S269608

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Defendant and Petitioner,

v.

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

JANE DOE,
Plaintiff and Real Party in Interest.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 3, CASE NO. B307389
HON. SHIRLEY K. WATKINS, TRIAL JUDGE
LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC659059

REAL PARTY IN INTEREST'S OPPOSITION TO AMICI CURIAE BRIEFS

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INTRODUCTION

Plaintiff submits this combined Answer to the amicus briefs submitted in support of Defendant Los Angeles Unified School District, (the "District") and filed by: 1) Hesperia Unified School District ("Hesperia"); 2) Northern California Regional Liability Excess Fund, Southern California Regional Liability Excess Fund, Statewide Association of Community Colleges, and School Association for Excess Risk (collectively referred to as "ReLiEF"); 3) California State Association of Counties ("CSAC"); and 4) California Association of Joint Powers Authorities, Association of Schools for Cooperative Insurance Programs, and Public Risk Innovation, Solutions, and Management (collectively "JPAs"). Nothing in the amicus briefs submitted shed new light on the issue before this Court. Instead, Amici largely repeat the same flawed arguments advanced by the District.

Despite the fact that the Legislature expressly intended the treble damages provision of Code of Civil Procedure section 340.1(b) to be a tool to breakdown institutional cover-ups of childhood sexual abuse which have plagued this State for far too long, Amici argue that public entities - arguably the largest perpetrators of such cover-ups – are *exempt* from the reach of this statutorily created enhanced damage. According to Amici, because recovery of treble damages would result in damages *beyond actual compensatory damages*, treble damages are punitive damages and thus prohibited by Government Code section 818. But treble damages are *not* per se punitive damages.

As detailed in the opening and reply briefs on the merits, the treble damages provision under Section 340.1(b) is not designed simply to punish defendants who cover-up childhood sexual abuse but serves a remedial purpose of encouraging and incentivizing victims to come forward, striking at institutional cover-ups and preventing childhood sexual abuse. In

response to the "pervasive problem" of institutional cover-ups of child sexual abuse, spanning "***schools*** to sports leagues" and resulting in "*continuing victimization* and the sexual assault of additional children," the Legislature amended Section 340.1, to include subdivision (b), permitting recovery of up to treble damages where a victim can demonstrate that his or her abuse was the result of a cover-up. (Code Civ. Proc. § 340.1(b); Exh. 5, at 74-75; Exh. 6, at 94, 131, 135, 141.) To permit local public entities such as school districts to escape the purview of the very tool enacted by the Legislature to address the pervasive problem of institutional cover-ups makes no sense. This is not what the Legislature intended. "In construing a statute, we consider "the object to be achieved and the evil to be prevented by the legislation." (*Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 675.)

Amici fail to ever meaningfully consider the very intent and purpose of the treble damages provision and the societal problem the Legislature sought to address. Shockingly, Amici Hesperia seemingly mocks the Legislature's efforts and argues "the Legislature's preoccupation with forestalling instances of sexual abuse of minors" – i.e. the Legislature's efforts to combat the pervasive problem of institutional cover-ups – does not displace "economic concerns as it relates to public entities to a secondary posture." (Hesperia at 10; see also 37 ["The Legislature has expressed a preoccupation with ensuring that taxpayers do not foot the bill for wayward employees at their public entities, and that funds designed for specificized purposes should find their way to their targets [i.e. the victims of sexual abuse]."") It continues: "if public entities are drained of resources that they require to function, aspiring plaintiffs would find no forum within which to initiate litigation." (Id.) The argument is outrageous.

Sexual abuse of children caused by institutional cover-ups of prior abuse is not a topic de jour. It is an epidemic plaguing this country.[1] "Childhood sexual abuse continues to ruin children's lives and continues to shock the nation because, unfortunately, perpetrators continue to abuse, often with impunity, and *sometimes with the help of third parties who either choose not to get involved or actively cover-up the abuse*." (Exh. 5, at 74; Exh. 6, at 93-94, 130, 134, 138 (emphasis added). It is through the treble damages provision that the Legislature has sought to address this specific harm and prevent it from perpetuating cycles of sexual abuse in the future.

While Amici argue that their interpretation best harmonizes the statutes at issue, they ignore that under their construction public entities that engage in the precise conduct the Legislature has concluded that without the force of treble damages, such cover-ups will continue unabated, exposing future children to the self-perpetuating cycle of sexual abuse. The fact that these public entities may escape the statutory damages designed to combat such abhorrent conduct *but* private entities cannot, reveals an inequity in application of the law that the Legislature has repeatedly fought against in childhood sexual abuse actions.

[1] And students do not "aspire" to be victims of sexual abuse and thereafter plaintiffs in civil actions. Nor are victims grateful that the school had not previously gone bankrupt so as to remain standing to then cover-up sex abuse, causing the plaintiff to be abused, and thereafter exist as a defendant in the action. Such arguments are not only offensive, but tone-deaf to the realities of childhood sexual abuse.

