January 14, 2021

Honorable Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Amicus* Letter of California Legal Services & Nonprofit Organizations in Support of Petition for Review
Brennon B. v. Superior Court, No. S266254

Dear Honorable Chief Justice & Associate Justices:

Pursuant to Cal. Rules of Court, rule 8.500(g), California Legal Services and nonprofit organizations respectfully submit this *amicus* letter in support of the petition for review ("Petition") in *Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367 (*Brennon B.*). The issue of whether the California Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code, § 51 *et seq.*, applies to California public schools is of paramount importance to low-income and other vulnerable communities throughout California.

The First Appellate District's erroneous exclusion of public schools from the Unruh Act denies primary civil rights protections to millions of California students, parents, and families. It also ignores the Act's legislative history and defies the statutory interpretation of the California Attorney General in previous litigation. *Amici* urge the Court to grant the petition and reverse.

Interest of Amici

Amicus Disability Rights Education & Defense Fund (DREDF) is recognized for its expertise in California and federal civil rights laws and has participated in numerous cases as to the history and scope of

the Unruh Act. This includes key cases cited by the First Appellate District.

Most notably, as further discussed below, undersigned DREDF attorney Linda D. Kilb was counsel of record for plaintiff in *Sullivan v. Vallejo Unified Sch. Dist.* (E.D. Cal. 1990) 731 F.Supp. 947 (*Sullivan*). Ms. Kilb was also counsel of record in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019 (*Colmenares*), and co-author of *amicus* briefing providing guidance to this Court in *White v. Square, Inc.* (2019) 7 Cal.5th 1019. In *White,* this Court overturned erroneously narrow intermediate appellate case law, and confirmed the need for expansive interpretation of state civil rights statute.

DREDF is joined by the following additional amici:

California Rural Legal Assistance Foundation (CRLAF)

Disability Rights Advocates (DRA)

Disability Rights California (DRC)

Disability Rights Legal Center (DRLC)

Impact Fund

Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCRSF)

The majority of these organizations are, like DREDF, 501(c)(3) nonprofits that are part of the formal California Legal Services System. This gives *amici* intimate knowledge of the issues of consequence to the communities that they serve, as well as experience and expertise relevant to understanding the history and scope of state law mandates. Most *amici* also participated in *amicus* briefing in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661.

Importance of the Issue

As detailed in the Petition at pp. 8-9, over 6 million California children are enrolled in over 10,000 public schools throughout the state.[1] Free and equal access to public education is one of the primary means by which our state ensures that all children will be prepared to participate fully in the life of our democracy. The California Legislature and this Court have thus long recognized that public education is a "fundamental right" under our state constitution.[2] The *Brennon B.* decision threatens this fundamental right by denying public schools the protection of the Unruh Act. The ruling departs from the expansive interpretation of civil rights laws mandated by this Court in precedential decisions.

California's Fundamental Right to Public Education Is Part of a Larger State Commitment to Civil Rights.

The fundamental right to education is enshrined in the California Constitution. Beginning in the late 1800's, as federal rights were receding in the wake of the *Civil Rights Cases* (1883) 109 U.S. 3, California began reinforcing its broad and independent state law commitment to civil rights. California passed its first law prohibiting

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[1] See Cal. Dept. of Education, Fingertip Facts on Education in California – CalEdFacts (Oct. 12, 2020), <https://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp>.

[2] The California Constitution specifies that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (See Cal. Const., art. IX, § 1. See also *Butt v. California* (1992) 4 Cal.4th 668, 680. ["Since its admission to the Union [in 1850], California has assumed specific responsibility for a statewide public education system open on equal terms to all"].)

racial discrimination in places of public accommodation in 1897.[3] For more than a century thereafter through today, California law has consistently reflected and bolstered that commitment. This included passage of the Unruh Act in 1959, which (as with the original 1897 statute) was enacted in reaction to erroneous judicial narrowing.[4]

The California Attorney General Has Expressly Supported Unruh Act Coverage of Public Schools

In their Opposition to Petition for Review ("Answer"), respondents assert that this Court "must allow the [California] Attorney General reasonable additional time to file a brief in this matter." (Answer at p. 2, n.1.) This assertion fails to note that the California Attorney General has *already* weighed in on the question of whether the Unruh Act covers public schools. As further discussed below, in 1989-1990, the California Attorney General participated as *amicus* in support of the plaintiff in *Sullivan*. Thus, the *Sullivan* precedent that the First Appellate District urges this Court to ignore is, in fact, the authority that confirms the expansive analysis of the California Attorney General.

