v. Board of Education* (1955) 349 U.S. 294, 301 (*Brown II*), italics added.) The California Legislature of 1959 may not have anticipated either the subsequent decades of recalcitrance noted with hindsight by the First Appellate District, or the degree to which that recalcitrance was fostered by the

[1] The footnote reads in full: "We fully appreciate that many states ignored *Brown* and it has taken decades and tireless effort to enforce its mandate. This has not been due to any lack of clarity as to the applicability of federal law to state public school districts, however, but rather to the sheer recalcitrance of states to comply with this law."

modified legal mandate for "all deliberate speed." But the California Legislature of 1959 had every reason to be skeptical that *Brown* would be enough to secure educational rights, given the second consideration the First Appellate District fails to credit: the fact that the Unruh Act was predicated on more than half a century of federal civil rights failures.

2. The 1959 Unruh Act and Its State Law Precursors Were Crafted in Light of Federal Civil Rights Failures

In the late 1800s, the U.S. Supreme Court invalidated federal post-Civil War legislation prohibiting racial discrimination in public accommodations.[2] Expansive federal protections would not return until the civil rights era of the 1960s when—notably for purposes here—the U.S. Congress had concluded that statutory enforcement options were necessary to realize constitutional mandates. Implementation deficits ultimately led to the passage of the Civil Rights Act of 1964. (See

[2] See *Civil Rights Cases* (1883) 109 U.S. 3, in which the high court struck down the Civil Rights Act of 1875. (43 Cong. Ch. 114, 18 Stat. 335-337, enacted Mar. 1, 1875.) The court construed the Thirteenth and Fourteen Amendments as narrowly focused on the abolition of slavery and a small measure of protection from discriminatory governmental action. (*Civil Rights Cases, supra,* 109 U.S. at p. 23.)

Pub.L. No. 88-352 (Jul. 2, 1964) 78 Stat. 241.)[3]

In the decades between the 1883 Civil Rights Cases and the 1964 Civil Rights Act, California picked up the civil rights mantle abandoned by the federal government. In 1897, California passed its first public accommodations statute, the Dibble Civil Rights Act.[4] In contrast to the leisurely trajectory of federal law, California waited less than a decade to strengthen state law implementation provisions. (See Stats. 1905, ch. 413, p. 553 § 2 (providing remedies for enforcement of statutory rights created by the Dibble Act)[5]. Over the next sixty years, this Court, as well

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[3] The 1964 Civil Rights Act included mandates for desegregation in public education, and applied nondiscrimination mandates to non-federal entities receiving federal financial assistance, including public schools. The unifying focus on effective implementation was specified in provisions enabling enforcement of constitutional rights, provisions for injunctive relief, provisions authorizing litigation by the U.S. Attorney General, and establishment of new federal executive agencies empowered to enforce civil rights mandates.

[4] See Stats. 1897, ch. 108. The statute's author, Henry Clay Dibble, was notable for his career as an early civil rights lawyer and legislator. (See McClain, *California Carpetbagger: The Career of Henry Dibble* (2010) 28 Quinnipiac L.Rev. 885.)

[5] While the Answer Brief on the Merits ("Answer Brief") of Real Parties in Interest notes the 1919 and 1923 amendments to the Dibble Act, it fails to include a reference to the 1905 amendment. [See Answer Brief, p. 7]. However, the 1905 amendment is the most informative in confirming that the California Legislature

as the state's appellate courts, issued multiple expansive public accommodations decisions, acknowledging the statute's application to unenumerated diversity characteristics and scenarios.[6]

In analyzing the 1959 passage process, the First Appellate District concludes that "nothing in the historical context from which the Unruh Act emerged suggests that the state's earlier public accommodation statutes were enacted to reach 'state action.'" (*Brennon B. v. Superior Court, supra,* 57 Cal.App.5th at p. 372.) However, the court below fails to cite or analyze a pre-Unruh Act case that *did* apply California's precursor law to a

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intended to rely on its own state laws—rather than federal law—to protect civil rights.

[6] See, e.g., *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734 (applying public accommodations protections to characteristics not specifically enumerated in statute); *Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 113-114 (rejecting strict construction of public accommodations statute, and identifying the importance of adequate remedies to ensure appropriate public access to privately operated accommodations); *Lambert v. Mandel's of Cal.* (App. Dept. Super. Ct. of Cal., Los Angeles Dec. 15, 1957) 156 Cal. App. 2d. Supp. 855 (shoe store is a place of public accommodation, even though not enumerated); *Evans v. Fong Poy* (1st App. Dist. Div. 2, Jan. 7, 1941) 42 Cal. App. 2d 320 (bars and saloons are places of public accommodation, even though not enumerated).

state government actor. (See *Stoumen v. Reilly* (1951) 37 Cal.2d 713.)