ARGUMENT

I.

THE STATUTORY CONSTRUCTION ANALYSIS OFFERED BY AMICI REFLECTS THE SAME FLAWED ANALYSIS ARGUED BY THE DISTRICT

As has been held by this Court: "Our goal is to *determine the Legislature's intent* in enacting the statute '"***so that we may adopt the construction that best effectuates the purpose of the law***."' [Citation] In doing so, we look first to the statutory language, which generally is '"the most reliable indicator of legislative intent."' [Citation]." (*Kibler v. N. Inyo Cty. Loc. Hosp. Dist.* (2006) 39 Cal.4th 192, 199.) "'The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' [Citation.] If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.' [Citation.] But if the statutory language may reasonably be given more than one interpretation, '"*courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute*."'" (*People v. King* (2006) 38 Cal.4th 617, 622.)

Treble damages are *not* punitive damages. Section 340.1(b) does not expressly provide for punitive damages. (See Code Civ. Proc. § 340.1(b).) The plain language of the statute nowhere references the phrase "punitive damages" nor Civil Code section 3924.[2] Further, Government Code

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[2] Notably, the Legislature has used the term "punitive damages" and/or "exemplary damages" in other parts of the same statutory scheme as Section 340.1. (See e.g. Code Civil Proc. §§ 425.15 [Actions against religious corporations or religious corporation soles; claims for punitive or exemplary damages; amended pleadings; discovery]; 425.13 [Negligence actions against health care providers; claims for punitive damages; amended pleadings]; 425.115 [Punitive damages; service of statement; form]; 377.42 [Damages recoverable].) For example, in Section 377.42, the Legislature specifically stated: "In an action or proceeding against a

section 818 is not mentioned *anywhere* in the statute. Nor is there any provision in the statute prohibiting recovery of treble damages against public entity defendants. The statutory language is therefore straightforward. Section 340.1, subsection (b), permits recovery of *treble damages* – not punitive damages.

As conceded by Amici, "[s]tatutes are crafted with great precision and deliberation." (Hesperia 32.) "If the Legislature intended to make the application of treble damages absolute in every circumstance, it was certainly within the ambit of its powers to do so." (Hesperia 9.) Through the unanimous passage of AB 218 and the provision permitting treble damages upon a showing that the abuse was caused by a cover-up of prior sexual abuse, that is precisely what the Legislature did.

According to Amici CSAC, the fact that the Legislature did not specifically include public entities as falling within the treble damages provision requires a finding the provision does not apply to public entities. (CSAC at 15.) CSAC goes so far as to cite *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201 as support for its statutory construction analysis excluding public entities from the reach of treble damages. (CSAC at 14-15.) Apparently lost on CSAC is that it was precisely because of the result in *Shirk*, where a victim of sexual abuse as a child was precluded from bringing a civil action against the public entity school district defendant because she had not first filed a government tort claim within six

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decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest, on a cause of action against the decedent, all damages are recoverable that might have been recovered against the decedent had the decedent lived *except damages recoverable under Section 3294 of the Civil Code or other punitive or exemplary damages*." (Civ. Proc. Code § 377.42.) No such similar language is found in Section 340.1 either with respect to the nature of treble damages nor its application against public entity defendants.

months of the accrual of her cause of action, that the Legislature further amended the statutes at issue to clarify its original intention to treat public and private entities the same in actions under Section 340.1 for childhood sexual abuse. In direct response to *Shirk*, the Legislature enacted Government Code section 905, subdivision (m), which eliminated the claim presentation requirement for claims brought pursuant to Section 340.1. (*A.M. v. Ventura Unified Sch. Dist.* (2016) 3 Cal.App.5th 1252, 1258, citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 640 (2007–2008 Reg. Sess.) as amended June 8, 2008, p. 3 ["'This bill is intended to address the *Shirk* decision by expressly providing that childhood sexual abuse actions against public entities are exempted from government tort claims requirements and the six-month notice requirement'"].)

Since the decision in *Shirk*, the Legislature has repeatedly sought to clarify and confirm its intention to afford *all victims* of childhood sexual abuse the same extended period of time to discover their actions and avoid unjust results for those victims with claims against public entities. This legislative intent is the common thread running through nearly every amendment to Code of Civil Procedure section 340.1, including AB 218. (Exh. 6, at 94, 131, 135, 140-141, 146.)

Furthermore, unlike in *Shirk* where the plain language of the revival provision in the previous version of Section 340.1 concerned only those actions previously barred by the statute of limitations (and not those barred by the failure to bring a tort claim), the plain language of the treble damages provision here applies to "*any party*" against whom an action may be brought under Section 340.1, subdivision (a). (See *Shirk*, 42 Cal.4th at p. 211 [the plain language of the prior version of Section 340.1(c) "expressly limited revival of childhood sexual abuse causes of action to those barred '*solely*' by expiration of the applicable statute of limitations."]; see RBM at 18-19.) Thus, here, by referencing an action described in (a),

which absolutely includes public entity defendants, the treble damages provision *necessarily* includes public entity defendants.

