

Case No. S269608

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant/Petitioner,

v.

SUPERIOR COURT,

Respondent,

JANE DOE,

Plaintiff/Real Party in Interest.

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After a Decision of the Court of Appeal, Second Appellate District,  
Division Three, Case No. B307389, on Petition for Writ of Mandate to the  
Superior Court of California, County of Los Angeles,  
Case No. BC659059, Hon. Shirley K. Watkins, Judge

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
IN SUPPORT OF LAUSD; AMICUS CURIAE BRIEF**

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## **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

This is the initial certificate of interested entities or persons submitted on behalf of amici curiae for petitioner, Association of Schools for Cooperative Insurance Programs, Public Risk Innovation, Solutions, and Management, and California Association of Joint Powers Authorities, in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rule of Court 8.208.

Dated: March 9, 2022

By: /s/ Daniel S. Modafferi

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS ..... 2

TABLE OF AUTHORITIES..... 4

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN  
SUPPORT OF LAUSD ..... 5

STATEMENT OF INTEREST ..... 5

AMICUS CURIAE BRIEF ..... 7

I. The Treble Damages Remedy under Code of Civil Procedure,  
section 340.1, Bears All of the Hallmarks of Punitive Damages ..... 8

II. The Punitive Impact of Subjecting Public Entities to Liability for  
Treble Damages Would Fall on Taxpayers Statewide, Rather Than on the  
Alleged Tortfeasors, and Thus, the Intended Deterrent Effect Would Be  
Vitiating ..... 11

III. Plaintiff Has Failed to Provide Any Plausible Interpretation of the  
Limiting Clause of Code of Civil Procedure, Section 340.1, Other Than as a  
Limitation on Punitive Damages Awards ..... 14

CONCLUSION ..... 15

CERTIFICATE OF COMPLIANCE ..... 16

PROOF OF SERVICE ..... 17

## TABLE OF AUTHORITIES

### Cases

<i>City of Newport v. Fact Concerts, Inc.</i> (1981) 453 U.S. 247 .....	12, 13
<i>Lane v. Hughes Aircraft Co.</i> (2000) 22 Cal.4th 405 .....	14
<i>McAllister v. South Coast Air Quality Management Dist.</i> (1986) 183 Cal.App.3d 653 .....	8
<i>McGary v. President &amp; Council of the City of Lafayette</i> (1846) 12 Rob. 668 .....	12
<i>Muskopf v. Corning Hospital District</i> (1961) 55 Cal.2d 211 .....	7
<i>Nativi v. Deutsche Bank National Trust Company</i> (2014) 223 Cal.App.4th 261 .....	14
<i>Neal v. Farmers Ins. Exchange</i> (1978) 21 Cal.3d 910 .....	9, 12
<i>Roman Catholic Bishop of Oakland v. Superior Court</i> (2005) 128 Cal.App.4th 1155 .....	7
<i>State Dept. of Corrections v. Workmen’s Comp. App. Bd.</i> (1971) 5 Cal.3d 885 .....	7
<i>Wells v. One2One Learning Foundation</i> (2006) 39 Cal.4th 1164 .....	8, 11
<i>X.M. v. Superior Court</i> (2021) 68 Cal.App.5th 1014 .....	9, 10, 11, 12

### Statutes

42 U.S.C. § 1983 .....	12, 13
Civ. Code, § 3294 .....	passim
Code Civ. Proc., § 340.1 .....	passim
Gov. Code, § 818 .....	passim
Gov. Code, §§ 810-996.6 .....	7

### Other Authorities

Rest., Contracts, § 342 .....	9
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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
IN SUPPORT OF LAUSD**

Association of Schools for Cooperative Insurance Programs (“ASCIP”), Public Risk Innovation, Solutions, and Management (“PRISM”), and California Association of Joint Powers Authorities (“CAJPA”) respectfully request that the attached amicus curiae brief be submitted in support of petitioner Los Angeles Unified School District (“LAUSD”). Counsel is familiar with all of the briefing filed in this action to date. The attached amicus curiae brief addresses the nature of the treble damages remedy under Code of Civil Procedure, section 340.1, and its similarity to the punitive damages remedy under Civil Code, section 3294. The brief further addresses the public policy implications of subjecting public entities to liability for treble damages, the impact of which would fall not only on the defendant public entities, but also all members of the defendant public entities’ risk pools, as well as the taxpayers of all such public entities.

No party to this action has provided support in any form concerning the authorship, production, or filing of the attached amicus curiae brief.

**STATEMENT OF INTEREST**

ASCIP is a non-profit public agency Joint Powers Authority that provides liability, property, workers’ compensation, health benefits coverage, and school construction insurance to public school districts, charter schools, community colleges, and subsidiary JPAs throughout the State of California.