In *Stoumen*, the plaintiff-proprietor challenged the California Board of Equalization's (BOE's) suspension of his bar and restaurant liquor license on the grounds that "many of [his] patrons were homosexuals." (*Stoumen v. Riley, supra,* 37 Cal.2d at p. 717.) The fact pattern differs from *Brennon B.*, in that it involved what is conventionally understood to be a "business establishment." This fact, by itself, does not support an expansive view of the 1897 Dibble Act. However, *Stoumen* involved significant broadening analysis in two crucial regards. First, it extended protections to a diversity characteristic ("homosexuals") not expressly enumerated in statute. (*Id.* at p. 716 [citing *Orloff, supra,* 36 Cal.2d 734].) Second—and as most relevant here—it applied California's public accommodation law to a state agency (the California BOE). Again, there are distinctions from the case at bar. Restaurants cannot serve alcohol without a liquor license, so the government action at issue in *Stoumen* was relevant to the operation of what is conventionally understood to be "business establishment." But the 1951 *Stoumen* decision put the 1959 California Legislature on notice that California's public

accommodations protections had been interpreted to apply to government action, and *Stoumen* was an endorsement of that analysis by this Court. Notably, the Legislature did not disavow *Stoumen* during the Unruh Act passage process.[7] Instead, it focused attention on broadening—not limiting—Dibble Act authority.

By the 1950s, in addition to expansive authority, restrictive decisions had also been issued. Such decisions included *Coleman v. Middlestaff* (1957) 147 Cal.App.2d. Supp. 833 (dentist office not a place of public accommodation); *Long v. Mountain View Cemetery Association* (1955) 130 Cal.App.2d. 328 (cemetery not a place of public accommodation); and *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887. As recognized by this Court, the 1959 Unruh Act was a direct rebuke to these decisions, superseding them by statute. (See *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 608

[7] Subsequent authority did call into question the damages analysis of the 1951 *Stoumen* decision, which were deemed to have been superseded by the explicit, heightened remedial provisions of 1959 Unruh Act. See *Harris v. Capital Growth Investors* (1991) 52 Cal.3d 1142, 1151. However, neither the Legislature nor this Court has disavowed the application of California's public accommodation protections to government actors.

[noting that "the Legislature undertook, through enactment of the Unruh Civil Rights Act, to revise and expand the scope of the then-existing version of [Civil Code] section 51."].)

Such adverse cases are discussed by the First Appellate District below. (*Brennon B. v. Superior Court, supra,* 57 Cal.App.5th at pp. 373-374.) However, that court again came to the wrong conclusion, particularly as to its analysis of *Reed*. In *Reed*, the appellate court held that public accommodation protections did not extend to private schools because they were not specifically enumerated nor were they sufficiently similar to entities that were. (*Reed v. Hollywood Professional School, supra,* 169 Cal.App.2d Supp. at pp. 889-890.) The *Reed* court noted that while the "ultimate question" was "whether a Negro applicant to a private school may be denied admission because of race," that question nevertheless "must be decided in part on the distinction between a public and private school in view of appellant's contention that discrimination of any kind is repugnant to the public policy of the State of California." (*Id.* at p. 891.)

The *Reed* court explicitly distinguished "private or semiprivate uses," when the civil rights statute did not apply, from those situations when the statute did apply. (*Reed v.*

Hollywood Professional School, supra, 169 Cal.App.2d Supp. at p. 890.) The court noted that the extension of civil rights had previously been based upon discrimination exercised in, among other things, businesses "serving a general public purpose" or public accommodations that were "public property" or "being used in the exercise of a public function." (*Ibid.*) The *Reed* decision held that such "public" attributes were absent with respect to private schools, but in doing so made explicit comparison to the public schools.

The *Reed* decision noted that public education was required by both the California Constitution and by compulsory education laws, and that the Legislature had expressly provided for safeguards of public education. In comparison, the *Reed* court emphasized that private schools were statutorily exempt from the compulsory education law, and opined that the same legislative safeguards were not provided to those attending private schools. (*Reed v. Hollywood Professional School, supra,* 169 Cal.App.2d Supp. at pp. 888, 889.)

