S269608

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Defendant and Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent;

JANE DOE,
Plaintiff and Real Party in Interest

On Review From A Decision By The California Court of Appeal Second Appellate District, Division 3, Case No. B307389
Los Angeles County Superior Court, Case No. BC659059
Hon. Shirley K. Watkins

APPLICATION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER LOS ANGELES UNIFIED SCHOOL DISTRICT

and

PROPOSED BRIEF OF *AMICI CURIAE* NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, AND SCHOOL ASSOCIATION FOR EXCESS RISK

LOUIS A. LEONE (SBN: 099874)
SETH L. GORDON (SBN: 262653)
LEONE ALBERTS & DUUS
1390 Willow Pass Rd., Suite 700
Concord, CA 94520
Tel: (925) 974-8600 • Fax: (925) 974-8601
Email: lleone@leonealberts.com
Attorneys for *Amici Curiae*

APPLICATION TO
FILE AMICUS CURIAE BRIEF

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

Pursuant to California Rule of Court 8.520(f),[1] Northern California Regional Liability Excess Fund ("Nor Cal ReLiEF"), Southern California Regional Liability Excess Fund ("So Cal ReLiEF"), the Statewide Association of Community Colleges ("SWACC"), and the School Association for Excess Risk ("SAFER") (collectively "Amici Curiae") hereby request leave to file the attached amicus curiae brief in support of Defendant-Petitioner Los Angeles Unified School District.

In 2019, the California Legislature passed Assembly Bill 218 ("AB 218"), which took effect January 1, 2020, and made several significant changes to Code of Civil Procedure section 340.1 ("CCP § 340.1")—the statute of limitations for claims of childhood sexual abuse. Among other things, the new law revives all claims of childhood sexual abuse not previously litigated to finality for a 3-year period (regardless of how long ago the abuse allegedly occurred); it extends the already lengthy statute of

[1] Pursuant to California Rule of Court 8.520, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

limitations for such claims to 22 years after the age of majority (or age 40); it authorizes treble damages for "cover ups"; and it retroactively eliminates the protection previously afforded to public school districts by Government Code section 905, subdivision (m), which provided a bright-line rule that public entities could not be held liable for abuse claims arising from conduct occurring prior to January 1, 2009.

The issue in this case is a narrow one—*Does the newly added treble damages provision now contained in CCP § 340.1(b) apply to public entities such as the Los Angeles Unified School District*?

This question is one of significant importance to all public school districts in this State. As explained below, Amici Curiae are joint powers authorities (established under the Government Code) that provide liability coverage and risk management services to approximately half the school districts in the state of California. For over a decade, following aggressive (and successful) lobbying by the Plaintiffs' Bar to expand the statute of limitations for childhood sexual abuse claims, such claims have been the leading liability for public school districts in California—more than double the amount of the next highest loss leader. Between 2010 and 2015, NorCal ReLiEF alone received approximately 100 claims for sexual assault and molestation, resulting in over $46 million of incurred liability. Since 2011, Amici Curiae have incurred more than ***$165 million*** in liability from sexual abuse claims.

In this case, Plaintiff asks the Court to hold that CCP § 340.1—as amended by AB 218—now authorizes treble damages against public school districts. This would have a catastrophic impact on public schools in this state. The numbers are staggering. If Plaintiff's interpretation is adopted, the $165 million incurred by school districts represented by Amici Curiae over the last decade would be increased to ***$495 million***—and that's only for a 10-year period. Since AB 218 opened a three-year window for all claims regardless of when the abuse occurred, this number could reach ***Billions*** of dollars, sending school districts across the state into receivership.

Thankfully, this scenario need not come to pass. Since the passage of AB 218 in 2019, the question whether treble damages are available against public entities under CCP § 340.1(b) has reached the Court of Appeal on two occasions. In both cases, the Court of Appeal correctly found that the treble damages provision now contained in CCP § 340.1(b) is "primarily" punitive in nature and therefore barred by Government Code section 818, which provides that "a public entity is not liable for damages … imposed primarily for the sake of example and by way of punishing the defendant." (*Los Angeles Unified School District v. Superior Court* (2021) 64 Cal.App.5th 549, 552 ["[b]ecuse treble damages under section 340.1 are primarily exemplary and punitive, a public entity like LAUSD maintains sovereign immunity from liability for such damages under [Government

Code] section 818."]; *X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1029 [same].)

Plaintiff now asks this Court to reject the Second District's decision in this case as well as the Fourth District's decision in *X.M.* Plaintiff's primary argument is that Government Code section 818 does not apply unless the treble damages provision is "entirely" or "solely" punitive. (Real Party in Interest's Opening Br. p. 9 ["a category of damages that is beyond compensatory, but not entirely punitive, does not fall within the narrow immunity afforded by Section 818."].) In doing so, Plaintiff ignores the plain language of Government Code section 818, which prohibits "damages imposed ***primarily*** for the sake of example and by way of punishing the defendant." (Gov. Code, § 818 [emphasis added].) Of course, the word "primarily" does not mean "solely." Moreover, Plaintiff's position on this issue ignores this Court's statement that "the purpose behind the statutory ban on punitive damages against public entities [is] to protect their tax-funded revenues from legal judgments in amounts ***beyond those strictly necessary to recompense the injured party***[.]" (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1196, fn. 20 [emphasis added].)

Put simply, the question is not—as Plaintiff would have it—whether the treble damages provision serves *any* non-punitive function. Rather, based on the plain language of section 818, the question is whether the treble damages provision is "primarily" punitive. And, based on this

Court's statements in *Wells*, if the damages go "beyond those strictly necessary to recompense the injured party," they are barred by Government Code section 818.

Secondarily, Plaintiff's position is based on the proposition that it would be unfair to treat public entities differently than private defendants and that the treble damages provision therefore must apply to public entities. As with Plaintiff's statutory argument, this too is based on a false premise. Public entities *are* different than other defendants. This Court itself has recognized that public entities are afforded "special status" under the law, "according them greater protections than nonpublic entity defendants, because unlike nonpublic defendants, public entities whose acts or omissions are alleged to have caused harm will incur costs that must ultimately be borne by the taxpayers." (*Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 908.)

Ultimately, the Second District's decision in this case is correct and should be affirmed. Plaintiff's contention that CCP § 340.1(b) authorizes treble damages against public school districts is not supported by the plain language of Government Code section 818 or this Court's more recent statements concerning the prohibition of enhanced damages against public entities, it would give rise to serious constitutional concerns, and it would unquestionably have a catastrophic financial impact on our public school system. Based on these concerns, Amici Curiae support Los Angeles

Unified School District's argument that treble damages are not available in this case.

Identity and Interest of Amici Curiae

The Regional Liability Excess Fund ("ReLiEF") is a non-profit member-owned and operated Joint Powers Authority ("JPA") organized pursuant to the California Joint Exercise of Powers Act (Gov't Code, § 6500.1 et seq.) that provides liability coverage and risk management services to public schools in the state of California. ReLiEF is comprised of two independent regionally-based risk sharing programs, SoCal ReLiEF and NorCal ReLiEF. Together, these two entities currently serve more than 400 educational agencies in California—representing in excess of two million students across the state. ReLiEF is the largest property and casualty program for public schools in the country.[2]

Like ReLiEF, SWACC also is a non-profit member-owned and operated JPA organized pursuant to the California Joint Exercise of Powers Act and provides liability coverage and risk management services to more than 45 public Community Colleges in the state of California—representing over 590,000 daily Full Time Equivalents (students). SWACC is the largest Community College property and casualty program in California.

[2] Los Angeles Unified School District is not a member of ReLiEF or the risk sharing pools operated by Amici Curiae.