The *Brennon B.* Decision Erroneously Limits Unruh Act Authority

As the First Appellate District recognized, the Unruh Act's statutory mandate can only be correctly understood in historical context and in light of the range of authority construing it. (See *Brennon B.*, *supra*,

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[3] 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.)

[4] The Unruh Act was a direct rebuke of the appellate decision in *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887, which declined to extend the 1897 statute to unenumerated categories of entities.

57 Cal.App.5th at p. 369 ["examining the historical genesis of the Act … and canvassing the [C]ourt's decisions"].) While noting the necessary "multi-pronged" nature of this analysis, the First Appellate District misinterpreted both the Act's historical context and this Court's existing authority.

The *Brennon B.* decision erroneously concluded that in 1959, when the Unruh Act was passed, coverage of public schools was unnecessary because public school nondiscrimination rights were already federally guaranteed pursuant to *Brown v. Board of Education* (1954) 347 U.S. 483.[5] This conclusion contradicts this state's intent to ensure that California rights will always be secure, regardless of changes to federal authority.[6]

The First Appellate District also cites amendments to the Unruh Act during the 1959 passage process to support its determination that eliminating expressly enumerated categories reflected an intent to exclude those categories from coverage in the final legislation. (See *Brennon B.*, *supra*, 57 Cal.App.5th at pp. 374-379.) Ultimately, such enumerations were replaced by the broad general mandate covering "all business establishments of every kind whatsoever." (Cal. Civ. Code, § 51(a).)

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[5] See *Brennon B.*, *supra*, 57 Cal.App.5th at pp. 373, 378 (arguing that while Unruh Act coverage of *private* schools was necessary, coverage of *public* schools was not, because discrimination in public school was already unconstitutional pursuant to *Brown*).

[6] See, e.g., Gov. Code, § 12926.1, subd. (a) ("The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 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."). Case law involving other statutes and diversity character is similarly expansive. (See, e.g., *Flannery v. Prentice* (2001) 26 Cal.4th 572; *Romano v. Rockwell* (1996) 14 Cal.4th 479; *Commodore Home Systems, Inc, v. Super. Ct.* (1982) 32 Cal.3d 211.)

As this Court has noted,

> [b]y its use of the emphatic words "all" and "of every kind whatsoever," the Legislature intended that the phrase "business establishments" be interpreted "in the broadest sense reasonably possible." [citing *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468]. Indeed, the Unruh Act was adopted out of concern that the courts were construing the 1897 public accommodations statute too strictly.

(See *Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72, 78 (*Isbister*).)

In addition, the *Brennon B.* panel ignored this Court's express recognition of expansive state law construction. (See *Colmenares v. Braemar Country Club, Inc.*, *supra*, 29 Cal.4th 1019.) The appellate decision in *Colmenares* had narrowed the scope of "physical disability" as defined under the Fair Employment and Housing Act, Gov. Code § 12926.1, subd. (c). (See *Colmenares v. Braemar Country Club, Inc.* supra, (2001) 89 Cal.App. 4th 778, revd., 29 Cal.4th at p. 1032.) On review, this Court issued a unanimous opinion reversing that error, and confirming the breadth and independence of state law. (See *Colmenares*, *supra*, 29 Cal.4th at p. 1030 [holding that California's definition encompasses impairments that "limit" a major life activity, in contrast to the federal requirement of "substantially limits"].)