The *Reed* court also cited precedents holding that "a Negro was not denied any *constitutional* right by refusal of a private education institution to admit him, apparently on the ground

that the *constitutional* guarantees apply to state action rather than private action." (*Reed v. Hollywood Professional School, supra,* 169 Cal.App.2d Supp. at p. 890, italics added.) As did the First Appellate District below, the *Reed* court noted the existence of the federal *constitutional* mandate applicable to public schools. (*Id.* at p. 890, italics added [citing *Brown I, supra,* 347 U.S. 483].) But like the *Brennon B.* court, the *Reed* court failed to acknowledge *Brown II,* which raised the specter of inadequate remedies. Both the 1951 *Stoumen* Court and the 1959 Legislature found such remedial inadequacies to be a compelling reason for establishing statutory coverage.

Of greater significance, both the *Brennon B.* and the *Reed* courts assume that the distinction between "private" and "public" schools evinces a lack of *statutory* coverage of the latter. Under this erroneous analytical framework, "public" schools were never covered (before or after the Unruh Act), and "private" schools were denied coverage under restrictive case law, until superseded by the Unruh Act. However, the better reasoned conclusion is that—in the educational context—*public schools were always covered*, and thus expressly expansive aspects of Unruh Act were only needed to confirm private school coverage. This conclusion is

also supported by the Legislature's decision to forgo the explicit enumerations included in the early drafts of the Unruh Act. As ultimately enacted, the statute instead substituted a sweeping general provision covering "all businesses of every kind whatsoever." (Civ. Code, § 51, subd. (b) added by Stats. 1959, ch. 1866.)

At a minimum, the conclusion that coverage of public schools is presumed but unexpressed is at least as plausible as the conclusion that the 1897 Dibble Act and the 1959 Unruh Act were not intended to cover public schools. The conclusion that public schools are covered is more consistent with California's repeatedly expressed intention for expansive construction of its civil rights canon. (See Cal. Civ. Code § 4 ("The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.") This Court has acknowledged this expansive principle in case law both before and after the passage of the Unruh Act in 1959. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28, [citing *Orloff, supra,* 36

Cal.2d at p. 113; and *Winchell v. English* (1976) 62 Cal. 125, 128].) It is also consistent with the longstanding view of the California Attorney General, who has been given a central role in interpreting and implementing that canon.

C. The California Attorney General Participated in the *Sullivan* Case

As noted in the published decision, the California Attorney General participated in the *Sullivan* case. (*Sullivan v. Vallejo City Unified School Dist., supra,* 731 F. Supp. at p. 948.) In December 1989, the State's top lawyer and law enforcement officer filed an *amicus* brief asserting that public schools were indeed covered by California's public accommodation laws. (See *Amicus Curiae* Brief on Behalf of the State of California in Support of Plaintiff's Motion for Preliminary Injunction ("*Sullivan* AG *Amicus* brief") at pp.5-7.)[8]

In reaching this conclusion, the Attorney General analyzed key authority available up to 1989. Discussion encompassed

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[8] Concurrently with this Application for Permission to File *Amicus* Brief and Proposed Brief, Proposed *Amicus Curiae* Disability Rights Education & Defense Fund (DREDF)("Proposed *Amicus* DREDF") has filed a Request for Judicial Notice of the *Sullivan* AG *Amicus* Brief, as well as the brief filed in opposition to the *Sullivan* AG Brief. The *Sullivan* AG *Amicus* Brief is attached as Exhibit 1 to the Request for Judicial Notice.

judicial decisions issued after the Unruh Act, including *O'Connor v. Village Green Assn.* (1983) 33 Cal.3d 790; *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, cert. den. (1982) 459 U.S. 858; *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal. 2d 72; *In re Cox* (1970) 3 Cal. 3d 205; and *Burks v. Poppy Construction Co.* (1962) 57 Cal. 2d 463. The *Sullivan* AG *Amicus* Brief also addressed the pre-Unruh Act *Reed* case, *supra,* 169 Cal. App. 2d Supp. 887, as well as the 1959 Horowitz article on which the First Appellate District below so heavily relies. (See Horowitz, *The 1959 California Equal Rights in Business Establishments' Statute—A Problem in Statutory Application* (1962) 33 So.Cal. L.Rev. 260.)

