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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

REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS

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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ISSUE PRESENTED

"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?"

INTRODUCTION

In light of recent revelations exposing child sexual abuse cover-ups by schools, churches, and other youth organizations, the California Legislature passed Assembly Bill (AB) 218, which significantly amended Code of Civil Procedure section 340.1 governing actions for childhood sexual abuse. The bill greatly expanded the statute of limitations for victims of childhood sexual abuse and revived previously time-barred claims. It also set its sights on addressing the recurrent and horrific problem of institutions covering-up prior sexual abuse of children. To combat the "pervasive problem" of institutional cover-ups of child sexual abuse, AB 218 provides recovery of treble damages where a victim can demonstrate that his or her abuse was the result of a cover-up. The issue presented here concerns whether these enhanced damages may be sought against a public entity that engages in a prohibited cover-up.

Despite the fact that the Legislature intended treble damages to achieve non-punitive public policy objectives, that public school districts such as the District here constitute a sizable percentage of caregivers where children are victimized by cover-ups, and that there is absolutely nothing in the text, history or purpose of the AB 218 even hinting that the Legislature intended to *exempt* public entities from the reach of treble damages, the Court of Appeal here concluded that treble damages are solely punitive and thus cannot be pursued against public entities. The Court based this conclusion on Government Code section 818 which precludes application

of laws to public entities that have as their sole purpose punishment. As explained below, the Court erred. The subject Amendment is *not* simply and solely intended to punish defendants and, equally as important, exempting public entities from its reach will subvert the Legislature's intent to end the disturbing pattern of institutional cover-ups.

The facts here present a paradigmatical example of why the Legislature enacted the treble damages Amendment.

During her freshman year at Pearl Magnet High School, when Plaintiff Jane Doe was just *fourteen-years-old*, Daniel Garcia, a special education paraprofessional assigned to assist a special needs student at the school and an employee of the Los Angeles Unified School District ("the District") began to take an interest in her. (Exh. 1 to Writ Petition, at 7.) During the beginning of the 2014-2015 school year, Garcia began grooming Plaintiff for sexual abuse and by November he had engaged in sexual activity with her. (Id. at 8.) The sexual abuse continued throughout the school year and ended in September 2015, when Garcia was transferred out of Pearl Magnet High School. After Plaintiff bravely reported the sexual abuse to her mother, Garcia was arrested in May 2016 and admitted to the abuse. (Id. at 8-9.)

Tragically, and as alleged by Plaintiff, the District *knew* Garcia was a threat to female students and yet engaged in a concerted effort to hide evidence relating to his sexual abuse of minors. (Id. at 7-9.) Prior to the sexual abuse of Plaintiff, the District was aware that Garcia had set his sights on another female student and that he was apparently "dating" the student. (Id.) In response to learning this information, the District did not terminate Garcia but instead *transferred* Garcia to Pearl Magnet High School, where he met and eventually abused Plaintiff. (Id.) The District went so far as to create "a false and misleading iStar Incident Report related to Garcia's sexual abuse" of the prior student to cover up what it knew

about the abuse and to protect itself from having the information go public. (Id.) As a result of this cover-up, Plaintiff was sexually assaulted by Garcia. (Id.)

While the allegations here reveal the very type of cover-up for which treble damages may be awarded, the Court of Appeal held otherwise. According to the Court, because recovery of up to treble damages necessarily results in a victim recovering damages *beyond actual compensation*, such damages are by definition "punitive" and thus barred by Government Code section 818 when asserted against a public entity. The Court's analysis is mistaken.

Pursuant to Government Code section 818, a public entity is immune from liability for punitive damages. While 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; *Los Angeles County Metropolitan Transp. Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 275.) The immunity afforded to public entities under section 818 is therefore *"**narrow***, extending only to damages whose purpose is ***simply*** and ***solely*** punitive or exemplary." (*Los Angeles County Metro.,* 123 Cal.App.4th at p. 275, citing *Kizer, supra,* 53 Cal.3d at p. 146 and *People ex rel. Younger,* 16 Cal.3d at pp. 35-36.)

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 incentivize and encourage victims to come forward and report such systemic abuse.

In concluding otherwise, the Court here employed a misguided analysis constrained by the notion that: "Compensation is the essential condition." (*Los Angeles Unified Sch. Dist. v. Superior Court* ("*LAUSD*") (2021) 64 Cal.App.5th 549, 557.) According to the Court, because recovery of treble damages would result in damages *beyond actual compensatory damages*, treble damages are necessarily punitive in nature. The Court's analysis is predicated on the mistaken assumption that the only damages recoverable under the Government Claim Act are *compensatory damages*. 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.

Perhaps most troubling with the Court's opinion is the disregard of the Legislature's intent. "Our primary task 'in interpreting a statute is to determine the Legislature's intent, *giving effect* to the law's purpose. [Citation.]." (*California Bldg. Indus. Ass'n v. State Water Res. Control Bd.* (2018) 4 Cal.5th 1032, 1041.) The Court of Appeal offered short shrift as to whether the Legislature actually *intended* Government Code section 818 to apply to shield public entities from the reach of treble damages for engaging in a cover-up of sexual abuse as prescribed by Code of Civil Procedure section 340.1(b). Although the Legislature *not once* mentioned punitive damages in the legislative history of AB 218, nor mentioned Government Code section 818, nor included any indication in the plain language of the statute that treble damages are akin to punitive damages, the Court held that 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.

Rejecting statements in legislative committee reports expressly stating that the treble damages provision "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," as untethered to any non-punitive purpose (*LAUSD*, at p. 553), the Court further rejected the notion that a civil penalty or damages enhancement in a tort action can fall outside of the reach of Section 818 where it is motivated by a non-punitive public policy objective, such as encouraging victims to bring civil actions. (*Id*. at pp. 562-563.) "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." (*Id*. at p. 566 (emphasis added).) Again, the Court's analysis rests on the flawed premise that a victim can recover only his or her actual compensatory damages under the Government Claims Act.

In any event, and as detailed below, even assuming arguendo that treble damages *must* include a compensatory element to fall outside of the reach of Section 818 (which it does not), the legislative history here supports a finding that by using treble damages as a remedial tool to encourage and incentivize victims to come forward, it also *compensates* a victim of sexual abuse caused by a cover-up for the hardship, pain and grief in coming forward and initiating a lawsuit – harms that would *not otherwise* be recoverable.[1] Threaded throughout the legislative history is the very real difficulty victims face in coming forward and reporting sexual abuse in a lawsuit against the perpetrator and/or third party entity.