Prior to 1985, the majority of public school districts in California were covered by commercial insurance policies. Beginning in 1984, the United States went through what is now known as the Liability Insurance Crisis. The causes of the crises are debated. The impact, however, is not—between 1984 and 1987, premiums for general liability coverage more than tripled in this country (from around $6 billion to approximately $19.5 billion nationwide). Public school districts were among those hit the hardest by the crises and, because they simply could no longer afford commercial insurance, their policies were dropped.

ReLiEF and SWACC were formed in 1986 in response to skyrocketing premiums and decreasing availability of liability insurance for California schools. Recognizing this problem, a steering committee was formed in 1985 consisting of representatives of northern and southern California school districts and statewide representatives for community colleges to address the issue. Due to the diversity of need and location of the representatives, the committee split into three groups, which ultimately became SoCal ReLiEF, NorCal ReLiEF, and SWACC.

The need for these entities was driven by the prohibitively high cost and unavailability of traditional insurance. By pooling tax revenues from multiple school districts, the existence of SoCal ReLiEF, NorCal ReLiEF, and SWACC provide public school districts in California the ability to self-insure. Moreover, because each of these entities acts through a Board of

Directors comprised of representatives from member school districts, the school districts' themselves are able to dictate the terms of the coverage offered. It is the express mission of these entities to provide public schools in California with broad (yet cost-effective) liability and property coverage, stable rates, and quality, specialized risk management services. In furtherance of this mission, in 2002, SoCal ReLiEF, NorCal ReLiEF, and SWACC formed an additional JPA known as the Schools Association for Excess Risk ("SAFER"), which is a governmental, not-for-profit, risk sharing pool designed to provide California K-12 and Community College Districts with excess property and liability coverage and to eliminate all gaps in coverage. Together, SoCal ReliEF, NorCal ReLiEF, and SAFER provide liability coverage and risk management services to approximately half of the public school districts within the state.

Amici Curiae are not insurance companies.[3] Indeed, the majority of services that Amici Curiae provide to school districts falls under the category of risk management services. This includes identifying and assessing risks and taking actions to protect school districts against those risks. Amici Curiae operate from the standpoint that the best way to manage risk is to prevent it. This is a proactive endeavor and preventative

[3] See Gov. Code, § 990.8, subd. (c) ["The pooling of self-insured claims or lasses among entities … shall not be considered insurance nor be subject to regulation under the Insurance Code"].

measures include ongoing safety inspections, building evaluations, and online and in-house training and workshops. The online and in-house training provided by Amici Curiae cover a broad range of topics ranging from courses on sports-related concussions to the prevention of cyberbullying. Indeed, between January 2014 to the present, Amici Curiae have provided more than 12.2 million on-line safety and risk management training courses to nearly 1 million school district employees. With regard to teacher-student sexual abuse, Amici Curiae have instituted training programs to insure that school district employees know their responsibilities under California's Child Abuse and Neglect Reporting Law (Pen. Code, §§ 11164-11174.3) as well as training for school administrators to assist them with profiling problematic employees and identifying the signs that sexual abuse is occurring.[4]

In providing these services, Amici Curiae are principally tasked with identifying and assessing risks to member school districts. Once those risks are identified and assessed, Amici Curiae set the rates that school district members are required to contribute to ensure the risk sharing pools have sufficient funds to cover known and potential risks. In identifying and

[4] Since 2014, Amici Curiae's records show 2.3 million trainings have been completed concerning mandated reporting and over 200,000 on the issue of staff-to-student sexual misconduct. During the 2013/2014 school year, "Child Abuse: Identification & Intervention" was one of the top three courses taken by members of SoCal ReLiEF with nearly 55,000 trainings completed.

assessing school district risks, Amici Curiae look to the language of the statutes enacted by the state and federal Legislatures and, in particular, the California Government Claims Act (Gov. Code, §§ 810-996.6). Amici Curiae look first to these statutes because it is the language of those laws that define the scope and limitations of public entity liability in California. In addition, Amici Curiae routinely retain legal counsel not only to defend actual controversies, but also to provide interpretation and analysis of the laws applicable to school districts in this state. Put simply, Amici Curiae have a strong interest in the interpretation of the laws applicable to public entities in this state because it is those laws that allow Amici Curiae to identify and assess the risk of public school districts and ultimately to determine how much each member district must contribute to the pool to cover those risks.

How This Brief Will Assist the Court

The proposed brief of Amici Curiae will assist the Court in two ways. First, the Second District's decision in this case was based on the proposition that treble damages are barred by Government Code section 818. Amici Curiae, of course, agree with that holding. However, Amici Curiae believe there are additional (and significant) constitutional concerns that would arise if Plaintiff's position was adopted. The proposed brief addresses those concerns.

For instance, the abuse in this case allegedly occurred between 2014 and 2015. Yet the treble damages provision now contained in CCP § 340.1(b) was not added until 2019. In other words, for the treble damages provision to apply in this case, it must be retroactive. While claims for damages as a result of sexual abuse under CCP § 340.1, ***subdivision (a)*** are revived under the statute, there is no language in the statute making claims for treble damages under ***subdivision (b)*** retroactive. This, in itself, counsels against retroactive application. (See Code Civ. Proc., § 3 ["No part of [this Code] is retroactive, unless expressly so declared"]; see also *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840 [noting that retroactive application of a statute requires express language or an "unavoidable implication" from the Legislature].)

Moreover, *if* the treble damages provision is applied retroactively, it would raise serious questions under Article XVI, section 6 of the California Constitution, which prohibits the Legislature from making gifts of public funds. Interpreting this constitutional prohibition, this Court has expressly stated that **"the legislature has no power to create a liability against the state for any [ ] past act of negligence"** (*Chapman v. State* (1894) 104 Cal. 690, 693 [emphasis added]), and the imposition of liability for a "past act of negligence" "would, in effect, **be the making of a gift**." (*Heron v. Riley* (1930) 209 Cal. 507, 517 [emphasis added]); see also *Bourn v. Hart*, (1892) 93 Cal. 321, 328.) Indeed, "[t]he term 'gift' in the constitutional

provision 'includes all appropriations of public money for which there is no authority or enforceable claim,' even if there is a moral or equitable obligation." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450 [quoting *Conlin v. Board of Supervisors* (1893) 99 Cal. 17, 21-22].) It is undisputable in this case that treble damages were not available under CCP § 340.1 until 2020. As such, based on the above cited authorities from this Court, the retroactive application of liability for a past act of negligence would seemingly violate Article XVI, section 6. As stated by this Court, "statutes should be interpreted to avoid potential constitutional concerns." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1131.)

As the second way this brief will assist the Court, Amici Curiae will explain how Plaintiff's interpretation, if adopted, will have a significant financial impact on public school districts within the state of California. Because Amici Curiae were created to provide liability coverage and risk management services to the public school districts within this state, they have an informed and unique perspective on the potential impact of the Court's decision in this case.

/ / /

/ / /

/ / /

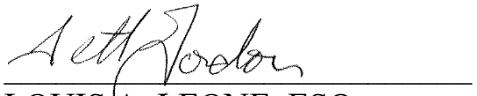
/ / /

Amici Curiae now respectfully request that this Court accept its application to submit this brief as amici curiae in order to call attention not only to the legal reasons why Plaintiff's argument regarding CCP § 340.1(b) should be rejected, but also to demonstrate how the adoption of Plaintiff's position in this case poses a significant risk of exposure to public school districts that could sound the death knell for risk-sharing pools in this State

Date: March 7, 2022

Respectfully submitted,

LEONE ALBERTS & DUUS



LOUIS A. LEONE, ESQ.
SETH L. GORDON, ESQ.
Attorneys for Amici Curiae
NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SCHOOL ASSOCIATION OF COMMUNITY COLLEGES, AND SCHOOL ASSOCIATION FOR EXCESS RISK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

INTRODUCTION

Treble damages are not available against public school districts under CCP § 340.1(b)—as a matter of law—for three reasons.