The Attorney General's analysis proffered in *Sullivan* concluded that the 1959 Legislature was motivated by concerns that the 1897 Dibble Act was being too narrowly construed, and that the enumeration of "public schools" in early drafts of the Unruh Act was (as with other enumerations) "dropped in favor of a broad term which would not permit courts to repeat their prior mistakes in limiting the law's coverage." (See *Sullivan* AG *Amicus* Brief at p. 7, lines 15-19 [citing *In Re Cox, supra*, 3 Cal. 3d at p. 214; and *Isbister v. Boys' Club of Santa Cruz, Inc., supra,*

40 Cal. 3d at p. 78].) Consistent with the strength of this authority, the *Sullivan* AG *Amicus* Brief's conclusion is strongly stated: "In light of the [California] Supreme Court's and the Legislature's repudiation of the notion that [public] schools are not places of public accommodation, *defendants' argument on this point is shocking."* (See *Sullivan* AG *Amicus* Brief at p. 7, lines 20-22, italics added.)[9]

II. CALIFORNIA LEGISLATIVE ACTIONS SINCE 1990 OFFER ROBUST ADDITIONAL SUPPORT FOR UNRUH ACT COVERAGE OF PUBLIC SCHOOLS

To the extent that arguments denying Unruh Act coverage of California public schools were "shocking" in 1989, they are even more so now. Since the *Sullivan* case was decided in 1990, multiple additional statutory amendments have confirmed and

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[9] While this particular sentence does not include the word "public," other references in the brief leave no doubt that what "shocked" the Attorney General was the defendant's position as to "public" schools specifically. The immediately following sentence reads "Public high schools are *also* unquestionably covered by California Civil Code section 54, which guarantees access to public buildings and other public spaces." This follow-on sentence makes it clear that "public" (rather than private) schools were the subject of the preceding sentence. (See *Sullivan* AG *Amicus* Brief at p. 7, lines 23-25, italics added.) The Attorney General also states this conclusion outright earlier in the brief. (*Id.* at p. 5, lines 22-23 ["Public high schools fall within Unruh's coverage of 'all business establishments of eery [sic] kind whatsoever.'"].)

expanded the breadth of this crucial state civil rights law. To avoid redundancy, Proposed *Amicus* DREDF will not detail all of these enactments, which are addressed in other filings. Discussion here will be limited to three enactments that reinforce the *Sullivan* court's conclusion, presented in chronological order.

First, the incorporation of the federal Americans with Disabilities (ADA) into California law. (See Assem. Bill No. 1077 (1991-1992 Reg. Sess.), Stats. 1992, ch. 913, codified at Civ. Code § 51, subd. (f); and Assem. Bill No. 2222 (1999-2000 Reg. Sess.), Stats. 2000, ch. 1049, codified at Gov. Code § 12926.1.)

Second, the Legislature's confirmation of the California Attorney General's central role in interpreting and enforcing the Unruh Act. (See Assem. Bill No. 2524 (2001-2002 Reg. Sess.), Stats. 2002, ch. 244, codified at Civ. Code § 51.1.)

Third, the express California Education Code confirmation of Unruh Act coverage of public schools. (See Assem. Bill No. 302 (2015-2016 Reg. Sess.), Stats. 2015, ch. 690, codified at Educ. Code. § 222, subd. (f).)

/ / / /

A. In 1992, the California Legislature Incorporated the ADA into the Unruh Act, as to Both Public and Private Entities Obligations

As noted above at Argument I.A., *supra,* at the time the *Sullivan* case was filed, briefed and decided, the U.S. Congress was considering the Americans with Disabilities Act (ADA), but that statute had not yet been enacted. (See Pub.L. No. 101-336 (Jul. 26, 1990) 104 Stat. 327-378.) Consequently, the claims asserted by plaintiff Christine Sullivan did not include an ADA claim. Following the enactment of the ADA in 1990, the California Legislature moved swiftly to incorporate the new federal protections into state law. (See Assem. Bill No. 1077 (1991-1992 Reg. Sess.), Stats. 1992, Ch. 913, codified at Civ. Code § 51, subd. (f), which specifies: "A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.")