As detailed below, separate from the harm caused by the abuse itself, as well as the cover-up, is the hardship and pain in initiating a lawsuit exposing the sexual abuse suffered. Victims often delay filing actions at all because of being ashamed by the abuse, blaming themselves for being a victim, and for fear of not being believed. The victim's embarrassment of having painful incidents of childhood sexual abuse paraded in a lawsuit, coupled with being subjected to invasive cross examination in deposition and at trial, is a cost of coming forward. But that harm is not otherwise recoverable. Trebling the damages available for those victims who have suffered sexual abuse as a result of a cover-up therefore not only encourages victims to come forward but also compensates them for the pain of exposing the abuse and cover-up in a lawsuit. As poignantly noted by

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[1] Plaintiff understands and accepts the Court of Appeal's finding that the harm suffered by a victim of sexual abuse who learns that the abuse was the result of an institutional cover-up is *already recoverable* under general tort principles. (*LAUSD*, 64 Cal.App.5th at pp. 552, 561.)

the Author of AB 218, "'We shouldn't be telling victims their time is up when in reality ***we need them to come forward to protect the community from future abuse***.'" (Paintiff's Request for Judicial Notice (RJN), at exhibit 3.)

In an analysis of statutory construction, the intent of the legislature cannot be disregarded. Deference to the very spirit and purpose of the law must guide the statutory analysis as it is the role of the courts to effectuate the law as intended by the Legislature. The Legislature's enactment of the treble damages provision was not designed simply or solely to punish a defendant who has engaged in a cover-up of childhood sexual abuse, but also to encourage victims to come forward and report such systemic abuse. Incentivizing victims to come forward helps expose an institution's efforts to cover-up and hide evidence of prior sexual assaults or inappropriate behavior. It is precisely this intention of ending system wide institutional cover-ups of child sexual abuse and protecting against future children from being abused that the treble damages provision was designed to achieve.

In light of the non-punitive objectives that lie at the heart of the treble damages provision, Government Code section 818 does not apply to cloak a public entity defendant with immunity from such damages. The Court's opinion otherwise, insulating public entity defendants from treble damages – which have proven to be a repeated offender of institutional cover-ups –constitutes a devasting blow to the efforts of the Legislature. 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's interpretation. There is no justification in the plain language of the statute nor its extensive Legislative history to exempt a public entity from the imperative societal goals the treble damages provision was designed to achieve.

Statement of the Case And Procedural Posture[2]

During the 2014-2015 school year, Plaintiff was just fourteen-years-old and a freshman at a high school within the District. (*LAUSD*, at pp. 552-553.) At the start of the school year, Daniel Garcia, a special education paraprofessional assigned to assist a special needs student at the school and an employee of the District began to take an interest in her and began grooming Plaintiff for sexual abuse. (*Id*. at p. 553.) By November he had engaged in sexual activity with Plaintiff. (*Id*.) Plaintiff did not disclose the abuse to her parents until March 2016. (*Id*.) Upon learning of the abuse, Plaintiff's parents immediately reported it to law enforcement and in May 2016, Garcia was arrested and charged with criminal offenses stemming from the abuse. (*Id*.)

As alleged, prior to the sexual abuse of Plaintiff, the District *knew* Garcia was a threat to female students and yet engaged in a concerted effort to hide evidence relating to his sexual abuse of minors. (*LAUSD*, at p. 553.)

During the prior school year, in or around February 2014, the District learned that Garcia was involved in a "boyfriend-girlfriend relationship" with a female student, H. M., and that the "relationship" began while Garcia was employed by the District. (*Id*.) In response to learning this information, the District did not terminate Garcia. Instead, the District *transferred* Garcia to a different LAUSD high school, where he met and eventually abused Plaintiff. (*Id*.) The District then created a false

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[2] The facts are primarily derived from the Court of Appeal's opinion (*LAUSD, supra,* 64 Cal.App.5th 549) which in turn are taken from the operative complaint (Exhibit 1 to Writ Petition, at 4-20), as is appropriate where the court has by way of a writ petition ordered the trial court to enter an order granting the District's motion to strike the treble damages request. (See *Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 966-967.)

incident report related to Garcia's sexual abuse of H. M. As alleged, this was all done by the District in an effort to cover-up Garcia's prior sexual assault of minor female students within the District. (*Id*.)

Even during Garcia's time at Plaintiff's high school while he was abusing her, the District was aware and actively sought to conceal evidence that Garcia was acting sexually inappropriate with other female students. (*LAUSD*, at p. 553.) One student even complained to the administration that Garcia had inappropriately touched her – and yet the District did nothing. (*Id*.) Indeed, Garcia was allowed to remain an employee of the District during the entire 2014-2015 school year. (*Id*.) As alleged by Plaintiff, it was precisely because the District covered up such inappropriate conduct and failed to take appropriate actions against Garcia, that Garcia was able to continue his grooming conduct directed at Plaintiff, and able to repeatedly sexually abuse her. (*LAUSD*, at pp. 552-553.)

The allegations concerning the District's mishandling of the prior complaints of inappropriate sexual conduct against Garcia fostered the very environment upon which Garcia could sexually exploit and abuse Plaintiff.

A. Plaintiff's Civil Action and The Trial Court's Order Denying the District's Motion to Strike.

In April 2017, Plaintiff commenced this action against the District and Garcia. (*LAUSD*, at pp. 552-553.) Plaintiff's operative complaint alleged causes of action against the District for negligent hiring, supervision, and retention of an unfit employee; breach of mandatory duty to report suspected child abuse; negligent failure to warn, train, or educate; and negligent supervision of a minor. (*Id*. at p. 553.) Pursuant to Code of Civil Procedure section 340.1(b), and in light of her detailed allegations of a cover-up of sexual abuse, Plaintiff included a prayer for treble damages. (*Id*. at pp. 552-553.)

The District filed a motion to strike the request for treble damages on the ground they were an improper request for punitive damages and thus precluded by Government Code section 818. (*LAUSD*, at pp. 552-553.) Plaintiff opposed the motion and explained that the immunity afforded to public entities under Section 818 extends only to damages whose purpose is *simply and solely punitive* and, here, treble damages is *not* simply and solely punitive, but rather seeks to more fully compensate victims of institutional cover-ups and encourage victims to come forward in the hopes of unraveling an institution's efforts to cover-up and hide evidence of prior sexual assaults. (*Id*. at pp. 552-553; Exh. 5, at 70-79.)

The trial court denied the District's motion. (*LAUSD*, at p. 554.) The court explained that the "narrow" immunity of Section 818 applies only to damages whose purpose is simply and solely punitive, and here, "[a]s drafted and put into effect on January 1, 2020, *CCP §340.l makes no reference to punitive damages.*" (*LAUSD*, at pp. 553-554; Exh. 11, at 205.) The court noted "the statute's legislative history makes no reference to treble damages being a punishment" and rather, "[t]he legislative intent for treble damages was to compensate the victim." (Id.)

