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Supreme Court of California
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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

REPLY TO LOS ANGELES UNIFIED SCHOOL DISTRICT'S ANSWER TO PETITION FOR REVIEW

TAYLOR & RING, LLP
David M. Ring, SBN 151124
Natalie L. Weatherford, SBN 278522
1230 Rosecrans Avenue, Suite 360
Manhattan Beach, California 90266
Telephone: (310) 209-4100
Email: ring@taylorring.com
weatherford@taylorring.com

ESNER, CHANG & BOYER
Holly N. Boyer, SBN 221788
234 East Colorado Boulevard, Suite 975
Pasadena, California 91101
Telephone: (626) 535-9860
Email: hboyer@ecbappeal.com

ATTORNEYS FOR PLAINTIFF AND REAL PARTY IN INTEREST

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INTRODUCTION

Despite the Legislature's intention to use the newly enacted treble damages provision of Code of Civil Procedure section 340.1(b) as a tool to breakdown institutional cover-ups of childhood sexual abuse plaguing this State for far too long, the Court of Appeal here found that public entities are *exempt* from the reach of this statutorily created enhanced damage. According to the Court, while a private entity may be liable for treble damages where a victim demonstrates that he or she was sexually assaulted as the result of an institutional cover-up, no such damages may be imposed against a public entity. In an effort to minimize the ominous impact of the Court of Appeal's Opinion, the District posits that review by this Court is unnecessary as this case involves a "straightforward" application of Government Code section 818. (Answer at 5.) As now explained, there is nothing "straightforward" about the statutory construction analysis employed by the Court of Appeal.

Public entities who have allowed perpetrators to sexually abuse multiple children by hiding evidence, sweeping allegations of impropriety under the rug, and "passing the trash" (an expression used to describe a school district's reprehensible conduct of transferring an employee with sexual complaints lodged against him or her to another school to avoid exposure and scandal),[1] engage in the precise conduct the Legislature

[1] "In situations where school employees commit sexual misconduct against students, school administrators often handle the matters internally due to fear of lawsuits, notoriety, and embarrassment. [FN] As a result, school administrators allow the perpetrators to leave their employment without restrictions, and the public never learns of the sexual misconduct. [FN] Sexually abusive employees can simply leave quietly and continue their deplorable conduct at other school districts. This practice is known as 'passing the trash.'[FN]" (See Noah Menold, *"Passing the Trash" in Illinois After Doe-3 v. Mclean County Unit District No. 5: A Proposal for Legislation to Prevent School Districts from Handing Off Sexually Abusive*

targeted through the treble damage provision. The fact that these public entities may nevertheless 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. Nowhere in the Legislative history is there even a hint that the Legislature intended to *exclude* public entities from the reach of the treble damages provision. Neither the plain language, nor the legislative history, even mention punitive damages nor Government Code section 818. In the context of childhood sexual abuse, the Legislature has long repudiated the notion that a victim damaged by sexual abuse be *treated differently* simply because the molester worked for a public rather than a private entity – yet that is precisely the result under the Court of Appeal's interpretation.

According to the District, Plaintiff "mischaracterizes" the issue before this Court as "a clash between the policy of compensating and protecting victims of childhood sexual abuse that motivated the enactment of AB 218 and the policy of protecting public entities from punitive damages embodied in Government Code section 818." (Answer at 5.) The District argues that because "[v]ictims of childhood sexual assault may recover full compensation for their damages from culpable public entities," the intent of the Legislature has been fulfilled. (Answer at 13.) Not so.

The issue is not whether the Legislature's intent to broaden the statute of limitations to expand the ability of victims to recover for their injuries has been fulfilled. Indeed, the facts here do not even implicate the extended statute of limitations under AB 218. Rather, the issue here concerns the Legislature's specific intention to respond to the "pervasive

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Employees to Other School Districts, 34 N. Ill. U. L. Rev. 473, 474–75 (2014).) As alleged, this is exactly what happened here leading to the sexual abuse of Plaintiff. (Exh. 1, at 7-8.)

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." (Exh. 5, at 74-75; Exh. 6, at 94, 131, 135, 141.) To address the issue of *institutional cover-ups*, the Legislature amended Section 340.1(b) to include recovery of 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).)

The issue here therefore concerns whether these treble damages may be sought against a public entity that engages in a cover-up.

