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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Legislature expressly intended the 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. Nevertheless, the Court of Appeal here found that public entities – arguably the largest perpetrator of such cover-ups – 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 its Answer Brief, Defendant Los Angeles Unified School District ("the District") represents that this is precisely what the legislature intended. The District is mistaken.

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",[1] engage in the precise conduct the Legislature 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

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

repeatedly fought against. 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.

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.

As detailed in the Opening Brief, the Court'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*. 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. A category of damages that is beyond compensatory, ***but not entirely punitive***, does not fall within the narrow immunity afforded by Section 818. (Gov. Code § 818; *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 35-36 [although penalty at issue was admittedly punitive, it was *"not simply and solely punitive in nature"* and thus did not fall within the immunity under Section 818].)

Perhaps recognizing the absence of any indication that the Legislature sought to exempt public entities from the reach of the treble damages provision, the District begins and ends its brief with policy arguments. (Answer at 9, 40.) According to the District, exposing "cash-strapped school districts" to the "'"draconian" statutory liability'" presented in the newly enacted treble damages provision "can only be considered

punitive" and as such barred by Section 818. (Answer at 9-10, 28-29.) The District goes on to argue: "Declining to authorize treble damage awards against school districts will not impair AB 218's principal goal of assuring compensation for victims of past abuse." (Answer at 10.) Throughout its brief, the District submits that because victims may rely on the extended statute of limitations and revival period to bring an action against a public entity for past sexual abuse, the intent of the Legislature has been fulfilled. (Answer at 10, 30, 34, 40.) All of this is wrong.

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 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 District entirely ignores the reality that its statutory construction analysis, whereby public entities are immunized from the reach of the treble damages provision, undermines the very policy goal that motivated the provision. In its Petition for Writ of Mandate before the Court of Appeal, the District pointed out that "[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). (Writ Pet. at 7.)[2] The District seemingly fails to appreciate that the Legislature was attempting to address the "crucial issue" of institutional cover-ups of childhood sexual abuse that results in "too many" children being sexually abused in California. During the 2019-2020 school year, ***over six million children*** attended public school (K-12) in California. Of those, *less than* five hundred thousand attended private school.[3]

A staggering 10% of K–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.[4] On average, a teacher who has sexually abused a child will pass through three different districts before being stopped, and one offender can have as many as 73 victims in his or her lifetime.[5] In her fact sheet concerning AB 218, the Author of the Bill specifically highlighted two troubling instances of a school concealing reports of sexually inappropriate comments, harassment and abuse by a teacher thereby exposing more

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[2] The District cited: "Fingertip Facts on Education in California," found at www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp.

[3] See the same California Department of Education source, "Fingertip Facts on Education in California," cited by the District. (See https://www.cde.ca.gov/sp/ps/cefprivinstr.asp.)

[4] Billie-Jo Grant, Ph.D; Stephanie B. Wilkerson, Ph.D.; Anne Crosby, M.S.W.; Molly Henschel, Ph.D., *A Case Study of K-12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation*, p. 1 (2017), National Criminal Justice Reference Service, ("Grant 2017") available at https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf; citing Shakeshaft, C. (2004). *Educator sexual misconduct: A synthesis of existing literature.* US Department of Education, Policy and Programs Studies Services, ("Shakeshaft 2004"), available at athttps://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf; US Government Accountability Office, *K-12 Selected Cases of Public and Pricvate Schools that Hired or Retained Individuals with Histories of Sexual Misconduct* (2010), ("GAO 2010) available at https://www.gao.gov/assets/gao-11-200.pdf

[5] (Grant 2017at pp. 5-6.)

children to his abuse – these instances occurred at *public schools*. The treble damages provision was created to address a *very specific problem* – a problem that plagues both public and private entities.

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

An analysis of statutory construction is not blind to the very nature and purpose of the law. Statutes are not interpreted in a vacuum. 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. It is inconceivable that the very tool designed by the Legislature to address the problem of institutions covering-up childhood sexual abuse thereby exposing more children to such abuse would not apply to the largest institution charged with the protection and care of children.

ARGUMENT

I.