As recognized by this Court in *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, in enacting the amendments to ensure that victims of sexual abuse with actions against public entities suffered are *not treated differently* from those with actions against private entities, the Legislature carefully balanced the ***competing policy interests*** underlying the Government Claims Act against the harms suffered by child victims of sexual abuse. (*See Rubenstein, supra,* 3 Cal.5th at pp. 914-915.) The Legislature specifically recognized "the dilemma faced by families of children abused by public school officials" and concluded that **the policy interests of protecting these victims *outweighs* the policies motivating the imposition of a claims presentation requirement**. (*S.M. v. Los Angeles Unified School Dist.* (2010) 184 Cal.App.4th 712, 721, fn. 6; see also *Rubenstein, supra,* 3 Cal.5th 903 at p. 914; *J.P. v. Carlsbad Unified Sch. Dist.* (2015) 232 Cal.App.4th 323, 333; *A.M., supra,* 3 Cal.App.5th at p. 1258.)

The same can be seen here. By permitting recovery of treble damages upon a showing of a cover-up as defined in the statute, and not "punitive damages," the plain language of the provision embraces both private and public defendants. Again, treble damages are *not* punitive damages. While aware that punitive damages are already available for victims of sexual abuse against non-public entities in childhood sexual abuse actions where the requisite malice has been shown, the Legislature chose to authorize an award of *treble damages* – a category of damages distinct from punitive damages – upon a showing that the abuse was caused by a statutorily defined cover-up. Such an award of heightened damages reflects the Legislature's grave concern for the welfare of children abused as a result of institutional cover-ups, while also preserving the Government Code's ban on punitive damages against public entities. It makes no sense

that the very tool designed by the Legislature to address the problem of institutions covering-up childhood sexual abuse would not apply to the largest institution charged with the protection and care of children.

Indeed, it is ironic that nearly all of Amici advocate a statutory construction analysis that highlights the Legislature's intent in protecting public entities from punitive damages (see ReLiEF at 4; CSAC at 6, 12-13; JPAs at 8), but yet *ignores* the Legislature's specific intent in creating the treble damages provision to combat the societal issue of institutions covering-up childhood sexual abuse. The intention of the Legislature cannot be so easily obviated.

A. Treble Damages are Not Punitive Damages.

According to Amici, treble damages are *punitive damages*. (Hesperia at 22-23; ReLiEF at 17; JPAs at 7.) However, and as detailed in the opening and reply briefs, there is no blanket rule that treble damages are always solely punitive and thus "punitive damages" so as to place them within the ambit of Government Code section 818 as a matter of law. While treble damages may have a punitive aspect, they are not *per se* punitive damages. (See *Molzof v. United States* (1992) 502 U.S. 301, 301; *PacifiCare Health Sys., Inc. v. Book* (2003) 538 U.S. 401, 405–07 ["Our cases have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards;" noting that treble damages in RICO is "remedial in nature"]; *Cook Cty., Ill. v. U.S. ex rel. Chandler* (2003) 538 U.S. 119, 130 ["While *the tipping point between payback and punishment defies general formulation*, being dependent on the workings of a particular statute and the course of particular litigation, the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive."]; *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597 [San Francisco municipal ordinance that trebled actual damages was not entirely punitive

but served other important purpose of encouraging access to the courts; "while both exemplary damages and statutory damages serve to motivate compliance with the law and punish wrongdoers, they are distinct legal concepts" and as such not all civil penalties are solely punitive]; *Kelly v. Yee* (1989) 213 Cal.App.3d 336, 342 [same].)

As recognized by the United States Supreme Court, damages that multiply actual harm "may be enacted to serve *remedial* rather than punitive purposes, such as ensuring full compensation or encouraging private enforcement of the law." (*Agency Holding Corp. v. Malley–Duff & Assocs., Inc.* (1987) 483 U.S. 143, 151 (emphasis added); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 635–636 ["Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of 'private attorneys general' on a ***serious national problem for which public prosecutorial resources are deemed inadequate***; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the ***carrot of treble damages***. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury in his business or property by reason of a violation."].)

As detailed below, an award of treble damages serves the remedial purpose of *encouraging victims to come forward to end the pattern of abuse*, thereby protecting other children in the community from future abuse. The societal problem of institutions covering-up instances of childhood sexual abuse and thus exposing more children to such abuse is the very evil sought to be addressed through the treble damages provision. As noted by the author of AB 218, we need children to come ***"to protect the community from future abuse***.'" (RJN at exhibit 3.) (Id. (emphasis added).) It is this public policy objective to encourage child victims to

come forward so as to dismantle systemic institutional cover-ups to protect future children from harm that lies at the heart of the treble damages provision.