PRISM, formerly known as CSAC Excess Insurance Authority, is one of the largest property, casualty, and employee benefit public entity risk pools in the nation. PRISM members include counties, cities, educational

organizations, special districts, housing authorities, fire districts, and other JPAs located throughout California.

CAJPA is an association of JPAs in California, formed to meet the need for communication and cooperation among the JPAs. It provides leadership, education, advocacy, and assistance to public-sector risk pools to enable them to enhance their effectiveness, and it advocated both in court and in the Legislature on behalf of JPAs. Its amicus advocacy is guided by a Legal Affairs Committee that reviews amicus requests from public entities throughout the state.

The issues in this case present potentially significant liability exposure and litigation expenses for public entities throughout the state. The resolution of these issues will have a direct and profound impact on public entities, individually and collectively, including the amici and their members. This impact affects the allocation of scarce public funds and the management of risk, not only within individual public entities, but also among public entities which have joined joint powers risk pools, such as ASCIP, PRISM, and the other members of CAJPA.

Dated: March 9, 2022

By: /s/ Daniel S. Modafferi

## AMICUS CURIAE BRIEF

In *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, this Court abolished the general rule of governmental immunity. In 1963, the Legislature enacted the comprehensive Government Claims Act (Gov. Code, §§ 810-996.6), abrogating *Muskopf* and eliminating all common law or judicially devised forms of governmental liability. Among other provisions, the Government Claims Act included Government Code, section 818, which immunizes public entities from all damages “imposed *primarily* for the sake of example and by way of punishing the defendant.” (Emphasis added.) The question presented to the Court in this case is whether the treble damages remedy under Code of Civil Procedure, section 340.1, subdivision (b), is “primarily” punitive and therefore barred by Government Code, section 818. ASCIP, PRISM, and CAJPA urge the Court to answer this question in the affirmative.

As detailed herein, the treble damages remedy under Code of Civil Procedure, section 340.1, subdivision (b), requires proof of conduct essentially equivalent to that which would be required to recover punitive damages against an employer defendant under Civil Code, section 3294, subdivision (b). Indeed, “[p]unitive damages are by definition in addition to actual damages and beyond the equivalent of harm done.” (*State Dept. of Corrections v. Workmen’s Comp. App. Bd.* (1971) 5 Cal.3d 885, 891.) “Although punitive damages have the concomitant effect of encouraging aggrieved persons to sue for their compensatory damages, the primary import of punitive damages is to punish and deter.” (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1172.) Because the treble damages remedy has all of the hallmarks of a punitive damages remedy, the Court should hold that it is precluded by Government Code, section 818.

Furthermore, subjecting public entities to liability for treble damages would not advance the intended goals of such remedies, from a public policy perspective. “The Legislature is aware of the stringent revenue, budget, and appropriations limitations affecting all agencies of government – and public school districts in particular. Given these conditions, we cannot lightly presume an intent to force such entities not only to make whole the [injured party], but also to pay huge additional amounts...” (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1195.) 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.” (*Id.* at p. 1196, fn. 20.) “Such a diversion of limited taxpayer funds would interfere significantly with government agencies’ fiscal ability to carry out their public missions.” (*Id.* at p. 1196.)

For all of these reasons, and as further explained below, ASCIP, PRISM, and CAJPA respectfully request that the Court affirm the ruling of the Court of Appeal and hold that public entities may not be subject to liability for treble damages under Code of Civil Procedure, section 340.1.

**I. The Treble Damages Remedy under Code of Civil Procedure, section 340.1, Bears All of the Hallmarks of Punitive Damages**

Government Code, section 818, provides: “Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed *primarily* for the sake of example and by way of punishing the defendant.” (Emphasis added.) Thus, whether statutory sovereign immunity applies to a particular damages provision depends on the provision’s primary purpose. (*McAllister v. South Coast Air Quality Management Dist.* (1986) 183 Cal.App.3d 653, 656.)



“All damages are in some degree punitive and preventive; but they are not so called unless they exceed just compensation measured by the harm suffered.” (Rest., Contracts, § 342, com. A, at p. 561.) “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13.) “The hallmarks of punitive damages are that they require proof of misconduct and are entirely discretionary. In other words, once the fact finder determines punitive damages are authorized, they must then decide not only whether or not to award such damages, but also what amount will be sufficient to punish the defendant and prevent future misconduct.” (*X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1022.) This latter decision entails a weighing of defendant-specific factors, such as their wealth and the reprehensibility of their conduct. (*Ibid.*)