NOTHING ARGUED BY THE DISTRICT SUPPORTS THE COURT OF APPEAL'S INTERPRETATION THAT THE LEGISLATURE INTENDED TO EXEMPT PUBLIC ENTITIES FROM THE REACH OF TREBLE DAMAGES

According to the Court of Appeal's statutory construction analysis, the Legislature *impliedly* intended to shield public entities from the reach of the treble damages provision by envisioning such damages to be entirely punitive and thus barred by Government Code Section 818. This was *not* what the Legislature intended.

A. An Analysis of Statutory Construction Must Begin by Considering the Purpose of the Law so that the Court May Adopt the Construction that Best Effectuates that Purpose.

The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572; *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 718–719.) "Statutes should be interpreted to be 'consistent with legislative purpose and not evasive thereof.' [Citations]." (*Presbyterian Camp & Conf. Centers, Inc. v. Superior Ct. of Santa Barbara Cty.* (2021) 12 Cal.5th 493, 512.) "'Courts properly examine the manifest purpose of the statute as a whole in interpreting its provisions. [Citations.] We examine the history and the background of the statutory provision in order to ascertain the most reasonable interpretation of the measure.' [Citation]" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543.)

The societal goal of protecting children from sexual abuse is at the forefront of AB 218. As recognized by this Court in *Doe*, 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.)

It is this broad intention to protect children from sexual abuse that motivated the Legislature to take action to dismantle the recurrent and horrific problem of institutions covering-up prior sexual abuse of children. "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). The legislative analyses note that in response to the "pervasive problem" of institutional cover-ups of child sexual abuse, spanning "schools to sports leagues" and resulting in "continuing victimization and the sexual assault of additional children," the Legislature amended Section 340.1, to include subdivision (b), permitting recovery of up to treble damages where a victim can demonstrate that his or her abuse was the result of a cover-up. (Code Civ. Proc. § 340.1(b); Exh. 5, at 74-75; Exh. 6, at 94, 131, 135, 141.)

In its Answer Brief, the District is careful to acknowledge *only* the legislature's intent to expand and revive the limitations period for victims of sexual abuse in AB 218. (See Answer at 10, 40.) But the District cannot ignore the fact that the intention of the treble damages provision, provided for in subdivision (b), was to address the "pervasive problem" of institutional cover-ups of child sexual abuse. That is the very purpose of subdivision (b). To find that it does not apply to public entity defendants, such as school districts, which again care for nearly all of the six million

students in grades K-12, would thwart the very efforts of the Legislature in response to systemic cover-ups of childhood sexual abuse.

Not only is such an interpretation belied by the statutory language, but nowhere the legislative 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.) 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.) How could the very circumstances exemplifying the travesties of a school district cover-up of childhood sexual abuse be in fact shielded from its reach? The District never acknowledges this point.

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

As described in the Opening Brief, the accounts of sexual abuse plaguing the two San Diego public schools referenced by the Author reveal that 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. (OBM at 35-36, 39-40; See also RJN at exhibit 2, Exh. 6, at 144.) 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.

The District curtly dismisses such an objective as concerns "not present in this case." (Answer at 39.) But the District's own recitation of large damage awards compensating those children sexually abused by teachers who have initiated actions against school districts (see Answer at 34, fn. 70) suggests that indeed it is only those victims who have suffered significant and prolonged sexual abuse that come forward. The legislative history as well as relevant literature on the subject confirm that most victims of sexual abuse never come forward. (See Exh. 6, at 94, 105, 126, 131, 135, 139, 141-142, 144, 148.)

As detailed in the legislative history, there are *numerous reasons* why children do not report sexual abuse – including feelings of shame, embarrassment and fear. (See Exh. 6, at 141-142, 144, 148; see also Grant at pp. 24-25; Shakeshaft at pp. 42-43.) Simply because the window is open for a child to bring an action arising out of sexual abuse, does not mean that the child will. Yet, and as explained throughout the legislative history, by providing victims the "path" to come forward and shine a light on those entities that have long harbored and protected child abusers, the "pervasive problem" of institutional cover-ups can be dismantled and our children protected. (See Exh. 6, at 94, 131, 135, 141-142, 148.)