Selectively plucking passages that refer to treble damages as "punitive in nature," Amici argue that treble damages are punitive damages. (Hesperia at 23; ReLiEF at 20) Hesperia cites *Imperial Merch. Servs., Inc. v. Hunt* (2009) 47 Cal.4th 381 as holding that "'treble damages are punitive in nature.'" (Hesperia at 23.) However, upon examination, the passage quoted served only to support the rationale that treble damages, just as punitive damages, "inure only to the person damaged." (*Imperial Merch.*, at p. 394.) Besides being dicta, the passage does not state that all treble damages *are* punitive damages.

Missing from the analysis of Amici is the fact that a category of damages can have a punitive aspect, but that does not mean the damages *are* punitive damages. Statutory penalties, as well as damage enhancements, have long been recognized as viable against public entities. (See *Los Angeles County Metro., supra,* 123 Cal.App.4th at p. 271-272 ["Most civil penalties are necessarily punitive to some extent in that they aim to deter misconduct and may lead to recoveries *in excess of an otherwise available measure of compensation*."]; *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597 [San Francisco municipal ordinance that trebled actual damages was not entirely punitive but served other important purpose of encouraging access to the courts; "while both exemplary damages and statutory damages serve to motivate compliance with the law and punish wrongdoers, they are distinct legal concepts" and **as such not all civil penalties are solely punitive**]; *Kelly v. Yee* (1989) 213 Cal.App.3d 336, 341-342 [same].) Amici Herperia appears to agree. "There is no statute shielding public entities from statutory penalties, after all what the Legislature giveth, it might yet choose to take away." (Hesperia at 11.)

Thus, a victim who has suffered injury at the hands of a public entity may absolutely recover a category of damages that is beyond actual damages, *but not* punitive damages. And while a statutory remedy may have a punitive aspect, it may also serve remedial non-punitive objectives thereby taking it out of the narrow immunity conferred by Government Code section 818. To determine whether a category of damages are *solely punitive* and thus "punitive damages" requires an analysis of whether the remedy is designed to and/or achieves serve some non-punitive objective. This is precisely the analysis detailed by the U.S. Supreme Court in *Molzof, PacifiCare Health Sys., Inc.* and *Agency Holding Corp.*

Neither Amici, nor the District, have cited any authority stating that treble damages are in fact *punitive damages*. Thus, at best, the issue of whether treble damages as provided for in Section 340.1(b) are punitive damages and thus barred by Government Code section 818 is *ambiguous* and requires examination of the history and background of the statutory provision so as to "choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences. [Citation.]" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543.) Employing such an examination reveals the non-punitive aspects of the treble damages provision and the Legislature's intention that the remedy be available in all actions of a cover-up. Indeed, to shield public entities from the reach of treble damages would result in the Legislature's only response to the problem before it practically meaningless.

B. Contrary to the Arguments of Amici, Neither the Plain Language Nor the Legislative History of Section 340.1(b) Reflect an Intention to Exclude Public Entities From the Reach of Treble Damages.

According to Amici, the addition of the phrase "unless prohibited by another law" following opposition from several education agencies on August 13, 2019 is "strong" evidence that the Legislature intended treble damages to be akin to punitive damages and thus barred by Government Code Section 818. (Hesperia at 31; ReLiEF at 26-27; JPAs at 14-15.) The argument is unconvincing.

First, and as highlighted in the reply brief on the merits (see RBM at 21) and ignored by Amici, the opposition letters cited requested that the statute of limitation be shorter than what was proposed and that the revival period and provision for treble damages be eliminated *completely*. (See Exh. 6, at 94-95, 131, 135, 147.) Nothing in the opposition requested an amendment specifically excluding public entities from the reach of treble damages. (*Id*.; see also 185.)

Tellingly, these same public entities *continued to oppose* the treble damages provision *after* the phrase "unless prohibited by another law" was added to the statute. (Exh. 6, at 94-95.) As noted in a letter filed on September 4, 2019, *after* the August 30, 2019 amendment to include the phrase "unless prohibited by another law" was added to the treble damages provision, many of the same public entity groups that had opposed the bill from its inception urged the Senate not to pass the bill stating that it exposed public entities to "awards that now include triple damages for 'cover ups.'" (RJN at exhibit 1.)