B. The Court of Appeal Grants the District's Petition for Writ of Mandate and in a Published Opinion Concludes that Government Code Section 818 Immunizes the District From Treble Damages.

After its motion to strike was denied, the District filed a petition for writ of mandate. (*LAUSD*, at pp. 552, 554.) After issuing an order to show cause, the Court granted the District's petition and directed the trial court to enter an order granting the District's motion to strike the treble damages request. (*Id*. at pp. 554, 567.)

In its May 21, 2021 published opinion, the Court held that the District is "immune from these enhanced damages under section 818." (*Id*.

at p. 567.) Focusing on damages as being either compensatory or punitive, the Court began by noting that under general tort principles a child victim of sexual abuse *may already recover* for the "added psychological trauma" suffered by a victim who learns that the sexual abused they endured was the result of a cover-up by an institution charged with their care. (*Id*. at pp. 552.) "It will no doubt be the case in some horrific instances that the victim of a childhood sexual assault will suffer additional psychological trauma upon learning those charged with his or her care and protection in effect facilitated the assault by aiding its perpetrator in a deliberate cover up of past sexual abuse. However, while the manifestations of this trauma may be largely subjective, damages to compensate for it are by no means unquantifiable, nor are they unavailable to the victim under normal tort damages principles." (*LAUSD,* 64 Cal.App.5th at pp. 552, 561.)[3]

From there, the Court reasoned that because recovery of treble damages would result in damages *beyond actual compensatory damages*, treble damages are necessarily punitive in nature. (*Id*. at pp. 554-562.)

> Compensation is the essential condition. Tort damages that have a compensatory function, although also having a punitive aspect, are not "imposed primarily for the sake of example and by way of punishing the defendant" (Gov. Code, § 818), and a public entity is liable under the Tort Claims Act for the injuries those damages serve to compensate. (*Kizer*, at pp. 145–147; *Younger, supra,* 16 Cal.3d at pp. 35–36; *State Dept. of Corrections, supra*, 5 Cal.3d at pp. 890–891; *Helfend, supra,* 2 Cal.3d at p. 16.)

(*LAUSD*, at p. 557.)

The Court further rejected the notion that a civil penalty or damages enhancement in a tort action can fall outside of the reach of Section 818 where it is motivated by a non-punitive public policy objective, such as

[3] Plaintiff does not disagree that the damages caused by the existence of the cover-up are already recoverable.

encouraging victims to come bring civil actions. (*LAUSD*, at pp. 562-563.) According to the court, it is only where civil penalties are sought outside of a tort action for damages that Section 818 does not apply. "In a tort action, as we have discussed, the essential condition that separates primarily punitive damages, for which a public entity maintains sovereign immunity under section 818, and normal tort damages having a punitive component, for which a public entity waives such immunity, is that the latter class of damages serves a *compensatory function*. Absent a compensatory function, punitive damages are just that—simply and solely punitive— under section 818." (*LAUSD*, at p. 563 (emphasis in original).) [4]

[4] Following this Court's order granting review in this case, the Court of Appeal, Fourth District, Division 2, issued a published opinion echoing the same mistaken analysis as the court of appeal here. (See *X.M. v. Superior Court of San Bernardino County* (2021) 68 Cal.App.5th 1014, petition for review pending.)

ARGUMENT

I.

THE LEGISLATURE'S EFFORT TO COMBAT THE SYSTEMIC PROBLEM OF INSTITUTIONAL SEXUAL ABUSE COVER-UPS THROUGH THE NEWLY ENACTED TREBLE DAMAGES PROVISION

As repeatedly recognized by the Legislature throughout the enactment of Assembly Bill 218, which passed with *unanimous* bipartisan support: "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).)[5]

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 Code of Civil Procedure section 340.1, governing actions for childhood sexual abuse, 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); Exh. 5, at 74-75; Exh. 6, at 94, 131, 135, 141.) The legislative history reveals that the treble damages provision

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[5] The Court of Appeal took judicial notice of the legislative materials presented to the trial court below. (*LAUSD*, 64 Cal.App.5th at p. 558, fn. 3.) Petitioner's Exhibits Vol. 2, Exhibit 6, pp. 85-152, include the eight legislative reports and analyses concerning AB 218. (Exh. 6, 85-152.) While all eight legislative documents are available online and thus no formal judicial request is necessary, Plaintiffs include a request for this Court to likewise take judicial notice of these documents in the concurrently filed Request for Judicial Notice. (See, e.g., *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 440, fn. 18; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 9 Cal.4th 26, 46 fn. 9 ["A request for judicial notice of published material is unnecessary. Citation to the material is sufficient. [Citation.]".)

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.’ (Assem. Floor Analysis, Analysis of Assem. Bill No. 218 (2019-2020 Reg. Sess.) as amended Aug. 30, 2019, p. 2, italics added.)" (*LAUSD*, at pp. 553-554, 558 (emphasis added).)

Further, and as highlighted by Plaintiff below and recognized in the opinion, the treble damages provision advances a non-punitive "public policy objective." (*LAUSD*, at pp. 562-563.)

> She maintains the provision's focus on cover ups reflects a legislative imperative to bring past childhood sexual abuse to light, and she argues the availability of treble damages advances this objective by offering victims an incentive to come forward to "end the pattern of abuse." Specifically, plaintiff contends treble damages are needed to "encourage those victims who experienced inappropriate encounters with sexual predators that may not have in-and-of themselves been egregious sexual abuse to come forward in a civil action." In those cases, she argues, "inappropriate conduct by a teacher may not give rise to substantial damage awards," but if damages are "enhanced up to three times the actual damages, a victim may be more likely to come forward which may help unravel an institution's efforts to cover[ ]up and hide evidence of prior sexual assaults or inappropriate behavior."

(*Id.*) An award of treble damages therefore 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.

Despite the Legislature's intention to use treble damages as a tool to breakdown institutional cover-ups of childhood sexual abuse plaguing this Country for far too long, the Court here found that public entities are *exempt* from the reach of treble damages.

II.

THE NARROW IMMUNITY PROVIDED TO PUBLIC ENTITIES UNDER GOVERNMENT CODE SECTION 818 DOES NOT SHIELD THE DISTRICT FROM TREBLE DAMAGES FOR ENGAGING IN A COVER-UP OF SEXUAL ABUSE

"Government Code section 818 was *not intended* to proscribe all punitive sanctions." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 142, 146.) As explained in *Los Angeles Cty. Metro.*, and citing California Supreme Court cases in support: "As the above discussed cases make clear, 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 Cty. Metro*., 123 Cal.App.4th at pp. 275–76.) This Court emphasized in *People ex rel. Younger* that 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 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. The analysis is not so black and white. (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*].)