The treble damages provision of Code of Civil Procedure, section 340.1, bears the hallmarks of punitive damages. (*Id.* at p. 1026.) First, the statute authorizes treble damages only upon proof of morally offensive behavior on behalf of the defendant. (*Ibid.*) A plaintiff receives actual (i.e., economic and noneconomic) damages if he or she proves he or she was the victim of childhood sexual assault. (*Ibid.*) But the statute authorizes an award of up to three times the actual damages if the plaintiff can also prove his or her assault was the result of the defendant’s cover up of a previous sexual assault of a child. (*Ibid.*) Second, even if the plaintiff presents the requisite proof, the decision to increase the damage award beyond actual damages lies entirely with the fact finder. (*Ibid.*) And third, if the fact finder does decide to increase the damage award, the amount by which it does so, though capped, is not fixed. (*Ibid.*) As a result, the fact finder is free to increase the damage award up to three times the plaintiff’s actual damages based on factors specific to the defendant. (*Ibid.*) “[T]hese common punitive traits indicate that the primary purpose of section 340.1’s increased damage award

is retribution and deterrence.” (*Ibid.*)

Plaintiff’s operative complaint in this litigation seeks punitive damages against the alleged abuser, Daniel Garcia, under Civil Code, section 3294, subdivision (a), as well as treble damages against LAUSD under Code of Civil Procedure, section 340.1, subdivision (b). In contrast to the punitive damages which may be recoverable against the alleged abuser, however, in order to obtain treble damages against the abuser’s employer for a cover up, a plaintiff must prove conduct essentially equivalent to conduct that would support recovery of a punitive damages award under Civil Code, section 3294, subdivision (b).

A private employer is not liable for punitive damages based on principles of respondeat superior. Instead, in order to recover punitive damages against a private employer, the plaintiff must plead and prove that the employer “had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded...” (Civ. Code, § 3294, subd. (b).) Moreover, “[w]ith respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud or malice must be on the part of an officer, director, or managing agent of the corporation.” (*Ibid.*) Thus, a plaintiff cannot recover punitive damages against a corporate employer based on the “advance knowledge or conscious disregard” of a rank-and-file employee, or even a midlevel supervisor.

Similarly, in order to recover treble damages against the employer of an alleged abuser under Code of Civil Procedure, section 340.1, subdivision (b), the plaintiff must plead and prove that the employer engaged in “a concerted effort to hide evidence relating to childhood sexual assault.” (Code Civ. Proc., § 340.1, subd. (b)(2).) Here, plaintiff alleges LAUSD had advance knowledge of Daniel Garcia’s unfitness based on prior inappropriate conduct

toward female students and that LAUSD consciously disregarded plaintiff's rights and safety by allowing Garcia to continue to serve as a teaching assistant. Therefore, plaintiff's allegations in support of the treble damages remedy are essentially equivalent to the allegations that would be necessary to establish a punitive damages claim under subdivision (b) of section 3294.

As the Court of Appeal correctly concluded below, a plaintiff alleging childhood sexual abuse is entitled to full compensation for all actual damages – economic and noneconomic. However, the treble damages remedy provided under section 340.1 exceeds “just compensation measured by the harm suffered” and is therefore primarily punitive. The Court should affirm the ruling of the Court of Appeal and hold that treble damages are barred by Government Code, section 818.

## **II. The Punitive Impact of Subjecting Public Entities to Liability for Treble Damages Would Fall on Taxpayers Statewide, Rather Than on the Alleged Tortfeasors, and Thus, the Intended Deterrent Effect Would Be Vitiating**

Even if it were not sufficiently clear from the statutory text that the treble damages provision in Code of Civil Procedure, section 340.1, is primarily punitive, policy considerations weigh heavily against imposing liability for treble damages against public entities. In cases where a statute's meaning is uncertain, the Court may consider the consequences of a particular interpretation, including its impact on public policy. (*Wells v. One2One Learning Foundation, supra*, 39 Cal.4th at p. 1190.)

Remedies such as the treble damages provided under Code of Civil Procedure, section 340.1, which reach “beyond the equivalent of harm done,” serve “twin goals,” from a public policy standpoint: retribution and deterrence. (See *X.M. v. Superior Court, supra*, 68 Cal.App.5th at p. 1022.)

Such remedies “punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928, fn. 13.) However, neither of these goals is “actually advanced if the defendant is a public agency and the tort is committed by an individual employee.” (*X.M. v. Superior Court, supra*, 68 Cal.App.5th at p. 1022.)

In *City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, a concert promoter sought compensatory and punitive damages against the City of Newport, Rhode Island, under 42 U.S.C. section 1983, alleging that its rights to free expression and due process were violated when the City revoked its license to present concerts in a public park. The jury awarded compensatory damages of \$72,910 and punitive damages of \$275,000, \$200,000 of which was awarded against the City. The U.S. Supreme Court granted certiorari in order to determine whether public entities could be liable for punitive damages under section 1983.