Nothing in the legislative history cited by Amici or the District reveals that the addition of the phrase "unless prohibited by another law" was intended to reference Government Code section 818. Indeed, Amici's

criticism that Plaintiff fails to offer any interpretation of the limiting phrase as referring to any provision *other than* Government Code section 818 (see JPAs at 14) showcases the weakness of the position. If the only provision that would prohibit treble damages is Government Code section 818, and indeed the Legislature intended to use this limiting phrase to insulate public entity defendants from treble damages, then why didn't the Legislature amend to exclude public entities or simply state "except as provided in Government Code Section 818?" (See e.g. Gov. Code § 66641.5(c) [in addition to civil penalties against any person or entity who violates the bay conservation and development law, whenever a person or entity has intentionally and knowingly violated the law, the statute permits recovery of exemplary damages "[*e*]*xcept as provided in Section 818*."]; see also *State Dep't of Corrections v. WCAB* (1971) 5 Cal.3d 885, 886-891 [this Court distinguished *DuBois* noting that there, a specific statute existed providing that the state not be liable for penalties].)

And why is there no mention in *any* legislative analyses as to Government Code section 818 or even to the notion of immunizing public entity defendants from the reach of treble damages? Not only is there no reference to Government Code section 818 in the plain language of the statute or its legislative history, but there is also no mention of the treble damages provision as being akin to punitive damages in the legislative history of AB 218. None.

Thus, while Amici ReLiEF is correct that "**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***," its position that an amendment to include the phrase "unless prohibited by another law" during the legislative progression of AB 218 is *evidence* that the Legislature intended treble damages to be akin to punitive damages and thus barred by Government Code Section 818 is

simply too far a stretch to garner support. AB 218 was amended twice during its progression through the Legislature (see Exh. 3, at 43-44), and the fact among the amendments made on August 30, 2019, the Author added the limiting phrase at issue in no way demonstrates that the Legislature *intended* to immunize public entities from the reach of treble damages.

Further misplaced is the argument that the treble damages provision here bears the "hallmarks of punitive damages," and thus warrants a finding that the Legislature intended treble damages to be akin to punitive damages and thus barred by Section 818. (JPAs at 7 ["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."].)

While treble damages under Section 340.1(b) may share some traits as those common in punitive damages, there are several traits which it does not share with punitive damages. Indeed, the very same distinctions from traditional punitive damages recognized in *Los Angeles County Metropolitan Transp. Authority v. Superior Court* (2004) 123 Cal.App.4th 261 exist here:

> Civil penalties are awarded upon a showing of liability by a preponderance of the evidence, whereas punitive damages require "*clear and convincing evidence*" of fraud oppression or malice. [Citation] We further observed that where, as here, the amount of the civil penalty is set, the problem of *limitless jury discretion* is eliminated. [Citation] Finally, we held that whereas an award of punitive damages cannot be sustained absent meaningful evidence of the *defendant's financial condition* [Citation], such evidence is not required for the class of civil penalties at issue in that case. [Citation]

(*Los Angeles County Metro,* supra, 123 Cal.App.4th at p. 276 (emphasis added).) The treble damages provision here does not consider the financial wealth of the defendant, does not impose a clear and convincing standard

and is not "limitless" as it permits a cap of three times the amount of actual damages proved. (See *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 34 [penalty permitted a "maximum $6,000 per day liability may be imposed for each day the oil referred to in the statute remains in the state waters …"]; *Kizer v. County of San Mateo* (1991) 53 Cal.3d 142 [long-term health care penalties at issue required clear and convincing standard and included penalties for "not less than $5,000 and not more than $25,000," "not less than $100 and not more than $1,000, "repeated violations may result in a trebling of the penalty assessed" and damages recoverable in civil action "not to exceed maximum amount of civil penalties"].)

Indeed, if the analysis of whether an award of damages beyond compensatory damages was in fact punitive and thus embraced by Section 818 turned on a comparison of the "hallmarks" to punitive damages – then there would likely have been a much different result in *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049.

Marron involved recovery of enhanced civil penalties for dependent elder abuse alleged against the Regents of the University of California for acts committed by doctors and staff of the UCSD Medical Center. The statute at issue provided that if it was proven by *clear and convincing evidence,* that a defendant is liable for physical or financial abuse and the defendant is guilty of *recklessness, oppression, fraud or malice* in the commission of the abuse, then the plaintiff can recover for the decedent's pain and suffering damages prior to death. While the Court refused to apply Section 818 as a bar to such damages, finding them to be compensatory in nature, the similarities between the heightened damages in *Marron* and the "hallmarks" of a claim for punitive damages are inescapable. (See *Marron,* at pp. 1060-1064; see also *State Dep't of Corrections, supra,* 5 Cal.3d at pp. 86-891 [primary purpose of statutory

penalty predicated on employer's willful misconduct likewise appears to be the primary purpose of the enhanced damages]; *Los Angeles County Metropolitan Transp. Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 270-271.)

Lastly, to the extent JPAs argue that the contours of a claim for a cover-up under the treble damages provision are similar in kind to a claim for punitive damages, and thus, according to JPAs, the treble damages provision here was intended to act as punitive damages, just the opposite is true. (JPA at 10-11.) If a victim can already recover punitive damages against an employer for covering up misconduct by an unfit employee, then there would be no need for the treble damages provision at all. The very fact that the Legislature created the treble damages provision here evidences its intent to create something different then punitive damages – and indeed applicable to government entity defendants given that they are arguably the largest perpetrators of such institutional abuse.