As detailed in the Petition and ignored in the Answer, the Court of Appeal's opinion finding that treble damages are akin to punitive damages and thus barred by Government Code section 818 rests on the mistaken assumption that the only damages recoverable against a public entity are *compensatory damages*. According to the Court, because recovery of treble damages would result in damages *beyond actual compensatory damages*, treble damages are necessarily punitive in nature. (Slip Opn. 11.) However, 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. Statutory penalties, as well as damage enhancements, have long been recognized as viable against public entities.

Despite the court's sweeping proposition that statutory civil penalties or damage enhancements that result in recovery beyond actual damages are per se punitive damages when alleged against a public entity, nothing in the plain language of the statutes at issue nor this Court's prior interpretations of Section 818 support such a finding. Government Code section 818 *does not* state that a public entity shall be liable only for compensatory damages, but rather states that 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." (Gov. Code, § 818.) Thus, a category of damages that is beyond compensatory, ***but not entirely punitive***, does not fall within the narrow immunity afforded by Section 818.

As outlined in the Petition and below, in passing AB 218 with full bi-partisan support, 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 District's position, this intention is not "fulfilled" simply because a victim can recover compensatory damages against a public entity for the sexual abuse suffered. There is no justification to insulate public entities from the treble damages provision designed by the Legislature to dismantle systemic institutional cover-ups and protect future children from harm. This was *not* what the Legislature intended.

ARGUMENT

I.

THIS CASE PRESENTS AN ISSUE OF ENORMOUS IMPORTANCE; THE DISTRICT CANNOT CREDIBLY ARGUE OTHERWISE

In its Answer to Plaintiff's Petition for Review, the District argues that review is unnecessary as "there have not been any decisions that reached a conclusion contrary to that of the Court of Appeal in this case." (Answer at 6.) But of course, AB 218 was only recently enacted. The fact that there are not currently any conflicting interpretations is not a testament to the correctness of the Opinion below but a mere fact of time. This Court need not wait for conflicting opinions to arise where the issue presented concerns an important question of law. (See Cal. Rules of Court, rule 8.500(b)(1).) A decision of first impression that insulates public entity defendants from the reach of treble damages, designed by the Legislature to combat the pervasive problem of institutions covering-up instances of childhood sexual abuse, undoubtedly presents "an important question of law" deserving of this Court's attention and review.

The District's attempt to downplay the significance of the Court of Appeal's Opinion is belied by the very efforts of the District to convince the Court of Appeal below to accept Writ Review. In seeking extraordinary review of the trial court's order denying the District's motion to strike treble damages, the District argued "[t]his petition raises a ***crucial issue*** for the 1,037 public school districts in California," concerning whether a plaintiff may recover treble damages under Section 340.1(b). This same "crucial issue" applies to the *thousands* of children sexually abused (see Ex. 6, at 141 ["'One in five girls and one in twenty boys is a victim of childhood sexual assault.'"]) seeking justice against those individuals and entities responsible for their injuries.

Further, the issue before the Court therefore does not concern a perfunctory application of the rules of statutory construction as argued by the District. Rather, the case concerns the unique interplay of Government Code section 818 and the Legislature's clear intention to hold accountable those institutions charged with the care of children, *both public and private*, who have covered-up prior sexual abuse thereby exposing additional victims to the horrors of childhood sexual abuse. There is no question that this case presents a significant issue of Statewide importance and worthy of Supreme Court review.

II.

NOTHING ARGUED BY THE DISTRICT JUSTIFIES IMMUNIZING PUBLIC ENTITIES FROM TREBLE DAMAGES UNDER GOVERNMENT CODE SECTION 818

Nothing in the District's Answer Brief supports a finding that public entities are exempt from the reach of treble damages. As explained in the Petition, the court's analysis is predicated on the mistaken premise that because treble damages are by definition *beyond compensatory damages* they must be solely punitive and thus barred by Government Code section 818. In its Answer Brief, the District entirely avoids any discussion of this flawed statutory analysis.