As in the *Sullivan* case (further discussed below), the California Attorney General participated as *amicus* in *Colmenares,* supporting a broad interpretation of state law. Also as in *Sullivan*, undersigned counsel Linda D. Kilb was counsel of record for the appellant in *Colmenares*.[7]

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[7] The California Attorney General's *amicus* participation in support of appellant is expressly noted. (*Colmenares*, *supra*, at p. 1021). Ms. Kilb's appearance is also noted. (*Ibid*.)

The expansive *Colmenares* analysis endorsed by the Attorney General and this Court accords with the legislative instruction that state statutory rights are cumulative, absent explicit instruction to the contrary.[8]

California Attorney General Filings in Key Cases Confirm that the Expansive *Sullivan* Holding—Not the Narrow *Brennon B.* Decision—is Correct

The *Brennon B.* decision concludes from the dearth of state case law that California courts have not yet adequately addressed the question of Unruh coverage of public schools. This is a misreading of relevant history. The absence of state case law derives from the settled understanding of broad coverage.

Canvassing state court decisions, the *Brennon B.* decision observes that the state bench has merely "cited to the first [federal] district court case to conclude a California public school district was a business establishment, *Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal. 1990) 731 F. Supp. 947." (See *Brennon B.*, *supra*, 57 Cal.App.5th at p. 392.) The *Brennon B.* panel further describes *Sullivan* as "bereft of any depth." (*Id.* at p. 393.) These assertions do not hold up on examination.

Significantly, both the *Brennon B.* decision and respondents' Answer fail to note that the California Attorney General filed an *amicus* brief in support of the plaintiff in *Sullivan*. As mentioned above, DREDF attorney Linda D. Kilb, undersigned counsel here, was counsel of record for the plaintiff in *Sullivan*. *Sullivan* involved extensive

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[8] FEHA "shall be construed liberally for the accomplishment of the purposes of this part." (Gov. Code, § 12993, subd. (a).) Statutory language also specifies that FEHA does not repeal additional civil rights protections under other statues, expressly including the Unruh Act. (Gov. Code § 12993, subd. (c).)

briefing on the scope of Unruh Act coverage, including supplemental briefing specifically addressing the scope of the Unruh Act vis-à-vis public schools.

In accord with the position of the California Attorney General in support of the plaintiff, the district court in *Sullivan* described the Unruh Act's legislative predecessors and history, which formed the basis of its conclusion that the Act does indeed cover public schools. The *Sullivan* court's analysis relied on "the California Supreme Court's broad reading of the statutory language as well as its understanding of the intention of the Legislature as read against the historical background" of the Unruh Act. (See *Sullivan*, *supra*, 731 F. Supp. at p. 953.)

Specifically, the *Sullivan* decision relied on this Court's expansive decision in *Isbister,* which in turn had relied on *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 731; *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795-796; and *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468. (*See Isbister, supra* 40 Cal. 3d at 76, 78.)

As the *Sullivan* court explained, that line of California Supreme Court authority, which had developed over decades, confirmed that the Unruh Act "expanded the reach" of its precursor statute to include "all businesses of every kind whatsoever," including public schools. (731 F. Supp. at p. 952, quoting *Isbister*, *supra*, 40 Cal.3d at p. 78 and citing *Marina Point*, *supra*, 30 Cal.3d at p. 730.) This sweeping language "was included in the Unruh Act to vindicate the Legislature's 'concern that the courts were construing the 1897 public accommodations statute too strictly.'" (*Ibid.*)

Rather than dispute any of these foundational premises of the *Sullivan* ruling, the *Brennon B.* appellate panel dismisses them out of hand without explanation. (See *Brennon B.*, *supra*, 57 Cal.App.5th at pp. 46-47, 48 [noting "analytical shortcomings" while simultaneously noting that the *Sullivan* court had addressed both legislative history and California Supreme Court decisions in support of its holding that

the Unruh Act covers public schools].) The uncontroversial nature of *Sullivan's* conclusion is confirmed by the numerous federal cases that relied on *Sullivan* to conclude that public schools are "business establishments" under the Unruh Act.[9]

This Court is, of course, not obligated to accept the federal courts' interpretations of California law. However, those federal courts relied on this Court's decision in *Isbister* to conclude that public schools are "business establishments" under the Unruh Act.