First, as the Second District held, treble damages are not available against public entities under Government Code section 818, which provides that "a public entity is not liable for damages … imposed primarily for the sake of example and by way of punishing the defendant." Both the U.S. Supreme Court and this Court have recognized that treble damages are typically punitive in nature. According to the U.S. Supreme Court, ***"[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct[.]"*** (*Tex. Indus. v. Radcliff Materials* (1981) 451 U.S. 630, 639 [emphasis added].) Similarly, this Court has characterized treble damages as "an exemplary award … [that] reveals a desire to punish intentional and morally offensive conduct." (*Harris v. Capital Growth Inv'rs XIV* (1991) 52 Cal.3d 1142, 1172, *overruled on other grounds by Munson v. Del Taco, Inc*., 46 Cal.4th 661.)

It should therefore come as no surprise that the first two (and only two) decisions from the Court of Appeal to address the issue held that the treble damages provision contained in CCP § 340.1 is not applicable to public entities. (*Los Angeles Unified School District v. Superior Court* (2021) 64 Cal.App.5th 549, 552 ["Because treble damages under section 340.1 are primarily exemplary and punitive, a public entity like LAUSD

maintains sovereign immunity from liability for such damages under [Government Code] section 818."]; *X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1019 ["We conclude the primary purpose of section 340.1's treble damages provision is punitive because it was designed to deter future cover ups by punishing past ones."]) As the Fourth District stated in the *X.M.* case, "the economic and noneconomic damages available under general tort principles are already designed to make childhood sexual assault victims whole—both for the physical and emotional harm from the abuse itself, as well as for any additional emotional harm from learning the abuse was the result of a cover up." (*X.M.*, *supra*, 68 Cal.App.5th at p. 1019.) This should be the end of the discussion based on this Court's statement in *Wells* that Government Code section 818 prohibits judgments against public entities "in amounts ***beyond those strictly necessary to recompense the injured party***[.]" (*Wells*, *supra*, 39 Cal.4th at p. 1196 fn.20 [emphasis added].)

Second, while claims for damages as a result of sexual abuse under CCP § 340.1, ***subdivision (a)*** are revived under the statute, there is no language in the statute making claims for treble damages under ***subdivision (b)*** retroactive. Indeed, the revival provisions (CCP § 340.1 (q) & (r)) expressly provide that they apply to claims for damages under ***subdivision (a)***. In the absence of *express and unequivocal* language making the treble damages provision retroactive, it cannot be applied

retroactively to claims arising from conduct that occurred prior to the amendment to CCP § 340.1 in 2020. (See *Myers v. Philip Morris Companies* (2002) 28 Cal.4th 828, 840.)

Third, Amici Curiae submit that the retroactive application of the treble damages provision against public entities would raise serious constitutional concerns. Article XVI, section 6 of the California Constitution provides that the Legislature has no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation…." Interpreting this prohibition, the California Supreme Court has expressly stated that **"the legislature has no power to create a liability against the state for any [ ] past act of negligence upon the part of its officers."** (*Chapman v. State* (1894) 104 Cal. 690, 693 [emphasis added].) Amici Curiae believe that the retroactive application of treble damages against public entities would fall squarely within this prohibition.

For the reasons set forth herein, Amici Curiae respectfully request this Court affirm the Second District's decision that treble damages under CCP § 340.1(b) are not available against public entities based on Government Code section 818. This not only would adhere to the plain language of Government Code section 818, it also avoids the serious constitutional questions raised by Plaintiff's position.

Finally, Plaintiff claims that the legislative history exhibits an intent for the treble damages provision to apply to public entities. In determining legislative intent, this Court has stated that "consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) The consequences of Plaintiff's interpretation would be dire. Over the last decade, the public school districts that are members of Amici Curiae have incurred more than ***$165 million*** in liability from sexual abuse claims. Under Plaintiff's interpretation, this figure would be tripled—resulting in ***$495 million*** in liability for only half the school districts in this state over a ten-year period. This position is untenable.

ARGUMENT

I. Treble Damages Under CCP § 340.1(b) Are Not Available Against Public School Districts Under Government Code section 818

A. Plaintiff's Assertion that Enhanced Damages Have to be "Entirely" or "Solely" Punitive for Government Code section 818 to Apply is Incorrect

Government Code section 818 provides: "Notwithstanding any other provision of law, a public entity is not liable for … damages imposed ***primarily*** for the sake of example and by way of punishing the defendant." (Gov. Code, § 818 [emphasis added].) Both the U.S. Supreme Court and the California Supreme Court have made clear that treble damages are punitive in nature (i.e., designed to punish). According to the U.S. Supreme

Court: ***"[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct[.]"*** (*Tex. Indus. v. Radcliff Materials* (1981) 451 U.S. 630, 639 [emphasis added].) According to this Court: treble damages are "an exemplary award … [that] reveals a desire to punish intentional and morally offensive conduct." (*Harris v. Capital Growth Inv'rs XIV* (1991) 52 Cal.3d 1142, 1172, *overruled on other grounds*.) More recently, this Court stated that "the Legislature typically reserves enhanced damages for deterring willful conduct" and that the "most plausible" "primary purpose" of a treble damages provision was "to deter" wrongful conduct. (*Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1112.)

Plaintiff asserts that Government Code section 818 only applies to damages that are "entirely" punitive in nature. (Real Party in Interest's Opening Br. p. 9.) This is incorrect as a matter of law. Government Code section 818 prohibits "damages imposed ***primarily*** for the sake of example and by way of punishing the defendant." (Gov. Code, § 818 [emphasis added].) Of course, the word "primarily" does not mean "entirely." Indeed, one of the cases relied on by Plaintiff emphasizes this fact, stating: "Limiting government immunity to damages that are '***primarily***' punitive reflects the reality that a single damages category may serve multiple remedial purposes." (*Los Angeles County Metropolitan Transp. Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 271-72 [emphasis added].)

Thus, the question is not whether the treble damages provision is "entirely" punitive, but whether it is "primarily" punitive. This Court's decision in *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, is instructive on the issue. There, the Court held that a public school district could not be sued under the California False Claims Act precisely because the Act authorized enhanced damages such as triple damages. (*Id*., at p. 1195.) The Court stated "such a diversion of limited taxpayer funds would interfere significantly with government agencies' fiscal ability to carry out their public missions" and then expressly noted that enhanced damages are not available against public entities under Government Code section 818. (*Id*., at p. 1195 fn. 20.)

Significantly, the Court noted that "[o]ne might argue that the … treble-damage provisions are not strictly, or even primarily, 'punitive,' in that they are necessary to ensure … full recovery…." (*Wells*, *supra*, 39 Cal.4th at p. 1196 fn.20.) Notwithstanding the possibility of a compensatory element to the damages provision, the Court stated "the purpose behind the statutory ban on punitive damages against public entities—to protect their tax-funded revenues from legal judgments in amounts ***beyond those strictly necessary to recompense the injured party***—applies equally here." (*Ibid*. [emphasis added].)

According to Plaintiff, if enhanced damages serve *any non-punitive function*, Government Code section 818 does not apply. This flips the

applicable standard on its head. Under *Wells*, if the damages go "beyond those strictly necessary to recompense the injured party," they are barred by Government Code section 818.