If merely providing a longer period of time for victims to come forward could solve the problem of institutions covering-up child sexual abuse as intimated by the District, then there would have been no point in the treble damages provision. Also, on this point, if treble damages were truly punitive damages at heart and thus only available against private entities – then again, there would have been no point for the statutory

provision since a victim of sexual abuse can *already recover* punitive damages against private entity defendants.

Further, the District's position that the Legislature could not possibly have sought to use the treble damages provision to more fully compensate victims who bravely come forward in civil actions proves tone-deaf to the unique difficulties faced by such victims. (See Answer at 34-35.) As noted throughout the Legislative history of AB 218:

> AB 218 would also confront the pervasive problem of cover ups in institutions, from schools to sports league, which result in continuing victimization and the sexual assault of additional children. The bill would allow for recovery of up to treble damages from the defendant who covered up sexual assault. *This reform is clearly needed* ***both to compensate victims who never should have been victims***- and would not have been if past sexual assault had been properly brought to light- and *also as an effective deterrent* against individuals and entities who have chosen to protect the perpetrators of sexual assault over the victims.

(Ex. 6, at 94, 131, 135, 141 (emphasis added).)

Victims often do not report sexual abuse to avoid the emotional trauma that surrounds talking about the abuse. (Grant at pp. 15, 24-25; Shakeshaft at pp. 31, 42-43.)[6] Victims also fear not being believed or being blamed for the abuse. (Id.) Such trauma is only exacerbated in a civil action where the victim has the burden of proof in asserting claims against the perpetrator and third-party entity. By recognizing this hardship with compensation for the litigation stress suffered but not otherwise awarded to

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[6] See also The National Child Traumatic Stress Network, *Why Don't They Tell? Teens and Assault Disclosure*, available at https://www.nctsn.org/sites/default/files/resources/fact-sheet/why_dont_they_tell_teens_and_sexual_assault_disclosure.pdf; Hamilton, M., *Delayed Disclosure* (2020) Child USA, available at https://childusa.org/wp-content/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf.

civil litigants, there is a greater chance victims will come forward and thus break the chain of repeated abuse and cover-up.

Thus, 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. In turning to an analysis of statutory construction, the purpose of Legislature must be the guiding light.

B. Neither the Plain Language of the Section 340.1(b), Nor the Legislative History of AB 218, Supports a Finding that Public Entities are *Exempt* From the Reach of Treble Damages.

Section 340.1(b) does not expressly provide for punitive damages. (See Code Civ. Proc. § 340.1(b).) Nor does the recovery of treble damages require proof oppression, fraud or actual malice. Recovery is likewise untethered to the financial wealth of the defendant. There is also no mention of the treble damages provision as being akin to punitive damages in the legislative history of AB 218. Nor is there is any reference to Government Code section 818 in the plain language of the statute or its legislative history. Nowhere in the legislative history is there any mention of public entities being exempt from the reach of treble damages.

In its Answer Brief, the District argues: "Although Plaintiff claims that the Legislature could not have intended to exempt public entities from treble damages, *the failure to expressly include public entities* in that provision shows exactly the opposite." (See Answer at 26-27.) According to the District, "AB 218's treble damages provision authorizes a person to recover 'up to treble damages' against a 'defendant' who covered up the sexual assault of a minor" and because "'Defendant,'" as defined in Code

of Civil Procedure section 308 is not specific to public entities, the treble damages provision "should not apply to the LAUSD." (Id.) Not so. Indeed, taking the District's argument further would mean that because public entities are *never identified* in the words of Section 340.1, the entire statute does not apply to public entities. But of course, this is *not* the law.

Closer examination of the District's statutory analysis actually proves the opposite of the District's position – that the Legislature absolutely meant to include public entities within the reach of the treble damages provision. To wit, Section 340.1, states:

> (a) In an action for recovery of damages suffered as a result of childhood sexual assault, the time for commencement of the action shall be within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later, for any of the following actions:
>
> (1) An action against any person for committing an act of childhood sexual assault.
>
> (2) An action for liability against ***any person or entity*** who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
>
> (3) An action for liability against ***any person or entity*** if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.