This is a notably sweeping and unqualified incorporation, which clearly encompasses the entire law. Based simply on the plain language of this new state statutory provision at the time of its enactment, there is no support for Real Parties in Interest's pronouncement that "the ADA was *not* incorporated into the

Unruh Act in its entirety." (See *Brennon B.* Answer Brief, p. 13, original italics.) Tellingly, Real Parties in Interest cite only out-of-state federal authority in arguing that the ADA incorporation was limited to the portions of that Act addressing privately operated, conventional "public accommodations." (*Id.* at pp.13-14, fn.6 [citing *Sandison v. Mich. High Sch. Athletic Ass'n* (6th Cir. 1995) 64 F.3d 1026, 1036; *DeBord v. Bd. of Educ.* (8th Cir. 1997) 126 F.3d 1102, 1106; and *Bloom v. Bexar Cty.* (5th Cir. 1997) 130 F.3d 722, 726-27].) However, such out-of-state authority is not controlling as to California's term-of-art coverage of "all business establishments of every kind whatsoever."

Moreover, to the extent that any confusion might have existed in 1992, it was dispelled by subsequent developments. In a pattern reminiscent of the 1950s-era judicial limiting of the 1897 Dibble Act—which, ironically, the California Legislature had hoped to avoid by eliminating specific statutory enumerations in the Unruh Act—during the late 1990s the post-ADA Unruh Act provisions were subject to narrowing in the lower California courts. (See *Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019, 1031, fn.6 [gathering and disapproving five cases establishing a restrictive state law

definition of "disability" based on restrictive federal law analysis].) Consequently, in the 1999-2000 session, the California Legislature again stepped in to confirm the intended breadth of the state civil rights canon. (See Assem. Bill No. 2222 (1999-2000 Reg. Sess.), Stats. 2000, Ch. 1049, codified at Gov. Code § 12926.1, subd. (a), which reads:

> The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

The post-ADA amendments thus confirm that the Unruh Act is both consistent with the broadest possible reading of the incorporated federal law, and, where relevant, broader (for example, given the Unruh Act's failure to disavow *Stoumen*, broad enough to extend beyond a private actor-focused interpretation of the phrase "business establishment").

B. In 2002, the California Legislature Confirmed that the California Attorney General Has a Central Role in Interpreting the Unruh Act

It has never been in dispute that the California Attorney

General is the State's top lawyer and law enforcement officer.[10] Notably, the Attorney General's express portfolio of responsibilities includes "enforcing civil rights laws." (*Id.*) However, in 2002, the Attorney General requested—and the Legislature confirmed—that the Attorney General plays an especially crucial role in interpreting the Unruh Act. As with other aspects of Unruh Act history, this clarification followed a period of narrowing judicial interpretations, which the Legislature acted to correct.

Specifically, the Legislature enacted Assembly Bill No. 2524 (2001-2002 Reg. Sess.), which had been sponsored by the California Attorney General's Office. (See Stats. 2002, Ch. 244, codified at Civ. Code § 51.1.) As relevant to the various constellations of rights subject to Unruh Act enforcement, the

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[10] See "About the Office of the Attorney General", <https://oag.ca.gov/office> [as of Sept. 11, 2021]["The Attorney General is the state's top lawyer and law enforcement official, protecting and serving the people and interests of California through a broad range of duties. The Attorney General's responsibilities include safeguarding Californians from harm and promoting community safety, preserving California's spectacular natural resources, *enforcing civil rights laws*, and helping victims of identity theft, mortgage-related fraud, illegal business practices, and other consumer crimes." italics added].

new statutory provision provided:

> If a violation of Section 51, 51.5, 51.7, 51.9, or 52.1 is alleged or the application or construction of any of these sections is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, *each party shall serve a copy of the party's brief or petition and brief, on the State Solicitor General at the Office of the Attorney General. No brief may be accepted for filing unless the proof of service shows service on the State Solicitor General.* Any party failing to comply with this requirement shall be given a reasonable opportunity to cure the failure before the court imposes any sanction and, in that instance, the court shall allow the Attorney General reasonable additional time to file a brief in the matter.

(Assem. Bill No. 2524 (2001-2002 Reg. Sess.), codified at Civ. Code § 51.1, italics added.) As explained in legislative history, the impetus for this statutory amendment was a narrowing decision issued in *Boccata v. City of Hermosa* (1994) 29 Cal. App. 4th 1797. In *Boccata*, the Second Appellate District, Division 4, held that anyone asserting a claim under the Bane Civil Rights Act, Civil Code section 52.1, must be a member of one of the classes protected by the Ralph Civil Rights Act, Civil Code section 57.1. In 2000, the Legislature passed Assembly Bill No. 2719 (1999-2000 Reg. Sess.), superseding *Boccata* by expressly eliminating the *Boccata* court's erroneous limitation. (See Stats. 2000, Ch. 98, § 1.)