Given this framework, the question is: What compensatory function does the treble damages provision contained in CCP § 340.1(b) serve? The Second District's decision in this case addressed this question head on. The court acknowledged the statement in the legislative history that treble damages were "needed both to compensate victims who never should have been victims—and would not have been if past sexual assault had been properly brought to light—and also as an effective deterrent against individuals and entities who have chosen to protect the perpetrators of sexual assault...." (*Los Angeles Unified School District*, *supra*, 64 Cal.App.5th at p. 558 [quoting Assem. Conc. Sen. Amends. To Assem. Bill No. 218 (2019-2020 Reg. Sess.) as amended Aug. 30, 2019].) The court further noted that, "[w]hile the same statement shows up in several other Assembly Floor Analyses for Assembly Bill 218, it appears to be the only reference to compensation related to treble damages in all the legislative history…." (*Ibid*.)

Ultimately, the Second District concluded that, despite the statements in the legislative history, the court could discern no compensatory purpose of the treble damages provision. (*Los Angeles Unified School District*, *supra*, 64 Cal.App.5th at p. 560.) The Court stated

the following: "A solitary statement repeated in some legislative analyses that treble damages are necessary to compensate the victims of a coverup does not unambiguously demonstrate the Legislature in fact added the provision … for that purpose." (*Ibid*.) The Court continued: ***"Critically, the statement does not identify what injury these treble damages are needed to compensate."*** (*Ibid*. [emphasis added].) Rather, the statement "refers only to 'victims who never should have been victims,' implying that the bill's author had the predicate sexual assault itself in mind—not some added injury resulting from the coverup that requires an added award…. Moreover, the moral condemnation voiced in the statement … while plainly warranted, indicates the bill's author may have had a primarily punitive motivation for imposing treble damages in response to patently heinous conduct." (*Ibid*.) Ultimately, the Court concluded that CCP § 340.1(a)(1) through (3) were fully adequate to compensate victims of childhood sexual abuse, including any psychological damages resulting from a cover-up. (*Id*., at p. 561.)

The Second District was correct in this regard. Under CCP § 340.1(a)(1), Plaintiff is able to obtain damages against the actual perpetrator of the sexual abuse. Under subdivision (a)(2), Plaintiff is able to recover from persons and entities (such as school districts and their employees) who owed a duty to the plaintiff and whose negligence was a cause of the abuse. And, under subdivision (a)(3), Plaintiff can recover

damages against persons and entities for intentional misconduct (such as "covering up" sexual abuse). As noted in the Second District's decision, under the standard jury instruction for tort damages, a plaintiff is entitled to recover an award of noneconomic damages for all past and future physical pain, *mental suffering*, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, *grief*, *anxiety*, *humiliation*, and *emotional distress*." (*Los Angeles Unified School District*, *supra*, 64 Cal.App.5th at p. 561 [italics in original].) Ultimately, the court noted that it was "unable to discern any uncompensated injury or unfulfilled right to compensation" and that the plaintiff did "not identify any injury from a childhood sexual assault or coverup for which normal tort damages fail to provide full compensation." (*Id*.) In other words, as stated by the court, "treble damages imposed under section 340.1 are, by definition, in addition to a plaintiff's actual damages…." (*Ibid*.) As such, the court correctly held that they were prohibited under Government Code section 818.

B. The Legislative History Suggests that the Legislature Recognized that Treble Damages Are Not Available Against Public Entities

In the first analysis provided by the Senate Committee on Appropriations, the committee provided the following comment on the fiscal impact of AB 218: "potentially-major out-year costs to local school districts to the extent litigation is successfully brought outside the current statute of limitations and/or ***the districts are liable for treble damages***."

(Sen. Com. on Appropriations, Fiscal Summary of AB 218 (2019-2020 Reg. Sess.), hearing date Aug. 12, 2019 [emphasis added].)[5] In other words, when AB 218 was first under consideration by the Legislature, it is clear that the Legislature did contemplate that treble damages may be awarded against public school districts. Then, as noted by Petitioner in this case, several school districts and joint powers authorities wrote to the Legislature, noting that treble damages could very likely bankrupt school districts in the state. (See Answer Brief p. 30.) Ultimately, the bill was amended and the Senate Committee on Appropriations authored an "Analysis Addendum." The addendum indicates that it was created to "reflect amendments adopted by the committee on August 30, 2019" and describes the fiscal impact as follows:

> potentially-major out-year costs to local entities and school districts to the extent litigation is successfully brought outside the current statute of limitations and/or the entities are liable for damages. If payouts are large enough, this measure could lead to cost pressures to the state to stabilize a local jurisdiction or district.
>
> Additionally, to the extent an extended statute of limitations affects liability insurance premiums, school district[s] could experience unknown, potentially-significant costs related to procuring liability insurance….

---

[5] The Senate Committee Analysis can be found online at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB218. Because this information is publicly available, a separate motion for judicial notice is not required. (*Sharon S. v. Superior Ct.* (2003) 31 Cal.4th 417, 440 fn. 18; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46 fn. 9.)

> **Author Amendments:** Permit a victim to receive up to treble damages … ***unless it is prohibited by another law***."

(Sen. Com. on Appropriations, Analysis Addendum to Fiscal Summary of AB 218 (2019-2020 Reg. Sess.), hearing date Aug. 30, 2019 [emphasis added].) In other words, after the Legislature received input that AB 218 could potentially bankrupt school districts in the state, the Legislature deleted "treble" damages from the discussion of the fiscal impact of the bill and added the proviso "unless prohibited by another law." Amici Curiae believe this is a strong indication that the Legislature recognized that treble damages were not available against public entities under Government Code section 818.

In sum, the legislative history shows the following: the treble damages provision originally did not include the proviso "unless prohibited by another law" and the initial report by the Senate Appropriations Committee suggested that treble damages were available against public school districts; there was discussion about the fiscal impact that treble damages could have on public school districts; and, the final bill included the provision "unless prohibited by another law" and the Senate Appropriations Committee deleted its reference to treble damages from its report on the fiscal impact of the bill. The addition of the end proviso and the deletion of treble damages from the analysis of the fiscal impact of the bill shows that the Legislature knew and understood that punitive damages

do not apply against public entities and therefore added the language as a signal that Government Code section 818 would exempt public entities from the treble damages provision.

II. The Retroactive Application of the Treble Damages Provision Would Raise Serious Constitutional Concerns

As stated by this Court, "statutes should be interpreted to avoid potential constitutional concerns." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1131.) While not raised in the Second District's decision, it should be noted that what Plaintiff is seeking in this case is retroactive application of the treble damages provision. The abuse in this case allegedly occurred in 2014 and 2015. AB 218, which added the treble damages provision to CCP § 340.1, did not take effect until January 1, 2020. In other words, for the treble damages provision to apply in this case, it must be retroactive. For the reasons set forth below, there is no clear and unequivocal statement in CCP § 340.1 demonstrating that the treble damages provision was intended to apply retroactively and, if the provision is applied retroactively, it would violate Article XVI, section 6 of the California Constitution. Because Plaintiff's position raises constitutional concerns it should be rejected.

A. There is No Express Statement in CCP § 340.1 that the Treble Damages Provision is Retroactive

Code of Civil Procedure section 340.1 governs the statute of limitations for childhood sexual abuse and has existed since 1986. (*Quarry*

v. Doe I (2012) 53 Cal.4th 945, 962.) While the statute has been amended several times, prior to 2020 the statute did not include a provision for treble damages. In 2019, the California Legislature passed AB 218, which was signed into law by Governor Newsom on October 13, 2019 and took effect on January 1, 2020.