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In enacting the treble damages provision, the Legislature unequivocally sought to address the troubling reality that institutions charged with the care of children have all too often covered-up instances of sexual abuse to protect their own reputation and survival. Contrary to the statutory interpretation offered by Amici, this intention is not fulfilled where a public entity is immunized from treble damages. Neither the plain language of Section 340.1(b), nor the legislative history of AB 218, supports a finding that public entities are exempt from the reach of treble damages.

II.

AMICI'S ARGUMENTS OF PUBLIC POLICY ARE MISPLACED AND FAIL TO APPRECIATE THE LEGISLATURE'S SPECIFIC INTENTION USING THE TREBLE DAMAGES PROVISION TO COMBAT INSTITUTIONAL COVER-UPS

Many of the Amici briefs rely on the argument that imposing up to treble damages against a public entity will have a "significant and catastrophic impact on the public school system." (ReLiEF at 40.) According to Amici, "public entities whose acts or omissions are alleged to have caused harm will incur costs that must ultimately be borne by the taxpayers"… and "[t]rebling the damages…would cripple the budgets of public entities and divert much needed funds away from their intended use." (See CSAC 15; Hesperia 9.)

Amici overlook the fact, however, that these same policy arguments were considered and rejected by the Legislature when AB 218 passed with *unanimous* bipartisan support. Carefully balancing concerns from public entity defendants arguing the treble damages provision should be removed since the costs associated with such clams could "be astronomical and could prevent the impacted entities from being able to support their main work," the Legislature explained: "Obviously, *the flip side* of the burden of the cost of these claims on schools, churches, and athletic programs that protected sexual abusers of children *is the lifetime damage done to those children*." (Ex. 6 at 146-148.)

The very numbers cited by ReLiEF, the $165 million incurred in liability from sexual abuse claims since 2011, is startling and only serves to underscore the epidemic of childhood sexual abuse in our public schools. (See ReLiEF at 2-3, 20.) While ReLiEF sets forth a parade of horribles where the $165 million would be "increased to $495 million" if victims can recover treble damages upon proof of a cover-up, such an argument presupposes that *every case of child sexual abuse resolved by the JPAs*

involved a cover-up of prior sexual abuse thereby causing the victim's abuse. (*Id.*) The notion that the "more than 400 educational agencies in California, representing in excess of two million students across the state," served by these JPAs have knowingly exposed children to sexual abuse is alarming and frankly, terrifying. Children, compelled to attend school from the ages of five to eighteen, should not bear the brunt of these failures by public employees. These children, and their families, are and will be taxpayers of California.

Just as in *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, the statutory scheme at issue here concerns a grave societal problem and is preventive in nature. (See *Kizer*, supra, 53 Cal.3d at pp. 150-151 [in light of an unquestionably important legislative purpose, there was no reason to exempt state licensed health-care facility from liability for penalties even though taxpayer would bear such a burden].)[3] The remedy of treble damages will not only encourage victims to come forward to dismantle institutional cover-ups but will hopefully prevent institutions from further covering-up sex abuse thereby preventing further children from being abused. To insulate public entities from the reach of treble damages would frustrate the entire purpose of the provision – which is designed not simply to punish bad conduct but to protect *our most vulnerable* from sexual abuse. Such a finding would essentially conclude that the public policy of protecting taxpayers from enhanced damages *outweighs* the public policy of protecting children from institutional sexual abuse caused by cover-ups.

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[3] Plaintiffs note, however, much of the alleged taxpayer burden is in fact paid by district insurance policies. While a public entity may pay for the policy, as the *Helfend* Court noted, premiums are the normal cost of maintain an enterprise, and an entity and its insurer are in position to spread the risk of loss and take precautionary measures to prevent injuries. (*Helfend v. S. Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 9, fn. 9.)

The Legislature's objectives could not be more compelling, as childhood sexual abuse within school settings has reached endemic proportions. "An estimated 10% of K–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.[4] Overall, 1 in 5 girls and 1 in 20 boys are victims of child sexual abuse.[5] But "[t]he prevalence of child sexual abuse is difficult to determine because it is often not reported."[6]

Amici fail to appreciate *the need* for victims to come forward to expose perpetrators of sexual abuse and dismantle institutional cover-ups. Permitting an award of up to treble damages in those situations where a defendant has covered-up evidence of sexual abuse not only seeks to deter such abhorrent conduct, but also encourages victims to come forward and report instances of abuse and otherwise incentivizes and compensates victims of sexual abuse for the pain, hardship and grief they suffer in initiating a lawsuit. (See Exh. 6, at 94, 131, 135, 141-142, 148.)