Instead of meaningfully addressing the points raised in the Petition for Review, the District begins its brief with a supposed public policy argument. (Answer at 7.) But the District's half-hearted argument that it is against public policy to permit a victim to plead treble damages against a school district as it punishes *taxpayers* is misplaced. Indeed, and as highlighted in the Petition for Review, a similar argument was raised by the public entity hospital in *Kizer v. County of San Mateo* (1991) 53 Cal.3d 142 and rejected by this Court. The Court explained:

> We agree with the Court of Appeal that, "[g]iven the ***unquestionable importance of this legislative purpose*** [assuring a uniform standard of quality health care], **we perceive no significant public policy reason to exempt a state licensed health-care facility from liability for penalties under the Act simply because it is operated by a public rather than a private entity, *even though it is the taxpayer who ultimately bears the burden when such penalties are imposed on a publicly owned facility.*** The citation and penalty provisions of the Act serve to ***encourage compliance*** with state mandated standards for patient care and to deter conduct which may endanger the well-being of patients. City councils and county boards of supervisors are as likely as private entities to heed the threat of monetary sanctions and make certain that their facilities are operated in compliance with the law. While it is true that all facilities, including those which are publicly owned, may be subject to the loss of license for repeated violations, that draconian sanction should not be the only real tool available to the Department to foster regulatory compliance by a publicly operated facility."

(*Kizer*, *supra,* 53 Cal.3d at pp. 150–51 (emphasis added).)

Just as in *Kizer*, insulating 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. Under no analysis does such a justification make sense.

Numerous courts, including this Court, have recognized that while Government Code section 818 precludes imposition of punitive damages against public entities, it was not intended to proscribe *all* damages with a punitive component; rather, damages which are punitive in nature but also aim to more fully compensate the victim or encourage victims to bring civil actions or otherwise achieve a non-punitive public policy objective are *not*

solely punitive and thus fall outside of the ambit of Government Code section 818. (*People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 35-36; *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 146; *State Dep't of Corrections v. WCAB* (1971) 5 Cal.3d 885, 886-891 [statutory penalty that an employee who suffers an industrial injury may recover damages increased by one-half if the injury resulted from the employer's willful misconduct was intended to provide more nearly full compensatory damages when the employer is guilty of aggravated misconduct and thus not barred as against public entity]; *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1062 [enhanced civil penalties for dependent elder abuse may be alleged against public entity]; see also *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]; *LeVine v. Weis* (2001) 90 Cal.App.4th 201, 209 [because award of statutory double backpay under Gov. Code, § 12653 "serves to more fully compensate the employee for the incalculable risk he takes when he threatens to disclose or discloses his employer's false claim," it is not punitive damages under Gov. Code, § 818], disapproved on other grounds by *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164 [finding school districts were not "persons" who were subject to suit under FCA]; *Hill v. Superior Court* (2016) 244 Cal.App.4th 1281, 1287 ["statutory damages awarded as a penalty are 'distinguished' from punitive damages. And recovery of both is 'permitted.'"].)

Thus, a public entity cannot escape civil penalties or damages provisions with a punitive aspect where such remedies serve some non-

punitive function and are thus not *solely* punitive. The Legislative history of AB 218 confirms that the Bill's provision for recovery of treble damages where a cover-up has been established is *not* simply or solely punitive, but rather seeks to more fully compensate victims of institutional cover-ups and encourages victims to come forward and report such systemic abuse.

According to the District, the analysis is *not* whether the remedy is solely punitive but instead whether the remedy is punitive at all. (Answer at 8-10.) The District argues that even a statute that is only "partially penal" may be considered punitive for purposes of section 818. (Answer at 8, citing *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382.)

The District's reliance on *DuBois* is misplaced and otherwise misguided. In *DuBois*, this Court held the Uninsured Employer Fund (UEF) is not subject to payment of a penalty pursuant to section 5814 for UEF's own unreasonable delay in payment of benefits to an injured worker. This Court noted that the UEF was "created to ensure that workers who happen to be employed by illegally uninsured employers are not deprived of workers' compensation benefits." (*Dubois*, at p. 389.) A statute was in effect providing, "The Uninsured Employers Fund shall not be liable for any penalties or for the payment of interest on any awards." (*Id*. at p. 387.) Thus, separate from Government Code section 818, there was an explicit statutory provision in the statutory scheme at issue that prohibited an award of penalties against the UEF. Of course, that is not the situation here. (See *State Dep't of Corrections v. WCAB,* 5 Cal.3d 885, 886-891 [in rejecting an argument that Section 818 precluded a statutory penalty permitting an employee to recover damages increased by one-half if the injury resulted from the employer's willful misconduct, this Court distinguished *DuBois* noting that there, a specific statute existed providing that the state not be liable for penalties]; *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1062 [finding *DuBois* unpersuasive and noting that enhanced civil

penalties for dependent elder abuse may be alleged against public entity despite Section 818].)