As amended by AB 218, CCP § 340.1 is now structured as follows. Subdivision (a) provides the statute of limitations for "an action for recovery of damages suffered as a result of childhood sexual assault." Subdivision (b) then authorizes treble damages for completely separate conduct (i.e., treble damages are authorized where the plaintiff can prove the sexual abuse was caused by a "cover up." (CCP § 340.1(b).) Subdivision (q) then revives "***any claim for damages described in*** … ***subdivision (a)***[.]" (CCP § 340.1(q) [emphasis added].) And subdivision (r) clarifies that "[t]he ***changes made*** to the time period ***under subdivision (a)***" apply to cases arising from conduct that occurred prior to the enactment of the amendment in 2020. (CCP § 340.1(r) [emphasis added].)

"It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity[.]" (*Tapia v. Sup. Ct.* (1991) 53 Cal.3d 282, 287.) Indeed, Code of Civil Procedure section 3 expressly states: ***"No part of [this Code] is retroactive, unless expressly so declared."*** (Code Civ. Proc., § 3 [emphasis added].) And the law is clear that, "if a statutory change is *substantive* because it would

impose new, additional or different liabilities based on past conduct, courts are loath to interpret it as having retrospective application." (*Brenton v. Metabolife Int'l. Inc.* (2004) 116 Cal.App.4th 679, 688.) This is precisely the situation in this case. Regardless of whether the treble damages provision 'creates' a new cause of action, it is undisputable that the provision imposes new, enhanced liability for "cover ups." As such, in the absence of language in the statute expressly providing that the provision is retroactive, it cannot be applied retroactively.

There is no language in CCP § 340.1 that makes subdivision (b) retroactive. The statute itself does not contain the word retroactive. Subdivision (q) "revives" "any claim for damages described in … *subdivision (a)*" for a three-year period. (CCP § 340.1(q) [emphasis added].) Of course, a claim for treble damages cannot be "revived" because, prior to the enactment of AB 218, there was no claim for treble damages under CCP § 340.1. That leaves subdivision (r), which provides that "[t]he changes made to *the time period under subdivision (a)* … apply to … any action filed before the date of enactment[.]" (CCP § 340.1(r) [emphasis added].) In other words, subdivision (r) makes the extended statute of limitations applicable to cases arising from conduct that occurred prior to 2019. Put simply, there is nothing in the statutory language of CCP § 340.1 that expressly provides that a claim for treble damages under subdivision (b) can be applied retroactively.

This Court's decision in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, in instructive on this issue. *Evangelatos* involved a personal injury action with multiple tortfeasors. While the case was being litigated in the trial court, the Legislature passed Prop. 51 in 1986, which modified the common law "joint and several liability" doctrine by limiting an individual tortfeasor's liability for noneconomic damages to their percentage of fault. (*Id*., at p. 1192.) After the passage of Prop. 51, both parties asked the trial court to determine whether the new rule was retroactive (i.e., whether the new joint and several liability doctrine would be applied in a case where the injury preceded the new law.) (*Id*.) The trial court held that the law was retroactive, the Court of Appeal upheld that decision, and the issue made its way to this Court. (*Id*., at p. 1193.)

Ultimately, the Court in *Evangelatos* held that Prop. 51 could *not* be applied retroactively. (*Evangelatos*, *supra*, 44 Cal.3d at 1193.) In so holding, the Court made several statements that are instructive here. Quoting the U.S. Supreme Court, the Court set forth the "well-established legal precept[ ]" that "'[*The*] *first rule of construction is that legislation must be considered as addressed to the future, not to the past* …. **The rule has been expressed in varying degrees of strength but always of one import, that *a retrospective operation will not be given to a statute … unless such be 'the unequivocal and inflexible import of the terms**, and the manifest intention of the legislature*.'" (*Id*., at p. 1207 [italics in

original, bold type font added].) According to this Court, "California authorities have long embraced this general principle." (*Id*.).

The Court in *Evangelatos* then pointed out that the Civil Code and the Code of Civil Procedure both contain express requirements that no provision of those codes can be applied retroactively without an express declaration of retroactivity by the Legislature. (*Evangelatos*, *supra*, 44 Cal.3d at 1207-08.) The Court stated that this rule "reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.'" (*Evangelatos*, *supra*, 44 Cal.3d at 1208.)

Importantly, it was argued in *Evangelatos* that, "even though there is no express language in the statute calling for retroactive application, an intent that the provision should apply retroactively can clearly be inferred from the objectives of the legislation." (*Evangelatos*, *supra*, 44 Cal.3d at 1209.) It is anticipated that, if Plaintiff addresses the retroactively argument in this case, she will likely take the same position. In *Evangelatos*, this Court addressed and rejected the position, holding that there must be either an express statement of retroactivity in the statute itself or in the legislative history. (*Id*., at pp. 1209-1212.)

Evangelatos is dispositive of this issue. As in *Evangelatos*, there is no express provision in the statute itself making CCP § 340.1(b)

retroactive. Additionally, there is no statement in the legislative history expressly declaring the treble damages provision was intended to be retroactive.

Finally, it is worth noting that, when the Legislature passed AB 218, while it did not include the word "retroactive" in CCP § 340.1(b), it *did* expressly make another statute retroactive. Specifically, in addition to amending CCP § 340.1, AB 218 also amended Government Code section 905. Subdivision (m) of section 905 was enacted in 2008 and exempted claims of childhood sexual abuse from the claim presentation requirements of the Government Claims Act. The provision, however, was prospective only, and only exempted claims arising from conduct that occurred on or after January 1, 2009. AB 218 changed this, eliminating the language that subdivision (m) only exempted claims occurring on or after January 1, 2009. In doing so, AB 218 expressly and unequivocally made the change retroactive: "*The changes made to this § … are* ***retroactive*** and apply to any action commenced on or after the date of enactment…." (Gov. Code, § 905(p) [emphasis added].) In other words, if the Legislature wanted to make claims for treble damages in CCP § 340.1(b) retroactive, they clearly knew how to do so because they made another statute retroactive in the same bill.

/ / /

/ / /

B. As Applied to Public Entities, The Retroactive Application of the Treble Damages Provision Would Violate Article XVI, Section 6 of the California Constitution

"The legislature is to be regarded as holding the public moneys in trust for public purposes." (*Conlin v. Board of Supervisors* (1893) 99 Cal. 17, 22.) As such, there are limits on how the Legislature may allocate and dispose of public funds. Article XVI, section 6 of the California Constitution provides one such limitation. The provision provides that "[t]he Legislature shall have no power to give or to lend, or to authorize the giving or lending … in any manner whatever, for the payment of liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money…." (Cal. Const. Art. XVI, sec. 6.)

This Court has addressed the constitutional prohibition on gifts of public funds on several occasions. The Court has made clear that, under the provision, "the legislature has no power to create a liability against the state for any [ ] past act of negligence upon the part of its officers" (*Chapman*, *supra*, 104 Cal. at p. 693 [emphasis added]), and the imposition of liability for a "past act of negligence" "would, in effect, be the making of a gift." (*Heron*, *supra*, 209 Cal. at p. 517 [emphasis added]).) Indeed, "[t]he term 'gift' in the constitutional provision 'includes all appropriations of public money for which there is no authority or enforceable claim,' even

if there is a moral or equitable obligation." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450 [quoting *Conlin*, *supra*, 99 Cal. at pp. 21-22].) As stated by this Court, **"<u>An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a gift within the meaning of that term … and it is none the less a gift that a sufficient motive appears for its appropriation[.]</u>"** (*Conlin*, *supra*, 99 Cal. at p. 22 [emphasis added].)