(Code Civ. Proc. § 340.1(a) (emphasis added).) There can be no dispute, and indeed there is none, that Subdivision (a) applies to public entity

defendants. (See Answer at pp. 10 [admitting that the extended statute of limitations and revival period apply to public entities]; 40 [same].)[7]

Subdivision (b), the treble damages provision, begins with: ***"[i]n an action described in subdivision (a),*** a person who is sexually assaulted and proves it was as the result of a cover up may recover up to treble damages against a defendant who is found to have covered up the sexual assault of a minor, unless prohibited by another law." (Code Civ. Proc. § 340.1(b) (emphasis added).) By referencing an action described in (a), which absolutely includes public entity defendants, the treble damages provision *necessarily* includes public entity defendants.

Indeed, subdivision (q), which was a part of AB 218, specifically revives "any claim for damages described in paragraphs (1) through (3), inclusive, of *subdivision (a)* that has not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, ***claim presentation deadline,*** or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020." (Code Civ. Proc. § 340.1(q) (emphasis added).) The very fact that the legislature references the "claims presentation deadline" as a bar to actions identified in subdivision (a) *confirms* that "any person or entity" in (a), and thus incorporated into (b), includes public entity defendants.

Under settled principles of statutory interpretation, it is appropriate to give the same meaning to the same terms used in a statute. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1288–1289, citing

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[7] There is also likely no dispute by the District that the multiple references to "defendant" when describing the certificate of merits requirement applies to public entity defendants. (See Code Civ. Proc. § 340.1(f)-(p).)

Walker v. Superior Court (1988) 47 Cal.3d 112, 132, 253 Cal.Rptr. 1, 763 P.2d 852 ["Identical language appearing in separate provisions dealing with the same subject matter should be accorded the same interpretation"]; *County of Placer v. Aetna Cas. etc. Co.* (1958) 50 Cal.2d 182, 188–189, 323 P.2d 753 ["statutes relating to the same subject matter are to be construed together and harmonized if possible"].) The fact that all other provisions of Section 340.1 apply to public entity defendants supports a finding that the newly enacted subdivision (b) likewise applies to public entity defendants. (See also *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 ["We examine that language, not in isolation, but in the context of the statutory framework as a whole to discern its scope and purpose and to harmonize the various parts of the enactment."].)[8]

The District next argues that the addition of the phrase "unless otherwise prohibited by another law" during the legislative progression of AB 218 is evidence that the Legislature intended treble damages to be akin to punitive damages and thus barred by Government Code Section 818. (Answer at 10, 30-31.) 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 Section 818. (Id.)

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[8] While the District cites *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1163, 1192 to argue that governmental entities are not included within the general words of a statute unless expressly stated (Answer at 27), the "sovereign powers" maxim is merely a tool to "help resolve an unclear legislative intent." (*Wells*, at p. 1193.) As noted in *Wells*, "it *cannot* override positive indicia of a contrary legislative intent." (*Id.*)

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.)

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." (Id.) Of course, and as noted above, the Legislature balanced such concerns against the lifetime of trauma suffered by abuse victims and the desperate need to stop child sex abuse occurring as a result of institutional cover-ups.

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

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 in the Opening Brief and below, Section 818 does not apply to the treble damages provision here given the non-punitive objectives of the damages provision.

Had the Legislature intended to exempt public entities from the treble damages provision, it could have easily said so. It didn't. (See Gov. Code § 66641.5(c) [in addition to civil penalties against any person or entity who violates the bay conservation and development law, whenever a person or entity has intentionally and knowingly violated the law, the statute permits recovery of exemplary damages "[*e]xcept as provided in Section 818*."].) Further, 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 v. WCAB* (1971) 5 Cal.3d 885, 886-891 [this Court distinguished *DuBois* noting that there, a specific statute existed providing that the state not be liable for penalties].)

The District's final argument that "[r]uling that public entities are not subject to treble damages under AB 218 would also be consistent with

the concerns that led the Court to decide school districts were not subject to suit under the California False Claims Act" in *Wells* is entirely misplaced. (Answer at 28.) *Wells* necessarily concerned a different statutory scheme than the one here. In determining whether the Legislature intended the term "persons" to include local public entities, the Court highlighted that public entities were specially not included in statutory list but yet the statute makes specific reference to government entities in other contexts. (*Wells*, at p. 1190.) Beyond this, the Court highlighted that a prior version of the bill included public entities in the definition of "person," and thereafter such language was excised from the final version adopted. (*Id*. at p. 1191.) None of these statutory indicators of legislative intent are present here.