The Court observed that, prior to the enactment of section 1983, the courts were “virtually unanimous” in denying punitive damages against public entities. (*Id.* at pp. 260-261 (quoting *McGary v. President & Council of the City of Lafayette* (1846) 12 Rob. 668, 677 (punitive damages “cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.”)).) Next, the Court considered whether public policy dictated that public entities should be held liable for punitive damages.

“Punitive damages are by definition not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.” (*Id.* at pp. 266-267 (citations omitted).) “Regarding retribution, it remains true that an award of punitive damages against a municipality

‘punishes’ only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. [Citation.] Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill.” (*Id.* at p. 267.) Based on these considerations, the Court concluded that public entities could not be held liable for punitive damages under section 1983.

In this case, the punitive impact of exposing public entities to liability for treble damages would fall not only on the taxpayers of the individual public entities that are shown to have engaged in cover ups, but on taxpayers statewide. For example, PRISM members include 55 of California’s 58 counties. 48 of those 55 member counties are members of PRISM’s general liability programs. Thus, if one of those 48 counties were subject to a claim for treble damages under section 340.1, the risk of that heightened liability would be placed upon taxpayers in all 48 counties that belong to the risk pool. “Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community’s vindictive sentiments. [Citations.] A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.” (*Id.* (emphasis in original).) Hence, treble damages are not an appropriate remedy against public entity defendants. ASCIP, PRISM, and CAJPA respectfully request that the Court affirm the ruling of the Court of Appeal.

### **III. Plaintiff Has Failed to Provide Any Plausible Interpretation of the Limiting Clause of Code of Civil Procedure, Section 340.1, Other Than as a Limitation on Punitive Damages Awards**

Subdivision (b)(1) of Code of Civil Procedure, section 340.1, provides that a plaintiff “who is sexually assaulted and proves it was as the result of a cover up may recover up to treble damages against a defendant who is found to have covered up the sexual assault of a minor, *unless prohibited by another law.*” “The rules of statutory construction direct us to avoid, if possible, interpretations that render a part of a statute surplusage. Courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous. The well-established principles of statutory construction preclude judicial construction that renders part of the statute meaningless or inoperative.” (*Nativi v. Deutsche Bank National Trust Company* (2014) 223 Cal.App.4th 261, 283-284 (quotations and citations omitted).) Therefore, the limiting clause by which the Legislature provided that treble damages are not available where they are “prohibited by another law” must be interpreted as a substantive – as opposed to merely theoretical – limitation on the remedy. LAUSD argues, based on the Legislative history of the statute, that the limiting clause was intended to refer to statutes, such as Government Code, section 818, that bar or limit punitive damages against certain classes of defendants. Plaintiff has not provided any other plausible interpretation of this clause.

“In more than 30 instances, the Legislature has provided for double or treble damages as a punishment for wrongful acts.” (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 425 (Brown, J., concurring).) The Legislature was no doubt aware that the courts have, in nearly every instance, held that double and treble damage remedies are primarily punitive, and therefore, public entities are not liable for such remedies, pursuant to Government Code,

section 818. Plaintiff has not offered the Court any other explanation for the intended meaning of the limiting clause. Therefore, the logical conclusion is that “unless prohibited by another law” referred to prohibitions on punitive damages, including Government Code, section 818.

## **CONCLUSION**

Remedies which go beyond what is necessary to make the plaintiff whole for his or her actual damages are, by definition, primarily punitive in nature. The Legislature enacted Government Code, section 818, to shield public entities and, by extension, the taxpayers, from having to bear the punitive impacts of such remedies. Because the treble damages provided under Code of Civil Procedure, section 340.1, bear all of the hallmarks of punitive damages, and such damages do not serve the “twin goals” of retribution and deterrence when applied to public entities, ASCIP, PRISM, and CAJPA urge the Court to affirm the ruling of the Court of Appeal, that public entities are not subject to liability for treble damages under section 340.1.

Dated: March 9, 2022

By: /s/ Daniel S. Modafferi

## CERTIFICATE OF COMPLIANCE

Counsel for amici hereby certifies that, pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed amicus curiae brief in support of LAUSD is produced using 13-point Times New Roman type including footnotes and contains approximately 3,057 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 9, 2022

By: /s/ Daniel S. Modafferi



## PROOF OF SERVICE

I, the undersigned, declare: That I am over the age of eighteen years and not a party to the case; I am a resident of, the County of San Diego, California, where the service occurred; my business address is: 5942 Priestly Drive, Suite 100, Carlsbad, California 92008; and my electronic service address is *dmodafferi@meyersfozi.com*.

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(for Hon. Shirley Watkins)

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Dated: March 9, 2022

By: /s/ Daniel S. Modafferi

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**

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3/9/2022

Date

/s/Daniel Modafferi

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