This Court first addressed the issue in *Bourn v. Hart* (1892) 93 Cal. 321. There, the plaintiff was a prison guard at San Quentin. (*Id*., at p. 326.) During the discharge of his duties, the plaintiff sustained serious personal injuries, including the loss of his arm, which he attributed to the negligence of his superior officer. (*Id*., at p. 327.) Following the injury, the Legislature passed a bill seeking to compensate the plaintiff for his injury. (*Id*., at p. 326.) The defendant demurred to the action on the ground that the law passed by the Legislature violated the constitutional prohibition on gifts of public funds.[6] (*Id*.) This Court agreed, noting that, at the time, the State could not be sued for negligence. (*Id*., at pp. 327-328.) Given that the

[6] The prohibition on gifts of public funds was previously contained in Article IV, section 31 of the California Constitution, which "declare[d] that the legislature shall not have power 'to make any gift, or authorize the making of any gift, of any public money, or thing of value, to any individual, municipal or other corporation whatever.'" (*Conlin*, *supra*, 99 Cal. at p. 21 [quoting former Art. IV, sec. 31].) The provision was renumbered and is now contained in Article XVI, section 6.

plaintiff did not have an enforceable claim, the Court held that the Legislature had no authority to retroactively impose liability. The Court stated: "A legislative appropriation made to an individual in payment of a claim for damages on account of personal injuries sustained by him while in its service, and for which the state is not responsible, either upon general principles of law or by reason of some previous statute creating such liability, is a gift within the meaning of the constitution." (*Id*., at p. 328.)

This Court again addressed the issue in *Conlin v. Board of Supervisors* (1893) 99 Cal. 17. There, the plaintiff entered into a contract with the City and County of San Francisco for construction of improvements on the city's streets. (*Id*., at p. 19.) The plaintiff completed the work but was not paid by the city for the work. (*Id*.) The Legislature thereafter passed a law authorizing payment to the plaintiff and, when the city continued to refuse to pay, the plaintiff brought suit. (*Id*.)

The defendant in *Conlin* (the superintendent of streets for the City and County of San Francisco) asserted that the Legislature's passage of the law to compensate the plaintiff for past work was unconstitutional and this Court ultimately agreed. The Court first noted that the prohibition on gifts of public funds applies not only to the State treasury, but also to legislation that attempts to force local public entities—such as a municipality—to make payments of public funds. (*Conlin*, *supra*, 99 Cal. at p. 21.) The Court stated that, "[t]he 'gift' which the legislature is prohibited from

making is not limited to a mere voluntary transfer of personal property without consideration…; but the term, as used in the constitution, includes all appropriations of public money for which there is no authority or enforcible [sic] claim, or which rest upon some moral or equitable obligation…." (*Id*., at pp. 21-22.) The Court made clear: "An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a gift within the meaning of that term … and it is none the less a gift that a sufficient motive appears for its appropriation[.]" (*Id*., at p. 22.) Ultimately, because the plaintiff's contract with the city contained a provision that the city could not be held liable under the contract, the Court recognized that the plaintiff did not have an enforceable claim and the Legislature's attempt to provide compensation was an unconstitutional gift. (*Id*., at p. 23 ["The legislature has no more right to direct a municipality to give away the public moneys in its treasury than had the municipality without such direction."].)

This Court again addressed the issue in *Powell v. Phelan* (1903) 138 Cal. 271. There, the plaintiff served as a juror in a criminal trial in 1899. (*Id*., at p. 271.) At the time, there was no law authorizing the payment of jurors' fees in the county that the plaintiff served jury duty. (*Id*.) In 1901, after the plaintiff completed jury service, the Legislature passed a law that provided as follows: "All persons who have attended as jurors … in the superior court of any county, or city and county, of this state, since …

1895 … and have not been paid the fees … shall receive and be paid out of the general fund of such county, or city and county, the sum of two dollars per day for each day's attendance as such juror." (*Id*., at p. 273.) Following the passage of the law, the plaintiff filed suit, seeking compensation from the county. The county asserted that the law violated the constitutional prohibition on gifts of public funds and this Court agreed, stating "the act is clearly a violation of the above provision of the constitution." (*Id*., at p. 273.) The Court held that, because the juror had no legal entitlement to the payment, "[t]he moral or equitable obligation which might prompt an individual to act is not sufficient for the legislature." (*Id*., at p. 274.) The Court continued by stating that **"[The Legislature] is the guardian of the public moneys, and the limitation in the constitution does not allow any room for moral considerations[;] If moral or equitable considerations would justify a grant of public moneys, the section might as well be set aside…."** (*Ibid*., [emphasis added].)

Following that decision, the Court again addressed the issue in *Heron v. Riley* (1930) 209 Cal. 507. There the Legislature added a section to the Civil Code authorizing liability and insurance coverage for injuries caused by the negligent operation of automobiles in public service. (*Id*., at p. 517.) Explaining that there was no retroactive effect of the law, the Court stated: "The legislature has not attempted to create a liability against the state for any past acts of negligence on the part of its officers, agents or

employees—***something it could not do***, and the doing of which would, in effect, be the making of a gift…." (*Id*., [emphasis added].)

All of the above cases are from this Court and none have been overruled or disapproved. Indeed, this Court's decision in *Conlin* was cited on the issue as recently as 2002 in *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, where the Court of Appeal recognized that "[t]he term 'gift' in the constitutional provision 'includes all appropriations of public money for which there is no authority or enforceable claim,' even if there is a moral or equitable obligation." (*Jordan*, *supra*, 100 Cal.App.4th at p. 450 [quoting *Conlin*].)

The rule from the above cases is straightforward: the Legislature cannot pass a law attempting to impose liability on a public entity for a past occurrence where there was no authority for the liability at the time of the occurrence. It is undisputable in this case that, at the time of the alleged misconduct in 2014 or 2015, Plaintiff could not have sought treble damages against the school district—there was no authority to do so. As such, under this Court's holdings in *Bourn*, and *Conlin*, and *Powell*, and *Heron*, the Legislature had no authority to impose treble damages on public school districts for past acts of negligence.

In sum, Plaintiff's position raises concerns over the constitutionality of CCP § 340.1(b). This can (and should) be avoided by adopting the

Second District's holding in this case that the treble damages provision does not apply to public entities under Government Code section n818.

III. The Argument that Treble Damages Can Be Retroactively Imposed on Public Entities, if Adopted, Will Have a Significant and Catastrophic Impact on the Public School System in California

This case presents an issue of exceptional importance to the public schools of this state and organizations, such as Amici Curiae, that provide liability coverage and risk management services to public school districts in California.

The viability of risk-sharing pools depends largely on two factors: (1) the ability to identify and predict risk; and (2) the ability of public school districts to provide funds sufficient to cover those risks. The retroactive imposition of treble damages on public entities would affect both of these factors and threaten the continued viability of risk-sharing pools in California.

In assessing risks and maintaining funds sufficient to cover those risks, Amici Curiae look to the laws of this State in effect at the time the risk is assessed. Indeed, this Court has recognized that organizations often place reliance on existing law and "may rely upon it in conducting their affairs." (*Douglas Aircraft Co. v. Cranston* (1962) 58 Cal.2d 462, 465-466.) According to the Court: "*The keeping of records, the maintenance of reserves, and the commitment of funds may all be affected by such reliance*,

particularly in a well-organized enterprise that seeks to operate efficiently." (*Ibid*. [emphasis added].) *"To defeat such reliance ... deprives them of the ability to plan intelligently with the respect to stale and apparently abandoned claims."* (*Ibid*. [emphasis added].)