In *Molzof,* a wife brought an action on behalf of her deceased husband for damages under the Federal Tort Claims Act (FTCA) for injuries suffered to her late husband as a result of the negligence of federal employees. The district court refused to award damages for future medical expenses and for loss of enjoyment of life. The Court of Appeals affirmed, ruling that damages of the latter two types were barred by the FTCA's prohibition on "punitive damages." (*Id*. at p. 304.) Reversing the appellate court's finding, the U.S. Supreme Court explained that simply because the claimed damages may be above and beyond ordinary notions of compensation, does not mean that such damages are "punitive damages" and thus prohibited by the statute. (*Id*. at pp. 306-309.)

> The Government's interpretation of § 2674 appears to be premised on the assumption that the statute provides that the United States "shall be liable only for compensatory damages." But the first clause of § 2674, the provision we are interpreting, *does not say that*. What it clearly states is that the United States "shall not be liable ... ***for punitive damages***." **The difference is important.** The statutory language suggests that to the extent a plaintiff may be entitled to damages that are not legally considered "punitive damages," but which are for some reason *above and beyond ordinary notions of compensation*, the United States is liable "in the same manner and to the same extent as a private individual." ***These damages in the "gray" zone are not by definition "punitive damages" barred under the Act***.

(*Molzof*, at p. 308 (emphasis added).) The same is true here.

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.

Indeed, that was precisely the result in *Los Angeles County Metro.*[6] At issue there was whether a bus passenger's action against a county transportation authority and bus driver – where the bus driver made a series of taunting, derogatory and homophobic remarks to the passenger and then attacked and severely beat the passenger – could seek civil penalties under the Ralph Civil Rights Act (Civ. Code § 51.7 and 52(b)) against the county transportation authority. (*Los Angeles Cty. Metro, supra,* 123 Cal.App.4th at pp. 264-265.) The MTA argued that the $25,000 civil penalty for each offense alleged, in addition to actual damages, was punitive in nature and thus precluded by Government Code section 818. (*Id*. at pp. 265-266.) The plaintiff argued that the civil penalty served more than to simply punish the defendant and was intended to and did serve other public policy purposes. (*Id*.) The trial court agreed and denied the MTA's motion to strike. After issuing an order to show cause following MTA's Petition for Writ of Mandate, the Court held that the statutory penalty was not *solely* punitive and thus not barred by Section 818. (*Id*. at pp. 270-276.)

An earlier panel of the same appellate division concluded that the county defendant could be liable for penalties under Civil Code 52(b)(2) because the legislative history revealed "at least two important nonpunitive purposes. The first is simply to provide increased compensation to the

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[6] Notably, while the Court of Appeal here was critical of its earlier decision in *Los Angeles County Metro,* the Court did not find it was wrongly decided. Indeed, the court noted that "[f]or a number of independent reasons, the LACMTA court correctly concluded section 818 did not preclude imposition of the penalty; …" (*LAUSD*, at pp. 564-565.)

plaintiff. The second purpose, and perhaps the more important one, is to encourage private parties to seek redress through the civil justice system by making it more economically attractive for them to sue." (*Los Angeles Cty. Metro, supra,* 123 Cal.App.4th at pp. 270-271.) The Court explained:

> "*… it is clear that the current version of section 52, subdivision (b)(2), is part of a larger body of law designed* ***to further a clear legislative intent to have the civil rights laws taken seriously and be vigorously enforced by encouraging private parties to litigate such claims***. Acceptance of MTA's argument that section 818 grants it immunity in this area *would defeat this important component* of the anti-hate crime legislation."

(*Id*. at p. 271 [emphasis added].) The same is true here. Indeed, *Los Angeles County Metro* undermines the Court of Appeal's analysis here as in that tort action against a public entity defendant, the statutory cause of action asserted by the plaintiff permitted recovery of a civil penalty *in addition* to actual damages.

Notably, Section 52(b) provided that where a defendant has violated Civil Code 51.7, he is "liable for each and every offense ***for the actual damages suffered*** by any person denied that right *and*, ***in addition***, the following: …(2) A civil penalty of twenty-five thousand dollars ($25,000) …" (Civ. Code, § 52(b) [emphasis added].) In finding that the penalty was not simply and solely punitive and thus barred by Government Code section 818, the Court noted that the $25,000 civil penalty "helps to ensure that plaintiffs receive ample compensation, *irrespective of their actual damages*." (*Los Angeles County Metro., supra,* 123 Cal.App.4th at p. 271.) "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*." (*Id*. at p. 272.)

Thus, even though a victim could recover actual damages and a $25,000 penalty, which would necessarily result in an award *beyond* actual

damages, the penalty was not entirely punitive and thus not barred by Section 818. (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.'"][7].)

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[7] In *Hill*, the plaintiffs, co-executors of their mother's estate, brought an action against their step-father seeking to recover property belonging to the estate as well as *double damages* pursuant to Probate Code section 859. Following the step-father's death during the action, the successor in interest argued that the double damages were "punitive" and could not be recovered against him pursuant to CCP section 377.42 which bars recovery against a successor of damages pursuant to Civil Code section 3294 or other punitive or exemplary damages. (*Hill*, 244 Cal.App.4th at pp. 1284-1285.) The trial court agreed and the Court of Appeal reversed. (*Id*. at p. 1286.) The Court held "double damages under section 859 are *not* punitive 'damages recoverable under section 3294 of the Civil Code."' (*Id*. at p. 1287.) The Court explained that a statutory penalty, even one that necessarily results in doubling the actual damages, is not per se punitive. (*Id*.)

Numerous courts have recognized that Section 818 does not apply to immunize public entities from the imposition of civil penalties where the purpose of the penalty is not solely punitive. (See *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 *Kelly v. Yee* (1989) 213 Cal.App.3d 336, 341-342 [the provision for treble damages serves the distinct non-punitive objective of encouraging tenants to bring actions].)

The court's analysis here ignores that a tort action against a public entity, falling within the rubric of the Government Claims Act, may include recovery of actual damages, as well as statutory damages that are different in kind or otherwise beyond actual damages but not punitive damages.

For instance, in *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, a police officer sued San Francisco City and County seeking actual damages and civil penalties for alleged violations of the Public Safety Officers' Procedural Bill of Rights Act (POBRA). The subject of the appeal was whether the trial court erred by dismissing the plaintiff's POBRA claims for failure to file a claim pursuant to the Government Claims Act. (*Ibid*.) Relevant here, the plaintiff argued that his POBRA claims were *not* "for money or damages" within the meaning of the Government Claims Act and thus he was not required to file a prelawsuit claim. (*Id.* at p. 1147.) The plaintiff argued the civil penalties under POBRA were not damages because they were not compensatory in

nature, and instead, operated to deter violations of POBRA by providing economic incentives to challenge wrongful conduct. (*Id.* at p. 1161.)