An incentive such as treble damages is essential when considering the tremendous emotional, practical and financial challenges confronting victims who come forward. These victims are often compromised by depression, insecurity and self-doubt resulting from being a childhood victim—most especially when the perpetrator was a teacher— and quite

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[4] Billie-Jo Grant, Ph.D; Stephanie B. Wilkerson, Ph.D.; Anne Crosby, M.S.W.; Molly Henschel, Ph.D., A Case Study of K–12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation, Department of Justice, Office of Justice Programs (2017) p. 1 (hereafter "Grant 2017") available at < https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf > (as of March 28, 2022).

[5] National Center for Victims of Crime, Child Sexual Abuse Statistics available at < https://victimsofcrime.org/child-sexual-abuse-statistics/> (as of March 28, 2022).

[6] Ibid.

frequently a very popular one at that.[7] "While studies of the effects of school employee sexual misconduct on victims are limited, we do know that victims of sexual abuse by any adult suffer serious psychological, physical, academic, and behavioral consequences that can last a lifetime." (Grant 2017, p. 2.) Victims of childhood sexual abuse are also more likely to be low income and thus may have fewer resources to initiate a claim. (Id. at p. 2.) Further still, some victims who have been harassed but not assaulted may feel that it is not worth coming forward. The treble damages provision may encourage such victims to bravely step forward and dismantle any existing intuitional cover-ups of sex abuse.

It is clear that eradicating childhood sexual abuse requires the active participation of victims willing to come forward to reveal the abuse otherwise shielded by a cover up. Incentivizing them to do so despite the enormous obstacles they—as children or adults—will confront is the only way to uncover the sad truths they have endured, and by doing so ensure systemic changes will protect future generations of students. This was precisely the objective desired by the Legislature. (Exh. 5, at 74-75; Exh. 6, at 94, 131, 135, 141.)

[7] "Contrary to common conception, school employee sexual misconduct offenders are typically popular and they often have been recognized for excellence. Offenders include all types of school employees, such as teachers, school psychologists, coaches, principals, and superintendents." (Grant 2017, supra p. 2.)

IV.

THE SUPPOSED CONSTITUTIONAL ISSUES RAISED ARE NOT ONLY IMPROPER AS FALLING OUTSIDE THE ISSUE ON REVIEW AND INDEED THE COURT OF APPEAL'S DECISION BELOW, BUT ALSO MERITLESS

Finally, ReLiEF argues that reading the treble damages provision to retroactively apply to public entities would raise constitutional concerns. (ReLiEF at 28-40.) Specifically, ReLiEF contends that there is no express statement that the treble damages provision is retroactive (an argument that appears to be grounded in principles of statutory interpretation rather than constitutional ones) and that the Legislature's decision to impose treble damages on public school districts was the equivalent of an unconstitutional "gift" of public funds. Besides being meritless, the argument is procedurally improper.

This Court granted review on the following issue: "Does Government Code section 818, which bars punitive damages against government defendants, preclude recovery under Code of Civil Procedure section 340.1, subdivision (b), which permits an award of up to treble damages after a child is sexually abused as a result of a cover up?" This Court did not grant review on retroactivity or constitutional issues. The court of appeal did not address these issues in its opinion. And the District likewise never argued these issues below nor on appeal. The arguments therefore should be not be considered. (*Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County* (2020) 9 Cal.5th 279, 334, fn. 25 [declining to address issues not addressed by the court of appeal, not raised in the petition, and not raised in the answer].) In any event, ReLiEF's arguments are unavailing.

ReLiEF first argues that the treble damages provision is not retroactive and thus does not apply to the conduct alleged against the District here. (ReLiEF at 28-33.) Setting aside that this is a statutory rather

than constitutional argument,[8] the plain language of the statute and the Legislative history make clear that the amendments to Section 340.1, including the treble damages provision, are retroactive. (See Code Civ. Proc. § 340.1(b), (q), & (r).)

Specifically, subsection (q) revives certain claims made actionable in subsection (a) (1) - (3). Subsection (b)(1), meanwhile, provides: "In an action described in subdivision (a), a person 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." (Code Civ. Proc. § 340.1(b).) Thus, subsection (b) refers back to subsection (a). As such, any claim under subsection (a) that is made viable through the revival provision in subsection (q) is necessarily encompassed in subsection (b). Likewise, Subsection (r) makes retroactive and/or revives all claims for damages under Subsection (a), which pursuant to the language of subsection (b), includes claims for treble damages.

The legislative history likewise indicates a plain understanding that the entirety of AB 218 be applied to all cases of child sexual assault. As reflected in the Assembly Commission on Judiciary, Analysis of AB 218, numerous public entity groups, insurance associations and joint powers associations oppose the bill requesting to eliminate the treble damages provision. (Exh., 6, at 147-148.) The report notes: "The Independent

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[8] Plaintiffs note that to the extent ReLiEF is suggesting that retroactive application of the treble damages provision would violate the District's due process rights, the District as a public entity cannot raise such a claim. (See, e.g., *Star-Kist Foods, Inc. v. County of Los Angeles* (1986.) 42 Cal.3d 1, 5-6 [subordinate political entities, as "creatures" of the state, may not challenge state action as violating the entities' rights under the Constitution]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296–297 [county had no standing to challenge law under either state or federal due process clause].)