Until the passage of AB 218, the law appeared clear that, for any claim for sexual abuse against a public entity arising from conduct that occurred prior to Jan. 1, 2009, prospective plaintiffs were required to comply with the claims presentation requirements of the Government Claims Act and that nothing in CCP § 340.1 altered the timing for which such claims must be presented.

Leading up to the enactment of Government Code section 905(m), Amici Curiae understood the law to say that students with claims of molestation against a public school district were required to present those claims in accordance with Government Code sections 911.2 and 945.4 within six months of accrual and that such claims accrued at the time of molestation. Based on that understanding, Amici determined that sexual abuse claims arising from conduct occurring prior to 2009 no longer posed a risk of liability.

The enactment of Government Code section 905(m) itself presented a daunting challenge to Amici Curiae and their school district members. While the Legislature assured public school districts that they could not be held liable for sexual abuse claims arising from conduct occurring prior to

2009, the new law did have an effect on Amici Curiae. Under former CCP § 340.1, plaintiffs had until age 26 to file a lawsuit against a public entity for sexual abuse occurring after January 2009. Because students start kindergarten at age five, Amici Curiae determined that the statute extended school districts' potential exposure to 21 years in the future. As a result, Amici Curiae were required to appropriately manage their reserves for an exposure that runs twenty one years for each fiscal year. As a practical matter, school districts' premiums had to be raised. In the year following the enactment of section 905(m), NorCal ReLiEF rates jumped by more than a dollar per ADA. Now, following multiple years in which sexual abuse claims have been the leading cause of losses to the pools, member rates have nearly doubled what they were for the fiscal year 2007-2008.

The numbers are significant. Since the enactment of Government Code section 905(m), sexual assault and molestation claims have become the leading liability for public school districts. Between 2010 and 2015 NorCal ReLiEF alone received approximately 100 claims for sexual assault and molestation, resulting in over $46 million of incurred liability. This is more than double the amount of the next highest loss leader, which was $22 million related to supervisory claims for the same time period. SoCal ReLiEF recognized the importance of this issue in its 2014-2015 Annual Report, telling its members:

> Our primary focus for the 2015-2016 year continues to be student safety. Child abuse is an epidemic that demands our attention like never before. It not only destroys lives but costs public schools hundreds of millions of dollars annually. It is the single biggest challenge our program faces today. As such, ReLiEF is committed to eradicating this epidemic from our schools. Mandated Reporter training is just the beginning. We must change the culture, help everyone understand they are the front line of defense, and encourage them to get involved. If you see something suspicious, report it! We must keep our children safe at school in order to achieve our education goals.

In 2008, ReLiEF received 28 molestation claims resulting in approximately $1.3 million in losses. By 2011, two years after the enactment of section 905(m), the number of claims jumped to 40 resulting in losses of more than $6million—five times the amount incurred in 2008. Since 2011, Amici Curiae have incurred more than ***$165 million*** in liability from sexual abuse claims.

As previously mentioned, the ReLiEF organizations and SWACC were formed in 1986. As districts joined they agreed to be jointly and severally liable for the liabilities of other members within the pool on a fiscal year basis. Based on Amici Curiae's understanding of the law regarding the time within which claims for childhood sexual abuse had to be presented to public school districts, after a certain amount of time, the fiscal years for which district members are responsible were closed out because it was determined there was no further risk of liability. Indeed, all of the fiscal years up to 2005 were previously closed out.

Until the passage of AB 218, Amici had no reason to believe that CCP § 340.1 or Government Code section 905(m) had any effect on the fiscal years that have already been closed or that treble damages could be imposed on public entities at any time given the prohibition on such damages under Government Code section 818.

Amici Curiae and their school district members' reliance on preexisting law has been significant. Risk sharing pools set school district contributions (which are paid with taxpayer money) based upon existing law. The risk sharing pools have managed pool funds and closed out fiscal years on the belief that liability no longer existed for those years based on preexisting law. When school districts join risk sharing pools they contractually agree to be jointly and severally liable for the liabilities of other member school districts and, in making these contractual obligations, school districts clearly do based on what they believe the potential liabilities of the school districts are, which in turn is based on preexisting law. Fiscal planning—by both the risk sharing pools and their member school districts—is based upon preexisting law. And school districts have record retention policies that are based on preexisting law. All of these expectations and actions taken in reliance are dramatically—and detrimentally—effected by the retroactive imposition of treble damages.

Perhaps the easiest way to understand the effect of AB 218 on public school districts is through a hypothetical based on numbers taken from a school district in the Bay Area.

For the purposes of the hypothetical, assume a school district has around 10,000 students. Based on that attendance, the school district's budget would be around $100 million, with the majority of that budget coming directly from the State. Between 85 and 90 % of that $100 million goes to district employees' salaries and benefits. That leaves between 10 and 15 % of the total budget to cover all of the districts' other expenses, including school books, utilities, building repairs, and any potential liabilities—not to mention the ever increasing amount that school districts pay in connection special education. As the Court can see, our hypothetical school district's money is quickly gone and the amount it has to pay for liabilities lies somewhere between 1 and 5 percent of its budget.

If our district is in a risk sharing pool, it would contribute funds to the pool based on its Average Daily Attendance and its Member Retained Limit (or deductible) (which varies from $5,000 to $250,000 per loss). In return for this contribution, the district would be self-insured for up to $1 million in liability. It would also receive a number of risk management services provided by the pool. These services include ongoing safety inspections, internet based programs that provide a variety of information and are designed for teachers and administrators' daily use, and a variety of

online and in-house training workshops. These trainings range from courses on the evaluation of sports-related concussions to the prevention of cyberbullying.

Important to this case, with sexual abuse claims emerging over the last 10 years as the primary source of liability that school districts face, Amici Curiae have instituted a campaign to prevent such abuse from occurring in the future, including training programs designed for teachers and administrators to know their responsibilities under the California Child Abuse and Neglect Reporting Law as well as training for administrators to assist them with profiling problematic employees and identifying signs that sexual abuse is occurring. At the time that Amici filed their brief in this case, their records indicated that more than 12.2 million training courses had been completed.

Returning to the protection provided by the pools, once a district is in the pool, the pool then purchases reinsurance (which is folded into the premium chosen by and paid for by each member district) up to $50 million.

Pursuant to the agreement signed by each district upon entering the pool, each district agrees to be jointly and severally liable for unfunded liabilities on a fiscal year basis.

This is the basic model upon which ReLiEF has operated since its formation in 1986. The model works—the ReLiEF organizations have

successfully managed the operations of their pools for the past 30-plus years and, while the gap between the pools' total assets and liabilities has closed over the last 10 years (primarily because of molestation claims), there has never been an assessment on member districts for a fiscal year for which the pool maintained insufficient funds.

Returning to our hypothetical, let's say that our district was a member of NorCal ReLiEF in 2001. Further assume that 100 other school districts were also members for that fiscal year, but that five of those districts are no longer members. Now, in 2021, our school district is sued by a former student of the district claiming sexual abuse by a teacher in 2001. Under Plaintiff's interpretation of AB 218, the plaintiff not only would be allowed to proceed with the suit so long as it is filed before 2023, the plaintiff would also be entitled to triple the amount of damages a jury awarded.

The problem is this, 2001—as a fiscal year—has been closed out by NorCal ReLiEF for several years and there is no longer any money allocated to cover liabilities for that year. Nevertheless, all of the members of the pool in 2001 would be jointly and severally liable, including the school districts that are no longer members. NorCal ReLiEF would therefore have to assess each district that was a member of the pool in 2001 for funds sufficient to cover the judgement. For a multi-million dollar judgment, which seems to be the trend for sexual abuse cases, this would be

no small amount—particularly if the amount is tripled. For school districts that remain members of the pool, this assessment would be charged in addition to the premiums already paid for the currently open fiscal years. For school districts that were members in 2001 that are no longer members, they would nevertheless be contractually obligated to pay the assessment.