Moreover, *Wells* concerned interpretation of the CFCA which is "designed to prevent fraud on the public treasury." (*State ex rel. Bartlett v. Miller* (2016) 243 Cal.App.4th 1398, 1405–1406.) As indicated in the definition of "persons," the statutory scheme is designed to allow the State and its political subdivisions to recover from natural persons, corporations, business, etc., that present false claims for payment. (*Id*.; see also Gov. Code § 12650(b)(5).) Nothing about CFCA revealed a particular problem concerning false claims made to the State by other public entities.

Here, Section 340.1 is concerned with permitting victims of childhood sexual abuse to recover against perpetrators of sexual abuse as well as third-party entities that "owed a duty of care to the plaintiff." (See Code Civ. Proc. § 340.1(a)(2), (b).) With respect to the treble damages provision, the Legislature history notes that it is a problem "***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.) Thus, the universe of third-party defendants that fall within

Section 340.1 and the treble damages provision is therefore much more narrow than the potential defendants in CAFA. Here, "schools" are arguably the target of the legislation.

For this same reason, the District's statutory construction argument fails as exempting public entity defendants from the only tool designed to combat institutional cover-ups would undermine the very goal motivating the provision. (See *Presbyterian, supra*, 12 Cal.5th at p. 512 ["The fact that the elimination of respondent superior liability would hinder the policy goals of section 13009 reinforces why Presbyterian's argument must fail."].) "'Statutes should be interpreted to be 'consistent with legislative purpose and not evasive thereof.'" (*Id.*, citing *Cal Pacific Collections, Inc. v. Powers* (1969) 70 Cal.2d 135, 140.)

II.

THE DISTRICT'S ENTIRE ARGUMENT RESTS ON A FLAWED INTERPRETATION OF GOVERNMENT CODE SECTION 818

Echoing the mistaken notion espoused by the court of appeal here that "compensation is the essential condition" in determining whether damages are punitive and thus barred by Government Code section 818 (see "*Los Angeles Unified Sch. Dist. v. Superior Court* ("*LAUSD*") (2021) 64 Cal.App.5th 549, 557), the District begins its Answer Brief by arguing "[s]ince the Government Claims Act was enacted in 1963, public entities in California have been protected from damages awards that exceed the amount necessary to compensate the injured person for the harm suffered." (Answer at 9.) But this is simply not true. Through a patchwork of selective case citations, mix-and-matched together, the District portrays Section 818 as stating something that it doesn't. Section 818 *does not* state that a public entity shall be liable only for compensatory damages. (See

Gov. Code, § 818.) Rather, it states that a public entity shall not be liable for *punitive damages*. (Id.) "***The difference is important***." (*Molzof v. United States* (1992) 502 U.S. 301, 308 (emphasis added).)

As detailed in the opening brief, a category of damages that is *beyond compensatory* does not fall within the narrow immunity afforded by Section 818 so long as it is not entirely punitive. In its Answer Brief, the District argues otherwise. According to the District, the discussion highlighted by Plaintiff from *Molzof* is "misplaced" in the analysis here since *Molzof* concerned a different statute. (Answer at 15-16.) While it is true that *Molzof* concerned the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671–2680, and not the California Government Tort Claims Act, the District entirely overlooks the similarities between the statutory language at issue here. As described in *Molzof,* the FTCA, similar to the Act here, was enacted to specify when the United States could be liable for the negligent acts of its employees. (*Molzof*, at pp. 304-305.) Pursuant to 28 U.S.C. section 2674,

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but *shall not be liable* for interest prior to judgment or *for punitive damages*.

(*Id*. at p. 305 (emphasis added).)

Just as the District argues here, the Government argued that "punitive damages" should be defined as "'damages that are in excess of, or bear no relation to, *compensation*.'" (*Id*. at p. 306.) "In the Government's view, there is a strict dichotomy between compensatory and punitive damages; damages that are not strictly compensatory are necessarily 'punitive damages' barred by the statute." (*Id*.)