The Court disagreed. The Court began by explaining that an action for money damages under the Government Claims Act includes all actions where the plaintiff is seeking monetary relief, regardless of whether the action was founded in tort, contract, or some other theory. (*Id.* at 1152.) The Court then reasoned that civil penalties under POBRA were within well-established understandings of the term "damages" since damages refer to compensation in money recovered by a party for loss or detriment suffered through the acts of another. (*Id.* at p. 1161.) The Court held:

> Moreover, *insofar as the civil penalty provides compensation* ***beyond actual injury suffered*** by the inured public safety officer where the public entity employer acted with the requisite malicious intent, **the civil penalty,** ***if not clearly compensation for "damages,"*** **is a claim for "money" within sections 905 and 945.5 of the Government Claims Act**. The claim presentation requirement of the Government Claims Act does not apply solely to claims for compensatory "damages," but to "all claims for money" (§ 905), as well.

(*Lozada, supra*, 145 Cal.App.4th at p. 1162.)

The Court thus concluded that because penalties and damages were "money" or "damages" within the meaning of the Government Claims Act, the plaintiff was required to file a prelawsuit claim and the failure to do so barred his action. (*Id.* at p. 1163.)[8] *Lozada* highlights the error in the

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[8] Other tort actions involving the POBRA likewise recognize the availability of civil penalties, in addition to actual damages, against public entities. (See *Riverside Sheriffs' Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 1425-1426 [plaintiff could pursue her damages following termination along with a $25,000 civil penalty against the County and attorney's fees under the POBRA]; *Davis v. County of Fresno* (2018) 22 Cal.App.5th 1122, 1125, 1138-1140 [same]; *Hawkins v. City of Los Angeles* (2019) 40 Cal.App.5th 384, 387, 392, [former employees alleged they were fired for whistleblowing and sought civil penalties under the

Court's reasoning here as not only could the plaintiff seek penalties in addition to actual damages but was required to assert such penalties in a prelawsuit claim *under the Act*. The civil penalties at issue, which were beyond actual damages, were subject to the very prefiling requirements of the Government Claims Act.

Notably, nowhere does the Government Claims Act limit the term damages to "actual compensatory damages." As highlighted in *Lozada*, Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefore in money, which is called damages." (Civ. Code § 3281; *Lozada,* 145 Cal.App.4th at p. 1161-1162.) Citing this Court's holding in *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, the Court in *Lozada* explained that the term "damages" is relatively broad and requires only that there be "'compensation,' in 'money,' 'recovered' by a party for 'loss' or detriment' it has suffered through the acts of another.'" (*Lozada*, at p. 1161-1162.) The Court noted that "'damages' generically includes restitutive and punitive measures" in addition to "'compensatory damages.'" (*Id*., *citing AIU*, 51 Cal.3d at p. 826, fn.11.)

Thus, Court of Appeal's focus here on compensation as the "essential condition" is mistaken. The analysis before the Court is *not* whether treble damages are compensatory, *but whether they are simply and solely punitive damages*. The fact that a damage category or remedy may be *punitive in nature* does not mean that the remedy is akin to *punitive damages* and thus barred by Section 818.

Private Attorney General Act; after jury found in their favor and awarded them damages, the trial court added on a $20,000 civil penalty and judgment affirmed on appeal].)

III.

THE COURT OF APPEAL'S RELIANCE ON *KIZER* IS NOT ONLY MISPLACED, BUT REFLECTS AN UNPRECEDENTED INTERPRETATION OF GOVERNMENT CODE SECTION 818 WHEREBY PUBLIC ENTITIES ARE IMMUNIZED FROM CIVIL PENALTIES IN TORT ACTIONS

In reaching the conclusion that a public entity is liable under the Government Claims Act for only actual damages for the injury suffered, and thus any civil penalty or damage enhancement that provides the plaintiff with damages beyond compensatory damages is per se punitive, the Court heavily relied on a select few statements from this Court's decision in *Kizer*. However, and as now explained, *Kizer* provides no support of the Court's mistaken analysis.

Kizer concerned an action brought by the State Department of Health Services against a county owned health care facility pursuant to the Long-Term Care, Health, Safety and Security Act ("the Act"). (*Kizer*, 53 Cal.3d at p. 141.) The issue before the Court was whether Government Code section 818 prevented the state from imposing statutory penalties under the Act. The Court held that Section 818 does not immunize the county from the reach of civil penalties. (*Id.* at pp. 146-150.)

This Court began its discussion by noting that the Government Claims Act "in general, and Government Code section 818 in particular, are not applicable in this case." (*Kizer*, at p. 144.) "Like the Court of Appeal, we find nothing in the Tort Claims Act to suggest that Government Code section 818 was intended to apply to statutory civil penalties designed to ensure compliance with a detailed regulatory scheme, such as the penalties at issue in the present case, even though they may have a punitive effect." (*Id*. at p. 146.) The Court poignantly noted: "**The Department's citation enforcement action *lies outside the perimeters of a tort action* and**

therefore does not readily lend itself to a liability analysis based on tort principles." (*Id*. (emphasis added).)

In its discussion of *why* the Department's enforcement action lies outside of the Government Claims Act, and thus outside of Section 818, the Court noted that a tort action seeks compensatory damages for an *injury* suffered – unlike a statutory enforcement scheme seeking civil penalties at issue before the Court. (*Id*. at p. 145.) The Court's discussion was therefore in the context of explaining why the Government Claims Act did not apply *at all*. The Court of Appeal here mistakenly interprets the discussion as defining the scope of available remedies – concluding that the Government Claims Act permits *only* recovery of compensatory damages and thus anything beyond compensatory is punitive and thus barred by Section 818. (*LAUSD*, 64 Cal.App.5th at pp. 554-555, 557, 562-567.)

In this tort action, Plaintiff is not arguing, nor has she argued, that treble damages under Code of Civil Procedure section 340.1 *lies outside of the Government Claims Act*. Instead, Plaintiff has consistently argued that in light of the non-punitive objectives designed to be achieved by the treble damages provision, such damages are not simply and solely punitive and thus are not cloaked with the "narrow" immunity provided for Section 818. As emphasized by this Court 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.)