The Unruh Act's Incorporation of Federal Law is Another Basis for Holding that California Public Schools Are Covered by the Act

As discussed above, California's broad prohibition against discrimination in place of public accommodation, Civ. Code, § 51, subd. (a), comfortably covers California public schools, with no need for any reference to federal law. Thus, this Court need not reach the separate issue of whether public schools are covered by the Unruh Act due to the incorporation of federal law set out in Civil Code section 51, subdivision (f).[10] However, should the Court decide to take up that

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[9] 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.

[10] Civil Code section 51, subdivision (f) states: "A violation of the right of any individual under the federal Americans with Disabilities Act of

question, the answer is clear: the federal Americans with Disabilities Act (ADA) covers public schools.

As it did with section 51(a) analysis, the First Appellate District erroneously limited the scope of section 51(f) solely to *private* businesses, based on a mistaken interpretation of this Court's decision in *Munson v. Del Taco* (2009) 46 Cal.4th 661. (See *Brennon B.*, *supra*, 57 Cal.App.5th at p. 404.) Both the express statutory language of section 51(f) and this Court's prior case law confirm that public schools are covered by Title II of the Americans with Disabilities Act. (See *Am. Nurses Assn v. Torlakson* (2013) 57 Cal.4th 570, 576 [recognizing that California public schools are covered by 42 U.S.C. § 12131 *et seq*.].)

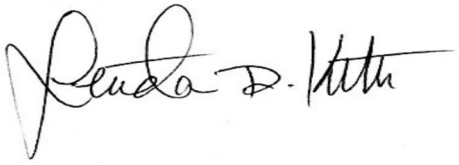
Should the Court grant review in this case, that will also offer an opportunity to clarify state law authority as to the reach of section 51(f) of the Unruh Act. However, that analysis is not necessary to establish a violation of section 51(a).

Conclusion

While erroneous, the length and detail of the *Brennon B.* decision suggests that its conclusion is carefully supported, when in fact it is a fundamental misreading of California law. While *Brennon B.* may be the only California state court appellate decision to address the issue of Unruh Act coverage of public schools, the decision is contrary to the well-reasoned *Sullivan* precedent in which the California Attorney General participated. *Sullivan* has been repeatedly referenced and reaffirmed in the three decades since it was decided. Given this context, there is already a case law split that should be addressed. *Amici* respectfully request that the Court grant review to ensure that the scope of California's long-standing commitment to expansive civil rights analysis is clearly recognized.

1990 (Public Law 101-336) shall also constitute a violation of this section."

Respectfully Submitted,



Linda D. Kilb,
Disability Rights Education & Defense Fund (DREDF)

cc: California Rural Legal Assistance Foundation (CRLAF)
Disability Rights Advocates (DRA)
Disability Rights California (DRC)
Disability Rights Legal Center (DRLC)
Impact Fund
Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR)

Proof of Service

Brennon B. v. Superior Court, No. S266254
First Appellate District, Division One, No. A157026
Superior Court of Contra Costa County, No. MSC1601005

I, the undersigned, declare that I employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2080 Addison Street, Suite 5, Berkeley, CA 94704.

On January 14, 2021, I served the following document:

AMICUS LETTER OF CALIFORNIA LEGAL SERVICES & NONPROFIT ORGANIZATIONS IN SUPPORT OF PETITION FOR REVIEW

on the interested parties in this action addressed as follows:

SEE ATTACHED LIST FOR METHOD OF SERVICE

[X] **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice the correspondence is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Berkeley, California, in the ordinary course of business. I am aware on the motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

[X] **BY E-MAIL OR ELECTRONIC TRANSMISSION:** A copy of the documents was sent through the Court's authorized e-filing service TrueFiling. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on January 14, 2021 in Berkeley, California

s/ Katharine Vidt

Katharine Vidt
IMPACT FUND

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