In rejecting the Government's interpretation of Section 2674, the Supreme Court explained: "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." (*Molzof, supra,* 502 U.S. at p. 308.) The Court continued: "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.'" (*Id*.)

While the District argues that unlike Section 2674, here Section 818 extends beyond common law punitive damages to reach "*all* damages that are imposed 'primarily for the sake of example and by way of punishing the defendant,'" the distinction is one without a difference. (Answer at 16.) As noted above, the Legislature clearly sought to exempt public entities from *punitive damages* – whether those damages are sought "under Section 3294" or some other statute permitting recovery of punitive or exemplary damages. As has been recognized by this Court, punitive damages serve the dual goals of punishment and deterrence. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 ["The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts. [Citations.]"]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1689.) The very language used in Section 818 mirrors these dual objectives. (See Gov. Code § 818; Civ. Code. § 3294(a).)

The District therefore fails to distinguish *Molzof* and its statutory construction analysis. There is simply no support for the District's argument that a public entity is liable *only* for compensatory damages. The analysis is *not* whether the damages at issue serve some compensatory function, but whether the damages are indeed punitive damages – those designed solely to deter and punish.

The District's criticisms of this Court's prior characterizations of Section 818 as applying only to those damages that are "simply and solely punitive," goes nowhere. (See Answer at 18-21.) According to the District, Section 818 all damages whose "primary purpose" is punitive. (Answer at 18-21, 40, citing *X.M. v. Superior Court* (2021) 68 Cal.App.5th 1014, 1031, review granted and briefing deferred (Dec. 1, 2021).) Again, the District is mistaken.

In *Helfend v. Southern California Rapid Transit District* (1970) 2 Cal.3d 1, one of the first few decisions following the enactment of Section 818, this Court refused to reduce a damages judgment by means of collateral payments to the injured party from an independent source on the grounds that the collateral source rule should not be classified as "punitive" for Section 818 purposes. (2 Cal.3d at pp. 13-14.) This Court explained that while the rule might have some punitive aspects, it also serves the laudable public policies of encouraging private investment in insurance for personal injuries and bringing victims closer to full compensation. (*Id*. at. pp. 9-14.) "Having concluded that the collateral source rules ***is not simply punitive in nature***, we hold, for the reasons set out infra., that the rule as delineated here applies to government entities as well as other tortfeasors." (*Id*. at p. 14 (emphasis added).)

Just a year later, in *State Department of Corrections v. Workmen's Comp. Appeals Board* (1971) 5 Cal.3d 885, this Court held that Section 818 was inapplicable to shield a public entity from a statutory penalty providing 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. (5 Cal.3d at p. 886-891.) Despite the fact that the statute at issue was *admittedly punitive*, in that the employer was "required to pay a higher amount of compensation by reason of his serious and willful misconduct than he would have been compelled to pay if his conduct were less culpable," the Court refused to find the statutory award barred by Section 818. The analysis centered on a previous decision wherein the Court considered whether this same provision was unconstitutional. (*Id*. at p. 888-889, citing *E. Clemens Horst Co. v. Indus. Acc. Comm'n of Cal.* (1920) 184 Cal.180, 192.)

As detailed in the opinion, Article XX of the California Constitution authorized the Legislature to create a system of workmen's compensation "to compensate" employees for injuries suffered on the job, regardless of fault. (*Id*. at p. 888.) The constitutional language "*does not authorize the creation of a liability for anything more than compensation*." (*E. Clemens Horst Co.,* at p. 192.) In *E. Clemens,* the Court held that the recovery of 1.5 damages where the injury results from the serious and willful misconduct of the employer is not unconstitutional since it *more fully compensates* the injured worker. (*State Department of Corrections,* at pp. 888-889.) In light of that decision, this Court explained that the statutory remedy could not be *solely punitive* since it had already been found to be compensatory and thus constitutional. Thus, the discussion of compensation specifically arose in

the context of the workers compensation system which was confined by the constitutional limit that only compensatory damages could be awarded. [9]

This Court next considered the application of Section 818 in *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30. There, this Court held that Section 818 did not apply to prohibit civil penalties for oil spills provided for in the Water Code to be enforced against a public entity. (*Younger*, 16 Cal.3d at p. 34.) Although the penalty was ***admittedly punitive*** in that it sought to deter oil spills, the *Younger* court concluded the money collected was **"not simply and solely punitive in nature"** because it also served to fulfill legitimate compensatory functions of compensating "the people of this state" for the unquantifiable damage to public waters and wildlife and to defray some of the costs of cleaning up waste and abating further damages. (*Id*. at pp. 37–39; see also *LAUSD, supra,* 64 Cal.App.5th at p. 563, fn. 6.)