According to the Court of Appeal, however, it is the *absence of any compensatory function* that renders the damages per se punitive and thus barred by Section 818. (*LAUSD*, at pp. 562-567.) The opinion below goes so far as to say that *even assuming* treble damages advance a non-compensatory and non-punitive public policy objective of incentivizing victims to initiate actions to dismantle institutional cover-ups and signal to

victims that the State treats such harm seriously, a victim could not obtain such relief pursuant to Government Code section 818. (*Id*. at pp. 566-567.) "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**." (*Id*. at p. 566 (emphasis added).)

The Court surmised "it was not the vindication of important policy objectives that removed the civil penalties from section 818's purview" in *Kizer,* but the mere fact that they were not being asserted in a tort action. (*Id*. at p. 566.) Again, the analysis rests on the mistaken premise that Government Code section 818 provides that a public entity can *only* be liable for compensatory damages in a tort cause of action, whether statutory or common law. But Section 818 does not say that. Section 818 provides only that a public entity is not liable for punitive damages. This Court's opinion in *Kizer* in no way narrows the damages available to a victim under the Government Tort Claims Act. The portions of the opinion in *Kizer* relied on by the Court of Appeal here were in the context of explaining why Section 818 had no role in the analysis. Nothing in *Kizer* supports the Court of Appeal's conclusion here that the *only* damages available in a tort action against a public entity are those that serve a compensatory function.

Indeed, this Court's further observations in *Kizer* concerning the absurdity of immunizing public entity defendants from the reach of civil penalties designed to protect California's vulnerable aging population are apropos of the analysis here. After finding that the Government Claims Act had no application to the enforcement action, the Court went on to note: "***Furthermore,*** *we find noting in the statutory scheme that suggests that state and other government health facilities should be treated differently than private facilities*." (*Id*. at p. 148 (emphasis added).) The Court

highlighted that the "focus of the Act's statutory scheme is *preventative*." (*Id*.) This Court thoughtfully 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).)[9]

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[9] Notably, in *Kizer* this Court recognized that the Act permitted civil actions for damages and civil penalties by patients. (*Kizer*, at p. 143, 149-150.) This Court recently examined such civil penalties sought in a civil action brought by a patient in *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375. There, this Court noted that the private action permitting actual damages, civil penalties and even enhanced damages are one of several alternative enforcement mechanisms designed by the Legislature to protect nursing home patients. (See *Jarman*, at pp. 390-392.) However, under the Court of Appeal's analysis here, while a county owned facility could not seek refuge under Section 818 under *Kizer*, the same county owned facility *would be shieled* from civil penalties under the Act if asserted by a patient in a civil action (such as the facts in *Jarman*). Such a result makes no sense. There is no justification to immunize the same defendant from civil penalties under the same Act in one civil action but not in another.

Similarly here, 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. Under no analysis does such a justification make sense.

IV.

THE COURT OF APPEAL'S OPINION FAILS TO EMPLOY A STATUTORY CONSTRUCTION ANALYSIS GUIDED BY THE INTENT OF THE LEGISLATURE

Despite noting that the "rules of statutory construction require that we ascertain the intent of the enacting legislative body so we may adopt the construction that best effectuates the law's purpose," the Court here failed to heed such an analysis. (*LAUSD*, 64 Cal.App.5th at p. 559.) Not only did the Court 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 non-punitive public policy objective that lie at the heart of the treble damages provision. (*Id*. at pp. 560, 568.) ["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. This is *not* what the Legislature intended.

As has been explained by this Court, the basic principles of statutory construction require that the court "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386, superseded by statute on another issue; see also *McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 227.) In doing so, the court looks "first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence." (*Id*. at pp. 1386–1387.) "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.]" (*Id*. at p. 1387.)

Turning to the plain language first, subsection (b) does *not* expressly provide for punitive damages. Rather, it permits recovery of up to treble damages. (Code Civ. Proc. § 340.1(b).) Subsection (b) also does not require proof oppression, fraud or actual malice or otherwise reference or mention Civil Code section 3294. Recovery of treble damages is likewise untethered to the financial wealth of the defendant. Beyond this, the statute nowhere references the phrase "punitive damages" nor Civil Code section 3924.[10] Further, Government Code section 818 is not mentioned *anywhere*

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[10] 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

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.

There is no blanket rule that treble damages are always solely punitive 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 *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*, *supra,* 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

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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.

civil penalties are solely punitive]; *Kelly, supra,* 213 Cal.App.3d at p. 342 [same].)

The legislative history also does not support the Court's implied finding that the Legislature intended treble damages to be solely punitive. Nowhere in the analyses did the Legislature even mention punitive damages, or any intention of protecting public entities from treble damages. In fact, throughout the Legislative history of AB 218, the Legislature made clear that **"[t]he bill applies *equally* to abuse occurring at public and private schools and applies to all local public entities**." (Exh. 6, at 94 (emphasis added), 131, 135, 140-141.)

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. The very notion that a public school could escape such damages is belied by the fact that the Author of AB 218 specifically referenced recent cover-ups at *public schools*. (Exh. 6, at 144, see also Plaintiff's Request for Judicial Notice (RJN), exhibit 2.)

Assemblymember Gonzalez, the author of AB 218, represents the 80th Assembly District, which encompasses southern San Diego. The "Fact Sheet" prepared by her office in support of AB 218, highlighted:

> Last year, media attention around childhood sexual abuse increased with high profile cases such as Larry Nassar, the former USA Gymnastics team physician, who sexually abused over 150 young athletes, and the hundreds of underage USA swimmers who were subjected to sexual abuse at the hands of their coaches and others in positions of power. …
>
> Most cases are not high profile though, and occur in our own schools, churches, and communities. **At a high school in the San Diego area, a teacher was investigated for improper behavior towards students multiple times and even**

> **removed from the classroom by the district.** ***However, an investigation found a lack of records for additional complaints that were made over a 10 year period, stating "some student complaints may have never left the principal's office"*****[].** The former students coming forward are now in their 20s and 30s.
>
> At a **middle school between 2008 and 2015**, students tried to raise concerns about a teacher to employees of the school, ***but were met with unhelpful advice and no consequences for the teacher for years*****, until one of the former middle school students reported a rape**.[]

(RJN at exhibit 2; see Exh. 6, at 144.)[11]

Thus, the very cover-ups described to justify the proposed treble damages provision concerned cover-ups at *public schools*. To now find that the Legislature intended to shield public schools from the enhanced