Thus, and contrary to the argument of the District, "the immunity afforded to public entities under section 818 is *narrow*, extending only to damages whose purpose is simply and solely punitive or exemplary." (*Los Angeles County Metropolitan Transp. Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 275–76.) As this Court emphasized in *People ex rel. Younger,* even where a liability is "undoubtedly punitive in nature and indeed is conceded to be so by plaintiff … the critical question is whether it ***is simply, that is solely, punitive***." (*People ex rel. Younger,* 16 Cal.3d at 37, fn. 4, 38-39.)

While implicit in every civil penalty or enhanced damages is an intent to punish the defendant, "[l]imiting government immunity to damages that are 'primarily' punitive reflects the reality that a single damages category may *serve multiple remedial purposes*." (*Los Angeles Cty. Metro*., 123 Cal.App.4th at p. 272.) That is precisely the situation here in light of the compensatory and non-punitive objectives for which the treble damages provision are designed to achieve.

Neither the United States Supreme Court, nor the California appellate courts, have adopted a bright line rule holding that treble damages, or even civil penalties, constitute "punitive damages." Contrary to the Court of Appeal's analysis, a plaintiff may recover a category of damages that is beyond actual damages, *but not* punitive damages. In other words, damages that provide a victim more than actual damages suffered are not *per se* punitive damages. (See *Molzof v. United States* (1992) 502 U.S. 301, 301 [simply because a statute permits recovery of damages *beyond* actual damages, does not alone render such statutory damages - *punitive damages*].)

III.

THE DISTRICT CANNOT IGNORE THE NON-PUNITIVE OBJECTIVES THAT LIE AT THE HEART OF AB 218 AND THE TREBLE DAMAGES PROVISION

As detailed in the Petition for Review, and again ignored by the District in its Answer Brief, not only did the Court of Appeal set aside statements in legislative reports clarifying the Legislature's intention to use treble damages to both compensate victims and deter future misconduct, but the Court admittedly ignored the non-punitive and non-compensatory public policy objectives at the heart of the treble damages provision. (See Slip Opn., 16, 28 ["Even if we agreed with plaintiff that the treble damages provision might incentivize victims to file claims for childhood sexual assault, **this supposed public policy objective *does not remove the enhanced damages provision* from section 818's purview**."].)

According to the Court's statutory construction analysis, the Legislature *impliedly* intended to shield public entities from the reach of the newly created treble damages provision by envisioning such damages to be entirely punitive and thus barred by Section 818. However, and as explained in the Petition, this is *not* what the Legislature intended.

In its Answer Brief, the District seemingly attempts to argue otherwise by focusing on the phrase "unless otherwise prohibited by another law." (Answer at 11.) According to the District, because the amendment to include this phrase occurred after "opposition from several education agencies on August 13, 2019," the Legislature must have meant it to reference Government Code section 818 and thus "it can be inferred that the Legislature did not intent to authorize awards of treble damages against public entities." (Answer at 11-12.) None of this is correct. Nothing in the legislative history supports any such supposed inference. (See Exh. 6, in its entirety.)

While the District is correct that numerous public entities opposed the Bill, such opposition 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 [in the August 2019 letter cited by the District, the opposition echoes the same concerns above; nowhere is it requested that public entities be exempt from treble damages].)

Further, as noted in the last analysis of AB 218 prior to its enactment (and thus *after* the phrase "unless prohibited by another law" was added to the statute), public entities voiced the *same opposition* to the Bill and requested, among other things, that the treble damages provision be eliminated. (Exh. 6, at 94-95.) Under the heading "Arguments in Opposition," the Analysis states: "This bill is opposed, unless amended, by public and private school officials, insurance associations, and joint powers associations. All of the opponents raise the same basic concerns: it is very difficult to defend against old claims when records and witnesses may be unavailable insurance may no longer be available, and the cost of defending these actions could be astronomical and could prevent the impacted entities from being able to support their main work. They request, among other things, that the bill be amended *to eliminate the treble damages provision*, eliminate the revival period, and limit liability for third parties. They also request amendments to create and fund procedures to prevent future abuse." (Id.)