Following the legislative override of *Boccata*, in passing Assembly Bill No. 2524 (2001-2002 Reg. Sess.) the California Legislature endorsed the Attorney General's request to be served in all Unruh Act appeals, acknowledging the Attorney General's central role in interpreting and enforcing the Unruh Act. (See Stats. 2002, Ch. 244, codified at Civ. Code § 51.1.) Notably—as in the *Sullivan* case—the Attorney General would have advised an expansive interpretation of state law in *Boccata*. Assembly Bill No. 2524 reinforces the Legislature's intent to ensure broad construction of all aspects of the Unruh Act, and underscores that the Attorney General's task is to assist the courts in upholding expansive state law interpretations.

C. In 2015, the California Legislature Explicitly Confirmed that the Unruh Act is Intended to Cover Public Schools

As discussed in more detail in other filings submitted to this Court, the California Legislature has also acted to underscore the availability of both general and specific federal and state civil rights protections by referencing or elaborating on them in provisions of the California Education Code. Relevant provisions include Education Code section 201, subdivision (a), which sets out a broad nondiscrimination protection, and

Education Code section 201, subdivision (g), which cross-references multiple statues, including the Unruh Act.

As the First Appellate District noted below, during the 1998 passage process amending Education Code section 201, the letter transmitting the legislation to the Governor specified that the goal was to consolidate scattered civil rights references into one comprehensive reference, and that *"The bill does not redefine or expand existing non-discrimination statutes."* (*Brennon B. v. Superior Court, supra,* 57 Cal. App. 5th at p. 395, original italics [citing Assembly member Sheila Kuehl, letter to then-Governor Pete Wilson, requesting his signature on Assem. Bill No. 499 (1997–1998 Reg. Sess.) Sept. 2, 1998, p. 1].) While the First Appellate District finds this informative, it begs the primary question, which is whether the specified cross-referenced existing statues already covered public schools.

In 2015, the Legislature left no doubt as to the answer when it further amended the Education Code. (See Assem. Bill No. 302 (2015-2016 Reg. Sess.), Stats. 2015, Ch. 690, codified at Educ. Code. § 222.) This subsequent legislation was focused on the rights of lactating students. But it provides yet more contextual confirmation that the Unruh Act covers public schools.

In the findings and declarations, Assembly Bill No. 302 specified: "The Unruh Civil Rights Act (Section 51 of the Civil Code) prohibits businesses, *including public schools,* from discriminating based on sex, which includes discrimination on the basis of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth." (See Assem. Bill No. 302, § 1, subd. (f), italics added.)

III. CASE LAW SINCE 1990 CONFIRMS CALIFORNIA'S LONG-STANDING INTENT FOR UNRUH ACT COVERAGE OF PUBLIC SCHOOLS

As with discussion of post-*Sullivan* statutory amendments, post-*Sullivan* case law has been extensively discussed in other filings. Again to avoid redundancy, Proposed *Amicus* DREDF will focus here on three arguments particularly relevant to understanding both *Sullivan* and its progeny in context.

First, the perfunctory nature of many post-*Sullivan* decisions does not reflect an absence of appropriate consideration. Rather, it reflects the uncontroversial nature of the *Sullivan* holding.

Second, the California Legislature has repeatedly demonstrated its willingness to respond to restrictive civil rights case law it finds to be contrary to legislative intent. But it has

never disavowed *Sullivan,* or the expansive position taken by the California Attorney General in *Sullivan*.

Third, subsequent case law does not contradict the *Sullivan* holding—which was based on California Attorney General analysis—that public schools are covered by the Unruh Act, even though not all members of the public are welcome on campus.

A. Widespread Case Law Citations to *Sullivan* Reflect the Uncontroversial Nature of the *Sullivan* Holding

In urging this Court to discard the *Sullivan* analysis and holding, Real Parties in Interest make two related errors. They argue that *Sullivan* itself was "bereft of any depth." They then assert that subsequent authority adopting *Sullivan* without extensive discussion is also thereby superficial. But as discussed above in Argument I, *Sullivan* was extensively briefed, and the *Sullivan* holding adopted the position of the California Attorney General, which actively participated as an *amicus curiae* in the federal forum. Because *Sullivan* itself was based on and included extensive analysis, it obviated the need for subsequent courts to repeat that analysis. Rather than reflecting a failure of consideration, case law summarily referencing *Sullivan* helps to confirm the uncontroversial nature of the *Sullivan* holding that

public schools are "business establishments" under the Unruh Act.[11]