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[11] The cover-up at the San Diego high school referenced in the Fact Sheet concerned La Jolla High School, where between 2002 and 2013, at least four women were groped or touched inappropriate by a physics teacher at the school. Despite multiple complaints by students, and even investigations by school administrators, there were no records kept of student complaints. "Some student complaints may have never left the principal's office." (See RJN exhibit 4, McGlone, *Women Say Complaints of Unwanted Touching by La Jolla Teacher Went Largely Ignored*, Voice of San Diego (Nov. 20, 2017), https://www.voiceofsandiego.org/topics/education/women-say-complaints-unwanted-touching-la-jolla-teacher-went-largely-ignored/
The cover-up at the middle school involved Mission Middle School in Escondido. There, students reported repeated instances of the French teacher's inappropriate sexual comments and conduct towards them, to which school administrators responded by telling students "not wear low cut shirts," and "[p]ut binders in front of [your] chest" when you see him to block his gaze. Following an allegation of rape in 2015, the teacher resigned and worked as a substitute teacher in two other public school districts. (See RJN at Ex. 5, Huntsberry & Jimenez, *Student Complaints About a Teacher's Behavior Came and Went, Until One Reported a Rape*, Voice of San Diego (Jan. 22, 2019), https://www.voiceofsandiego.org/topics/education/student-complaints-about-a-teachers-behavior-came-and-went-until-one-reported-a-rape/

damages available under Section 340.1(b) where a victim's sexual abuse was the result of a cover-up makes no sense and indeed would prove incongruent with the objectives of the statutory damages provision. (See *Dyna–Med, Inc., supra,* 43 Cal.3d at p. 1386-1387 [in a statutory construction analysis, where uncertainty exists, "consideration should be given to the consequences that will flow from a particular interpretation."].)

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.)

The societal goal of protecting children from sexual abuse, especially sexual abuse that could have been prevented had an institution not covered-up prior sexual abuse evidence, is at the forefront of AB 218. As recognized by this Court, Section 340.1 is "**a *remedial* statute** that the Legislature intended to be construed *broadly* to effectuate the intent that illuminates section 340.1 as a whole; *to expand the ability of victims of childhood sexual abuse to hold to account individuals and entities responsible for their injuries.*" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 536; see also *Quarry v. Doe I* (2012) 53 Cal.4th 945, 1003-1004.)

This broad intention to protect children from sexual abuse is prevalent in the legislative history of AB 218. "'Childhood sexual abuse has been correlated with higher levels of depression, guilt, shame, self-blame, eating disorders, somatic concerns, anxiety, dissociative patterns, repression, denial, sexual problems, and relationship problems.'" (Exh. 6, at 122.) The Legislative history reflects support from the Victim Policy

Institute, noting: "Victims who are ready to come forward today deserve an opportunity to expose their perpetrators and those who covered up the abuse. AB 218 simply provides a forum for victims to come forward. Victims will still be responsible for proving they were sexually assaulted and that someone covered it up. Victims deserve that chance and *the safety of our children demands that we provide every opportunity possible for victims to expose these crimes*." (Exh. 6, at 105, 126.)

In the legislative analysis, another supporter of the Bill explained:

> One in five girls and one in twenty boys is a victim of childhood sexual assault. Sexual assault and abuse is a crime with a lifelong, profound impact on survivors. **Victims may experience a wide range of psychological and physical symptoms well into adulthood, including post-traumatic stress disorder, depression, eating disorders, and drug and alcohol problems. The residual effects of the trauma impact the survivor's education and employment, adding to the economic loss the individual suffers as a result of the crime**.
>
> Our laws must be responsive to the reality that surrounds this crime: it is difficult for survivors of childhood sexual assault and abuse to come forward, and it may be decades before a survivor connects the struggles they have with their assault. Shame, guilt, fear of scrutiny, and intimidation all factor into the delay, and when the offender is a family member, it is particularly challenging for survivors to disclose their trauma. With the passage of time, emotional stability, maturity, and effective therapy, survivors may one day feel ready to fully face their perpetrator.
>
> ***Survivors of childhood sexual assault and abuse must be given a path to hold their offenders accountable and recover damages in civil court***. They should not be forced to incur the costs of the assault while the offender escapes liability. *Civil suits allow survivors to reclaim monetary losses they have incurred such as paying for health problems, counseling, and drug or alcohol treatment related to the abuse. Civil cases can also be initiated and directed by the survivor, reestablishing a sense of control that was lost during the abuse*.

(Exh. 6, 141-142 (emphasis added); see also 148 [another supporter notes that "NASW supports the bill expansion of access to justice for 'victims of childhood sexual assault by removing the current time limits placed on victims, *while increasing the amount of damages a victim may recover from those who sought to cover up the abuse*. We urge you to help victims of childhood sexual assault hold their abusers accountable for their despicable past acts.'"].)

Against this backdrop of alarming facts concerning the prevalence of sexual abuse and institutional cover ups, as well as the hurdles victims face in coming forward, the Legislature's intention in providing victims treble damages in cases where the abuse could have been avoided years prior reflects a non-punitive purpose – providing victims the "path" to come forward. (See Exh. 6, at 94, 131, 135, 141-142, 148.) Providing up to three times the actual damages would encourage those victims who experienced inappropriate encounters with sexual predators that may not have in-and-of-themselves been egregious sexual abuse to come forward in a civil action.

As revealed in the accounts of sexual abuse plaguing the two San Diego public schools referenced by the Author in describing examples of institutional cover-ups, a sexual predator may engage in conduct that is short of sexual molestation or rape but nonetheless entirely inappropriate and a potential red flag of sexual impropriety towards children.

For example, at La Jolla High School, some of the students reported that their physics teacher would make them uncomfortable by brushing back their hair, squeezing their thigh or waist as they walked by, or making odd comments to them. As recalled by one student:

> "Pretty quickly into his class, he started coming up behind me during exams or while we were working on projects and he would get so close to me that I could feel his breath on my ear. … And he would really, *creepily make cat noises in my ear. Like meowing.* And if I turned around and said, 'That's making

> me uncomfortable,' or like, 'Could you please not do that? That is very distracting,' he would hiss, like a cat."
>
> "He would harass me, sexually. I mean, he was getting into my personal space and into the space of other young women in my class. *He was pulling on belt loops. Touching my hair*," McCall said. "He never stopped. It went on for the rest of the school year."

(See RJN at exhibit 4; see also RJN at exhibit 5 [noting instances where the alleged abuser would look at female students "up and down from head to toe" and "look down their shirts"].)

While these types of inappropriate conduct by a teacher may not give rise to substantial damage awards, should such damages be enhanced up to three times the actual damages, a victim may be more likely to come forward which may help unravel an institution's efforts to cover-up and hide evidence of prior sexual assaults or inappropriate behavior. It is precisely this intention of ending system wide institutional cover-ups of child sexual abuse and protecting against future children from being abused that the treble damages provision was designed to achieve.