Throughout its discussion, this Court explained that it is only where the remedy is "simply and solely" punitive that it falls within the prohibition of Section 818. (*Younger*, at pp. 35-37, 39.) Notably, in a footnote, this Court rejected the public entity's reliance on a federal decision finding that the same section was punitive and thus barred against the Department of Navy under federal law. The Court poignantly explained:

> Defendant Port of Oakland contends that the punitive nature of the damages awarded for violation of section 13350, subdivision (a)(3) was conclusively determined in *People ex rel. Cal.Reg.W.Q.C.Bd. v. Department of Navy* (1973) 371

[9] Of course, and unlike the workers' compensation scheme, no such limitation of liability and/or recovery of *only compensatory damages* exists under the Government Code nor Section 340.1.

> F.Supp. 82. In that case the Attorney General brought an action against the Department of Navy asserting liability under such section for an oil spill into the waters of San Francisco Bay. The court held that the Department of Navy was immune under federal law because the asserted liability was punitive rather than compensatory, relying on *Missouri Pacific R. Co. v. Ault* (1921) 256 U.S. 554, 41 S.Ct. 593, 65 L.Ed. 1087. The applicable federal standard, *unlike the California standard set forth in Helfend and State Dept. of Corrections* ***which provides immunity only if the damages are simply punitive***, grants immunity to the federal government for damages '**which do not merely compensate**' (*Ault, supra*, at p. 564, 41 S.Ct. 593), or where the 'impact of (the) section *is more punitive than compensatory*.' (*People ex rel. Cal.Reg.W.Q.C.Bd.*, at p. 85.) *Since the federal standard for ascertaining punitive damages for federal government immunity purposes* ***varies so significantly from the California standard,*** *the case is inapposite*.
>
> Defendant Port of Oakland repeatedly points to the punitive aspects of section 13350, subdivision (a)(3) liability. The liability imposed by that section is **undoubtedly punitive in nature** and indeed is conceded to be so by plaintiff. **However,** ***the critical question is whether it is simply, that is solely, punitive***.

(*Younger,* 16 Cal.3d at p. 39 (emphasis added).)

Exactly. Section 818 precludes only punitive damages.

As stated in the California Law Revision Commission Comments to Section 818, "[t]his section exempts public entities from liability for punitive or exemplary damages." (Gov. Code § 818, Law Revision Commission Comments, 4 Cal.L.Rev.Comm. Reports 801(1963).) "Section 818 is explained by the California Law Revision Commission on the ground that '*such damages are imposed to punish a defendant for oppression, fraud or malice*. They are inappropriate where a public entity is involved, since they would fall upon the innocent taxpayers.' (4 California Law Revision Commission (1963) Recommendation Relating to Sovereign

Immunity, p. 817.)" (*City of Salinas v. Souza & McCue Const. Co.* (1967) 66 Cal.2d 217, 228, overruled in part by *Helfend v. S. Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1.)[10] At the same time the legislature enacted Section 818, it enacted Section 825 which states "[n]othing in this section shall affect the provisions of Section 818 *prohibiting the award of punitive damages* against a public entity." (*Id*., citing Gov. Code, § 825(e) (emphasis added).) Thus, the Legislature itself defined Section 818 as prohibiting "punitive damages." (*Id*.)