Importantly, SAFER—which provides coverage up to $50 million for claims in excess of $1 million—was not formed until 2002. In other words, even after each of the members from 2001 are assessed, our hypothetical school district would only be covered for up to $1 million dollars. If the judgment was greater than that, the money would come directly from the school district's general fund. One can imagine that, in a multi-victim-plaintiff situation, any judgment would greatly exceed this amount without even considering treble damages. Assuming our school district only had around $5 million in the general fund for the 2020-2021 school year to pay for liabilities, any judgment exceeding that amount would render the district insolvent.

The more concerning situation is this. Amici Curiae were formed in 1986. AB 218 creates a situation where a person molested in 1984 could sue a school district in 2020. Indeed, some member districts have recently been sued for conduct occurring in the 1970s. The district would first have to determine whether it was commercially insured for 1984. If it was not,

which is likely the case, then the entire judgment would come directly from district's general fund.

This result was not and could not have been anticipated by Amici Curiae. If Amici Curiae are required to maintain funds sufficient to cover not only potential liability for childhood sexual abuse that occurred as early as 1986, but *triple that amount*, the risk-sharing pools may no longer be sustainable. There is no possible way to determine and manage an unlimited exposure of this type or set appropriate reserves.

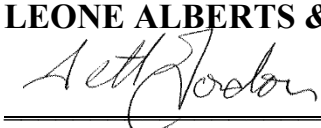
Put simply, the retroactive imposition of treble damages for claims going back to the formation of Amici Curiae in 1986 has the very real potential to put an end to risk-sharing pools for public school districts in California. Without the benefits of risk-sharing pools, public school districts will either have to obtain commercial insurance (which many will not be able to procure) or directly pay for these liabilities out of their own coffers. Indeed, excess insurance carriers are already refusing to underwrite the risk due to the current elongated statute of limitations under Section 340.1 and it applicability for post-2009 claims to public school districts under Government Code section 905(m). If it is determined that treble damages can be imposed retroactively on school districts in this state, Amici Curiae have no doubt that this market will evaporate, leaving districts to deal with a catastrophic risk exposure without liability coverage. This result should not be allowed to come to pass.

CONCLUSION

For the reasons articulated in this brief, Amici Curiae respectfully request that this Court follow the decision of the Second District Court of Appeal in *Los Angeles Unified School District v. Superior Court* (2021) 64 Cal.App.5th 549, and hold that the treble damages provision contained in CCP § 340.1(b) does not apply to public entities under Government Code section 818.

Respectfully submitted,

LEONE ALBERTS & DUUS



LOUIS A. LEONE, ESQ.
SETH L. GORDON, ESQ.
Attorneys for Amici Curiae

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I, Seth L. Gordon, counsel for Amici Curiae, hereby certify that the foregoing application and proposed brief consists of 10,090 words as counted by the Microsoft Office word-processing program used to generate this document.

Dated: March 7, 2022

LEONE ALBERTS & DUUS

SETH L. GORDON, ESQ.
Attorney for Amici Curiae

PROOF OF SERVICE
Supreme Court Case Number(s) S269608

I am employed in the County of Contra Costa; I am over the age of 19 years and not a party to the above-entitled cause; my business address is 1390 Willow Pass Road, Suite 700, Concord, California, 94520; and by business email address is kalexander@leonealberts.com.

I served a true and correct copy of the on the interested parties in this action:

Calvin R. House, Esq. Arthur C. Preciado, Esq. GUTIERREZ PRECIADO & HOUSE 3020 E. Colorado Blvd. Pasadena, CA 91107 Telephone: (626) 449-2300 Email: calvin.house@gphlawyers.com; apreciado@gphlawyers.com	Attorneys for Defendant and Petitioner Los Angeles Unified School District
Frederick R. Bennett, Esq. SUPERIOR COURT OF LOS ANGELES COUNTY 111 North Hill Street, Room 546 Los Angeles, CA 90012 Telephone: (213) 633-8598 Email: fbennett@lacourt.org	Attorneys for Respondent Superior Court of Los Angeles County
David M. Ring, Esq. Natalie L. Weatherford, Esq. TAYLOR & RING LLP 1230 Rosecrans Avenue, Suite 360 Manhattan Beach, CA 90266 Telephone: (310) 209-4100 Email: ring@taylorring.com; weatherford@taylorring.com	Attorneys for Plaintiff and Real Party in Interest Jane Doe

☒ (**BY ELECTRONIC SERVICE**) On August 23, 2021, I instituted service of the above-listed document(s) by submitting an electronic version of the document(s) via file transfer protocol (FTP) through the upload feature at www.tf3.truefiling.com, to the parties who have registered to receive notifications of service of documents in this case as required by the Court. Upon completion of the transmission of said documents, a confirmation of receive issued to the filing/serving party confirming receipt from info@truefiling.com for TrueFiling.

☒ **(BY MAIL)** by placing the sealed envelope with the postage thereon fully prepaid for collection and mailing at our address shown above, on the parties immediately listed below. I am readily familiar with Leone & Alberts' business practice for collecting and processing correspondence for mailing with the United States Postal Service the same day.

CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION 3 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	Appellate Court (Unbound Brief Only Via Mail Only)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 7th day of March, 2022, at Concord, California.

KATHERINE ALEXANDER

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **LOS ANGELES UNIFIED SCHOOL DISTRICT v. S.C. (JANE DOE)**
Case Number: **S269608**
Lower Court Case Number: **B307389**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **sgordon@leonealberts.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	LA Unified Amicus

Service Recipients:

Person Served	Email Address	Type	Date / Time
Calvin House Gutierrez Preciado & House LLP 134902	calvin.house@gphlawyers.com	e-Serve	3/7/2022 3:48:59 PM
Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	3/7/2022 3:48:59 PM
Natalie Weatherford TAYLOR & RING 278522	weatherford@taylorring.com	e-Serve	3/7/2022 3:48:59 PM
Ryan Miller Cummings McClorey Davis Acho & Associates, P.C. 256799	rmiller@cmda-law.com	e-Serve	3/7/2022 3:48:59 PM
Sheeny Bang Esner, Chang & Boyer	sbang@ecbappeal.com	e-Serve	3/7/2022 3:48:59 PM
Kelsey Wong Esner, Chang & Boyer	kwong@ecbappeal.com	e-Serve	3/7/2022 3:48:59 PM
Claudia Ramirez Gutierrez, Preciado & House, LLP	claudia.ramirez@gphlawyers.com	e-Serve	3/7/2022 3:48:59 PM
Kathleen Becket Esner, Chang & Boyer 334091	kbecket@ecbappeal.com	e-Serve	3/7/2022 3:48:59 PM
Holly Boyer Esner Chang & Boyer 221788	hboyer@ecbappeal.com	e-Serve	3/7/2022 3:48:59 PM
Frederick R Bennett Court Counsel, Los Angeles Superior Court 47455	fbennett@lacourt.org	e-Serve	3/7/2022 3:48:59 PM
David Ring Taylor & Ring, LLP	ring@taylorring.com	e-Serve	3/7/2022 3:48:59 PM

Kevin Nguyen Esner, Chang & Boyer LLP 322665	knguyen@ecbappeal.com	e-Serve	3/7/2022 3:48:59 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

3/7/2022

Date

/s/Katherine Alexander

Signature

Gordon, Seth (262653)

Last Name, First Name (PNum)

Leone & Alberts APC

Law Firm