B. The California Legislature Has Repeatedly Disavowed Restrictive Unruh Act Case Law, But Has Never Taken Issue with *Sullivan*

To the extent that this Court is not persuaded that *Sullivan* was carefully or correctly reasoned, it can turn for additional insight to the interplay between the California Legislature and both state and federal courts in the years since 1990. As discussed above in Argument II and in other briefing, the California Legislature has been extremely active in responding to Unruh Act case law that it finds to be contrary to legislative intent. As Real Parties in Interest note, "the Legislature is deemed to have been aware of existing law and to

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[11] See *Roe v. Grossmont Union High School Dist.* (S.D.Cal. 2020) 443 F.Supp.3d 1162, 1169 ("The Court finds the reasoning in the overwhelming authority holding that public schools can constitute business establishments persuasive."). See also *Yates v. East Side Union High School Dist.* (N.D.Cal. Feb. 20, 2019, No. 18-cv-02966) 2019 U.S. Dist. LEXIS 27143; *K. T. v. Pittsburg Unified School Dist.* (N.D.Cal. 2016) 219 F.Supp.3d 970, 983; *Walsh v. Tehachapi Unified School Dist.* (E.D.Cal. 2011) 827 F.Supp.2d 1107, 1123; *Nicole M. By and Through Jacqueline M. v. Martinez Unified School Dist.* (N.D.Cal. 1997) 964 F.Supp.1369, 1388; *Doe By and Through Doe v. Petaluma City School Dist.* (N.D.Cal. 1993) 830 F.Supp.1560, 1581-82.

have enacted legislation consistent therewith." (See Answer Brief, p. 24 [citing *People v. Castillolopez* (2016) 63 Cal.4th 322, 331].) As the *Castillolopez* decision notes, the Legislature is presumed to know about both "existing laws and judicial decisions construing the same statute in effect at the time the legislation is enacted." (*Id*.)

As laid out in Petitioner's Opening Brief on the Merits, pp. 25-29 ("Opening Brief"), post-*Sullivan* case law includes multiple federal and state court decisions issued over decades, holding that the Unruh Act covers public schools. The much sparser contrary authority includes the First Appellate District's *Brennon B.* decision below, as well as one restrictive 2016 federal court decision on which Real Parties in Interest rely. (See Answer Brief, pp. 5, 38, 39 [citing *Zuccaro v. Martinez Unified Sch. Dist.* (N.D.Cal. Sept. 27, 2016) 2016 WL 10807692].) While not necessarily dispositive, the Legislature's failure to react to the much older and much more robust expansive authority—even in years when it was actively considering and passing Unruh Act amendments—helps to confirm that the expansive judicial decisions correctly align with legislative intent.

C. This Court's *Warfield* and *Curran* Decisions are Easily Harmonized with *Sullivan,* Pursuant to the Analysis Provided in a 1987 California Attorney General Opinion

In arriving at the erroneous conclusion that the Unruh Act does not cover public schools, Real Parties in Interest give great legal weight to the fact that public schools are not open to all members of the public. But they fail to note that this argument was considered by the *Sullivan* court, which rejected it based on a 1987 opinion issued by the California Attorney General. (See *Sullivan v. Vallejo City Unified School Dist., supra,* 731 F.Supp. at p. 953 [citing 70 Ops.Cal.Atty.Gen 104 (1987)("AG Opinion")].[12]) That AG Opinion addressed the issue of whether some restrictions on who could access a particular facility affected the threshold legal question of whether that facility was sufficiently "public" to be covered by California civil rights laws.

The AG Opinion analyzed different code sections from the Unruh Act section 51 at issue in *Brennon B.*. Specifically, it addressed the California Disabled Persons Act (CDPA), Civil

[12] The pagination referenced in the *Sullivan* decision differs from the pagination of the now-available electronic version of the 1987 AG Opinion at <https://oag.ca.gov/system/files/opinions/ pdfs/86-105.pdf> (as of Sept. 10, 2001). The referenced language can now be found at filed opn. p. 2.

Code sections 54.1 and 54.2, which were at issue in the *Sullivan* case, along with Section 51. The *Sullivan* court reference to this AG Opinion was thus contained in the "Civil Code section 54.2" portion of the *Sullivan* decision. (See *Sullivan v. Vallejo City Unified School Dist., supra,* 731 F. Supp. at p. 953.)