Statutory words or phrases must be construed according to the context and approved usage of language, with technical terms to be allowed

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[10] While the District likewise quotes this passage from *Souza* and the Law Revision Commission, the District omits the italicized portion referring to the damages as being imposed "to punish a defendant for oppression, fraud or malice." (Answer at 11, fn. 7.) Also, while the District relies on this passage to argue Section 818 protects "innocent taxpayers" from the enhanced statutory damages at issue here, this Court in *Helfend* noted: "On the issue of whether liability recompensed by a collateral source can he imposed upon a public entity, plaintiff cogently points out that ***such liability is not imposed upon the innocent taxpayers as Souza assumes*** (see []Souza [] [at] 227), ***but upon the entity's insurer***. Of course the entity does pay the insurance premiums or the tort recovery, if it is a self-insurer. But such premiums or recoveries are the normal cost of maintaining an enterprise, and represent no grievous injury to taxpayers since the entity and its insurer are in an excellent position to spread the risk of loss and to take precautionary measures to prevent injuries." (*Helfend*, at p. 9, fn. 9 (emphasis added).) The same is true here.
And in any event, just as this Court concluded in *Kizer v. County of San Mateo* (1991) 53 Cal.3d 142, "' [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.'"*** (*Kizer* at pp. 150–51.)

their technical meaning and effect unless in either case, the context indicates that such construction would frustrate the real intention of the lawmaking power. (See *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82; *People v. Garcia* (2017) 2 Cal.5th 792, 805.)

In enacting Section 818, the Legislature referred to Section 3294 and other damages "primarily for the sake of example and by way of punishing the defendant." The phrase "for the sake of example and by way of punishing the defendant" is taken *directly* from Section 3294's description of *punitive damages*. (See Civ. Code § 3294.) The word "primarily" is an adverb that modifies only the phrase "for the sake of example." (Gov. Code § 818; *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1170 ["'Words and phrases in a statute are [typically] construed according to the rules of grammar and common usage.' (3 Singer & Singer, Sutherland Statutes and Statutory Construction (7th ed. 2014) § 59.8.)].)

Thus, the District's interpretation of Section 818 as applying to any damages whose "primary purpose" is punitive is flawed. Indeed, if that were the analysis then there would likely have been a much different result in *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049. *Marron* involved recovery of enhanced civil penalties for dependent elder abuse alleged against the Regents of the University of California for acts committed by doctors and staff of the UCSD Medical Center. The statute at issue provided that if it was proven by *clear and convincing evidence,* that a defendant is liable for physical or financial abuse and the defendant is guilty of *recklessness, oppression, fraud or malice* in the commission of the abuse, then the plaintiff can recover for the decedent's pain and suffering damages prior to death. While the Court refused to apply Section 818 as a

bar to such damages, finding them to be compensatory in nature, there can be no dispute that the "primary purpose" of the law at issue was *punitive*. (See *Marron,* at pp. 1060-1064; see also *State Dep't of Corrections, supra,* 5 Cal.3d at pp. 86-891 [primary purpose of statutory penalty predicated on employer's willful misconduct likewise appears to be the primary purpose of the enhanced damages]; *Los Angeles County Metropolitan Transp. Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 270-271.)

If the analysis turned on whether the "primary purpose" of the statute was punitive, then presumably all statutory penalties would be barred by Section 818 as the punitive nature of the penalty would likewise always outweigh other non-punitive objectives. Again, there is no support for such a sweeping proposition. "Government Code section 818 was *not intended* to proscribe all punitive sanctions." (*Kizer,* 53 Cal.3d at p. 146.)

As detailed in the Opening Brief, 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. (*Los Angeles Cty. Metro, supra,* at pp. 270-271; see also *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597; *Kelly v. Yee* (1989) 213 Cal.App.3d 336, 341-342.) The District entirely fails to address the fact 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. (See Opening Brief at 22-27, 31; Answer at 25 [The District only superficially distinguishes *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139 as not concerning Section 818].)

Section 818 prohibits only punitive damages – whether recoverable under Civil Code Section 3294 or some other statute. Such a construction comports with the legislative history of Section 818, its reference by the Legislature in other statutes, and the interpretation given by this Court. Nevertheless, and as detailed in the Opening Brief, *even if* Section 818 applied to those categories of damages whose "primary purpose" is punitive, the newly enacted treble damages provision would still fall outside the immunity of Section 818 in light of its non-punitive objectives to encourage and incentivize victims to come forward and thereby dismantle institutional cover-ups and prevent childhood sexual abuse.

CONCLUSION

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

Dated: February 7, 2022

TAYLOR & RING, LLP

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s/ Holly N. Boyer
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Kelsey Wong

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

(S269608 | B307389 | BC659059)

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