Insurance Agents and Brokers of California raise particular objection to the application of treble damages retroactively, when it is too late to 'deter bad conduct' and will 'merely [] line the pockets of the trial bar.'" (Exh., 6, at 147-148.)

The Legislative history does not reflect any proposed amendment in response to this objection to limit the retroactivity of the treble damages and nowhere did the Legislature dispute the notion that the treble damages could be applied retroactively. Instead, the Legislative history essentially indicates that the financial impact of the retroactivity was justified since "the flip side" to the financial burden to schools, churches, etc., is the lifetime of damage done to children. (Id.) In this regard, the Legislative history confirms a retroactive intent since the retroactivity was justified by the harm that sexual assaults cause, and the importance of a deterrent effect on the cover up of culpable behavior leading to sexual assault. "This reform is clearly 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 over the victims." (Exh. 6, at 94.)

Thus, contrary to ReLiEF's contentions, the plain language of Section 340.1 and AB 218's legislative history do reveal that the treble damages provision was intended to be applied retroactively.

ReLiEF's second argument, relying on Section 6 of Article XVI of the California Constitution, which prohibits the Legislature from making a gift or authorizing the making of a gift of any public money or thing of value to any individual without a legal right, likewise fails. (ReLiEF at 34-40.) ReLiEF reasons that because Plaintiffs could not have sought treble damages against the District at the time of Garcia's conduct in 2014 and 2015, the treble damages provision violates Section 6 by now permitting

such an award. (ReLiEF at 39.) But ReLiEF's logic, any time that the Legislature enacts a statutory cause of action or a remedy, the Legislature bestows a gift upon the potential claimant; thus, making any such relief a violation of the California Constitution. This cannot be so.

As ReLiEF recognizes, a gift is voluntary transfer of personal property without consideration. (ReLiEF at 36-37.) Were the treble damages provisions a gift, Plaintiffs would be entitled to recovery merely based on the enactment of AB 218. But that of course is not the case; AB 218 does not create an entitlement to treble damages, but, rather, merely creates an *opportunity* to obtain treble damages. To recover, Plaintiffs still has to prove that their abuse resulted from a cover up. (See *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668; Evid. Code, §§ 500, 520, 521 [Plaintiffs bear the burden of proof].) Thus, if Plaintiffs do recover treble damages, it is only because they have proven to a jury a legally viable right to recovery for harms that they suffered as a result of an institutional cover up, and not because the Legislature has authorized a potentially enforceable right.

The cases on which ReLiEF are readily distinguishable. In each of those cases, the plaintiffs had no cause of action against the public entity during the time of the underlying incident and *at the time the suit was commenced*. Indeed, it is telling that the cases ReLiEF find to be applicable (see ReLiEF at 39) were decided in the late 1800s or early 1900s, i.e. when governmental immunity was virtually absolute and long before sovereign immunity was temporarily abolished in 1961 and before the Legislature responded with the Government Claims Act of 1963 to provide a comprehensive statutory scheme under which plaintiffs can sue public entities. (See *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 803.) Also notable is that in many of the cases cited by ReLiEF, the only authority under which the plaintiffs in those cases could

recover were through legislative acts that directly authorized payments to the *particular* plaintiffs in those cases even though the state was immune to causes of action like negligence or breach of contract. (See e.g. *Bourn v. Hart* (1892) 93 Cal. 321, 326 [authorizing a direct payment to "A.J. Bourn" for the loss of his right arm while discharging his duties as a guard at a state prison]; *Conlin v. Board of Supervisors* (1893) 99 Cal. 17, 19 [authorizing a direct payment specifically to "John J. Conlin" for work done upon the streets pursuant to a contract Conlin had with the city and county of San Francisco].)

By contrast, the Legislature did not simply give money to Plaintiffs. And through statutory enactments such as the Government Claims Act and AB 218, Plaintiffs do have legally viable rights against public entities assuming they can prove their claims. Simply stated, the Legislature is not "appropriating any funds." Instead, it is the judiciary that is validly enforcing legal rights for damages that plaintiffs have asserted and proved against state entities, which in no way violated Section 6.

CONCLUSION

For the foregoing reasons, Government Code section 818 does not apply to immunize public entities the treble damages provision.

Dated: April 15, 2022

TAYLOR & RING, LLP

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Los Angeles Unified School District v. The Superior Court of Los Angeles County

(S269608 | B307389 | BC659059)

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STATE OF CALIFORNIA
Supreme Court of California

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