But while the AG Opinion was not focused on section 51, it nevertheless noted the existence of section 51, as well as other California civil rights statutes, observing that "[t]hese various legislative schemes have been construed together." (70 Ops.Cal.Atty.Gen. 104, 105 (1987) [filed opn. p. 2].) More significantly, the logic holds across statutes, as to the question of whether some restrictions on who is permitted at a particular facility results in that facility being entirely exempt from civil rights laws. The California Attorney General provided a clear answer over three decades ago, which was adopted by the *Sullivan* decision: some restrictions do not create a blanket exemption. (See *Sullivan v. Vallejo City Unified School Dist., supra,* 731 F.Supp. at p. 953 [citing AG Opinion at p. 107 [filed opn p. 4] ("For purposes of sections 54.1 and 54.2, it is irrelevant that some groups of the general public are excluded from the facility.")].)

Notwithstanding the relevance and logic of this longstanding authority, Real Parties in Interest assert the Unruh Act does not apply here because "[a] public school district is not classically open to the general public." (Answer Brief, p. 8.) In support of this argument, they cite this Court's decision in *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal. 4th 670, 697. (*Id.*) They further cite this Court's *Warfield* decision, arguing that "the heart of the analysis lies in evaluating the nature, purpose and regularity with which the private entity engages in transactions or activities with *non-members (the general public).*" (See *id.* at p. 29, italics added [citing *Warfield v. Peninsula Golf & Country Club, supra,* 10 Cal.4th at pp. 621-623, 599; and *Curran v. Mount Diablo Council of the Boy Scouts, supra,* 17 Cal.4th at pp. 699-700].)

However, this Court's *Curran* and *Warfield* decisions are easily harmonized with both the 1987 AG Opinion, and the *Sullivan* case. *Curran* and *Warfield* both dealt with the question of whether a particular entity was truly "private," in which case the Unruh Act would not apply. In that context, analysis focused on whether a particular degree of interaction with non-members was sufficient to trigger coverage. In contrast, *Brennon B.* raises

the issue of whether the California Legislature intended to bring school districts within the reach of the Unruh Act. If so, coverage is not affected by the fact that not all members of the public are permitted to access schools. The question is whether those who *are* permitted to have access are protected by particular statutory nondiscrimination mandates. This Court still needs to decide a threshold question: does the Unruh Act encompass public school districts? But the answer to that legal question is not affected by the fact that school access is limited to specific subgroups of the general public.

CONCLUSION

While it may not seem that a public school is a "business establishment" within the conventional or intuitive meaning of that phrase, the long-standing and compounding authority discussed above make it clear that "business establishment" is a unique term-of-art under California law. There is thus an affirmative answer to the first question specified for review by this Court, because the Unruh Act's term-of-art coverage of "all business establishments of every kind whatsoever" comfortably and directly encompasses California public schools pursuant to Civil Code section 51, subdivision (b). However, should this Court

decide to reach the second question, California public schools are also covered by the Civil Code section 51, subdivision (f) incorporation of the federal law into the Unruh Act.

Respectfully submitted,

September 15, 2021

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CERTIFICATE OF WORD COUNT
COURT RULE 8.204(c)(1)

Pursuant to Cal. Rules of Court Rule 8.204(c)(1), undersigned counsel certifies that the text in this proposed *Amicus Curiae* brief consists of 6,946 words as counted by the word processing program used to generate this document.

Executed on September 15, 2021, in California.

/s/ Linda D. Kilb
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PROOF OF SERVICE

I am employed in the County of Alameda. I am over the age of eighteen years and not a party to the within entitled action. My business address is 3075 Adeline Street, Suite 210, Berkeley, CA 94703.

On September 15, 2021, I served the following document described as:

- **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF DISABILITY RIGHTS EDUCATION & DEFENSE FUND IN SUPPORT OF PLAINTIFF AND PETITIONER BRENNON B.;**
- **PROPOSED *AMICUS CURIAE* BRIEF OF DISABLITY RIGHTS EDUCATION & DEFENSE FUND IN SUPPORT OF PLAINTIFF AND PETITIONER**

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Case No. S266254

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☒ **BY U.S. Mail:** I served the said document by depositing a true copy thereof with the U.S. Postal Service with the postage fully pre-paid, addressed to the addresses set forth below:

Case No. S265223

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Solicitor General of California 1515 Clay St. Oakland, CA 94612 (for Attorney General of California)	Service Required by Cal. Rules of Court, rule 8.29

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

Executed on September 15, 2021, in California

/s/ Susan Henderson
Susan Henderson