Of course, such financial impact concerns were rejected when AB 218 was enacted. Carefully balancing concerns from institutional 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*." (Id. at 146-148.)

Moreover, the very fact that the public entities continued to oppose the treble damages provision of the bill after its amendment to include "unless prohibited by another law" undermines any contention by the District that the phrase intended to immunize public entities under Government Code section 818. (Exh. 6, at 94-95; see also Plaintiff's RJN, exhibit 1, filed on 11/23/20.)

Beyond this, even if arguendo the phrase was added in response to pressures by public entity groups (which again is not supported by the Legislative history), the result would only be that the treble damages may be awarded unless prohibited by Government Code section 818. As detailed above and in the Petition for Review, Section 818 does not apply to the treble damages provision here given the non-punitive objectives of the damages provision. Had the Legislature intended that public entities be shielded from the treble damages provision, as argued by the District, it could have easily said so. It didn't. As noted above, while some statutes specifically immunize public entities from statutory penalties, as opposed to punitive damages, no such statute exists here. (See *State Dep't of Corrections, supra,* 5 Cal.3d at pp. 886-891 [Supreme Court distinguished DuBois noting that there, a specific statute existed providing that the state not be liable for penalties].)

CONCLUSION

The Court of Appeal's published Opinion provides that school districts across the State who have engaged in a cover-up of childhood sexual abuse thereby causing additional victims to be abused are insulated from the reach of the enhanced damages designed to combat such abhorrent institutional failures. Nothing in the plain language of the statute, nor the legislative history of AB 218, justifies protection of a public entity from the imperative societal goals the treble damages provision was designed to achieve. Review is unquestionably necessary and appropriate.

Dated: July 30, 2021

TAYLOR & RING, LLP

ESNER, CHANG & BOYER

By: *s/ Holly N. Boyer*

Holly N. Boyer
Attorneys for Plaintiff and Real Party in Interest

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s/ Holly N. Boyer
Holly N. Boyer

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s/ Kelsey Wong
Kelsey Wong

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

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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

Devin M. Storey, Esq.
THE ZALKIN LAW FIRM, P.C.
10590 W. Ocean Air Drive, Suite 125
San Diego, CA 92130
Telephone: (858) 259-3011
Email: dms@zalkin.com

Attorneys Amicus Curiae
National Center for the Victims of Crime

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 Via Mail Only)

Hon. Shirley K. Watkins
LOS ANGELES COUNTY SUPERIOR COURT
Van Nuys Courthouse East, Dept. T
6230 Sylmar Avenue
Van Nuys, CA 91401

Trial Court (Unbound Brief Via Mail Only)

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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Supreme Court of California

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Supreme Court of California

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Case Number: **S269608**
Lower Court Case Number: **B307389**

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Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	7/30/2021 10:49:01 AM
Sheeny Bang Esner, Chang & Boyer	sbang@ecbappeal.com	e-Serve	7/30/2021 10:49:01 AM
Kelsey Wong Esner, Chang & Boyer	kwong@ecbappeal.com	e-Serve	7/30/2021 10:49:01 AM
Claudia Ramirez Gutierrez, Preciado & House, LLP	claudia.ramirez@gphlawyers.com	e-Serve	7/30/2021 10:49:01 AM
Holly Boyer Esner Chang & Boyer 221788	hboyer@ecbappeal.com	e-Serve	7/30/2021 10:49:01 AM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	7/30/2021 10:49:01 AM
David Ring Taylor & Ring, LLP	ring@taylorring.com	e-Serve	7/30/2021 10:49:01 AM
Arthur Preciado	apreciado@gphlawyers.com	e-Serve	7/30/2021 10:49:01 AM
Natalie Weatherford	weatherford@taylorring.com	e-Serve	7/30/2021 10:49:01 AM
Devin Storey 234271	dms@zalkin.com	e-Serve	7/30/2021 10:49:01 AM

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/s/Kelsey Wong
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Boyer, Holly N. (221788)
Last Name, First Name (PNum)

Esner, Chang & Boyer
Law Firm