In describing AB 218 soon after it was passed, Assembly-member Gonzalez explained that in addition to extending the statute of limitations, damages can be trebled in cases in which a child becomes a victim of sexual assault as the result of an effort to cover up past sexual abuse. (RJN at exhibit 3.) She poignantly noted: "'We shouldn't be telling victims their time is up ***when in reality we need them to come forward to protect the community from future abuse***.'" (Id. (emphasis added).) It is this public policy objective, to encourage child victims to come forward, especially in those cases where there has been a concerted effort to cover-up prior abuse, so as to dismantle systemic institutional cover-ups to protect future children from harm that lies at the heart of the treble damages provision.

These same goals of using treble damages to incentivize and encourage victims to forward was present in *Kelly v. Yee* (1989) 213 Cal.App.3d 336. There, the Court upheld a San Francisco ordinance that trebled damages from wrongful conviction where the treble damages provision was aimed to encourage tenants to "promote effective enforcement of the ordinance on behalf of low-income tenants." (*Kelly*, at p. 342; see also *Los Angeles Cty. Metro*., 123 Cal.App.4th at p. 275-276 [citing *Kelly* to highlight that some civil penalties are designed to not only punish but also encourage litigants to bring actions].) The Court in *Kelly* rejected the landlord's argument that the treble damages provision was "punitive in nature" and thus preempted by Civil Code section 3294, governing punitive damages. (*Kelly*, at p. 341-342.) After noting that "[t]his truism, however, *is merely semantical and diversionary*," the Court highlighted that the provision for treble damages serves the distinct non-punitive objective of encouraging tenants to bring actions.

As explained by the court:

> lawsuits over wrongful evictions are likely to involve small amounts of money that may not justify the costs of litigation—especially in the case of suits brought by the very type of tenant the ordinance is especially intended to protect: 'senior citizens, persons on fixed incomes and low and moderate income households.' (San Francisco Admin. Code, § 37.1, subd. (b)(2).) *If civil remedies in aid of these tenants are to be meaningful, they must provide sufficient financial incentive to justify bringing suit*. ***The award of treble damages very clearly serves such a purpose***.

(*Id*. at p. 341 (emphasis added).) The same is true here.

While this non-punitive objective removes treble damages from the narrow contours of Government Code section 818, *even assuming* arguendo that "compensation is the essential condition" (*LAUSD*, 64 Cal.App.5th at p. 557), the availability of up to treble damages *compensates* a victim of

sexual abuse caused by a cover-up for the hardship, pain and grief in coming forward and initiating a lawsuit – harms that would *not otherwise* be recoverable. (See *Ortega v. Pajaro Valley Unified Sch. Dist.* (1998) 64 Cal.App.4th 1023, 1060-1061 [emotional distress damages for "litigation stress" is legally non-compensable]; *MacCharles v. Bilson* (1986) 186 Cal.App.3d 954, 958 ["the mental stress of litigation" is a burden that the litigant must bear themselves].)

Separate from the harm caused by the abuse itself, as well as the "additional psychological trauma upon learning those charged with his or her care and protection in effect facilitated the assault by aiding its perpetrator in a deliberate cover up of past sexual abuse," which as held by the Court of Appeal here is recoverable under normal tort damages principles (see *LAUSD,* 64 Cal.App.5th at pp. 552, 561), is the hardship and stress in initiating a lawsuit exposing the sexual abuse suffered.

The legislative history details the difficulty victims of sexual abuse face in coming forward and reporting abuse in a civil action. (See Exh. 6, at pp. 93-94, 118-122, 125-127, 138-149.) Victims often delay filing actions at all because of being ashamed by the abuse, blaming themselves for being a victim, and for fear of not being believed. (Exh. 6, at pp. 94, 139, 141-142, 144.) The Legislature not only recognized the difficulty in disclosing the abuse when coming forward, but also the trauma of facing the perpetrator in an action concerning the sexual abuse suffered. (Id. at 142.) The Legislature highlighted that "victims often have difficulty coming forward soon after the abuse for a variety of reasons, including threats, shame, self-blame, lack of trust, and fear." (Id. at p. 144.)

The embarrassment of having a childhood sexual abuse detailed in a lawsuit and often exploited by the defense is a cost of coming forward that is not otherwise recoverable. Trebling the damages available for those victims who have suffered sexual abuse as a result of a cover-up therefore

not only encourages victims to come forward but also compensates them for the pain of exposing the abuse and cover-up in a lawsuit. By providing an enhanced damage, victims are *compensated* for the burden of bringing a civil action to expose the cover-up. In this respect, treble damages are a remedial tool by which the Legislature can encourage victims to come forward to end systemic institutional cover-ups of child sexual abuse.

Thus, a statutory construction analysis reveals that the treble damages provision here is not simply and solely punitive and thus barred by Government Code section 818. 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. There is simply no support for the Court of Appeal's finding that the Legislature *impliedly* intended to shield public school districts who have engaged in a cover-up of childhood sexual abuse thereby causing additional victims to be abused from the reach of the enhanced damages designed to combat such abhorrent institutional failures.

CONCLUSION

For the foregoing reasons, this Court should find that in light of the non-punitive remedial purposes served by the treble damages provision in Code of Civil Procedure section 340.1(b), Government Code section 818 does not apply to immunize public entities like the District here from the reach of such damages. The Court of Appeal's order granting the District's petition should be reversed and remanded with directions to vacate the peremptory writ and enter a different order denying the District's petition.

Dated: November 17, 2021

TAYLOR & RING, LLP

ESNER, CHANG & BOYER

By: *s/ Holly N. Boyer*

Holly N. Boyer

Attorneys for Plaintiff and Real Party in Interest

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 12,035 words as counted by the word processing program used to generate the brief.

s/ Holly N. Boyer
Holly N. Boyer

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

(S269608 | B307389 | BC659059)

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

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Kelsey Wong Esner, Chang & Boyer	kwong@ecbappeal.com	e-Serve	11/17/2021 3:04:13 PM
Claudia Ramirez Gutierrez, Preciado & House, LLP	claudia.ramirez@gphlawyers.com	e-Serve	11/17/2021 3:04:13 PM
Holly Boyer Esner Chang & Boyer 221788	hboyer@ecbappeal.com	e-Serve	11/17/2021 3:04:13 PM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	11/17/2021 3:04:13 PM
David Ring Taylor & Ring, LLP	ring@taylorring.com	e-Serve	11/17/2021 3:04:13 PM
Arthur Preciado	apreciado@gphlawyers.com	e-Serve	11/17/2021 3:04:13 PM
Devin Storey 234271	dms@zalkin.com	e-Serve	11/17/2021 3:04:13 PM

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Date

/s/Kelsey Wong

Signature

Boyer, Holly N. (221788)

Last Name, First Name (PNum)

Esner, Chang & Boyer

Law Firm