APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE ROMAN CATHOLIC BISHOP OF OAKLAND, et al., Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; MULTIPLE PLAINTIFFS, Real Parties in Interest.	COURT OF APPEAL – SECOND DIST. FILED Oct 20, 2021 DANIEL P. POTTER, Clerk mfigueroa Deputy Clerk B313278 (Alameda County Super. Ct. No. JCCP 5108) (Winifred Y. Smith, Judge) **ORDER**

We have read and considered the petition for writ of mandate, request for immediate relief, and motion for judicial notice filed on June 28, 2021; the preliminary opposition filed on July 8, 2021; the reply and second motion for judicial notice filed on July 19, 2021; and the letter regarding new authority petitioners filed on September 24, 2021.

The motion for judicial notice filed on June 28, 2021 is granted as to all exhibits (Exhibits A through H). The motion for judicial notice filed on July 19, 2021 is

denied as to Exhibit A and granted as to Exhibits B and C.

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Petitioners do not establish entitlement to writ relief. Accordingly, the petition and request for immediate relief are denied.

GRIMES, Acting P.J.	STRATTON, J.	OHTA, J.*

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE ROMAN CATHOLIC BISHOP OF ORANGE et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent.	COURT OF APPEAL – SECOND DIST. FILED Sep 01, 2021 DANIEL P. POTTER, Clerk mgudiel Deputy Clerk B313939 (Super. Ct. No. JCCP 5101) (David S. Cunningham III, Judge)
PLAINTIFFS in cases coordinated in JCCP 5101, Real Party in Interest.	ORDER

THE COURT:

The court has read and considered the petition for writ of mandate filed on August 2, 2021, as well as the opposition filed on August 26, 2021. The petition is denied.

PERLUSS, P. J. SEGAL, J. FEUER, J.

APPENDIX C

Court of Appeal, Second Appellate District,
Division Eight - No. B313278

S271532

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE ROMAN CATHOLIC BISHOP OF OAKLAND et al., Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;

JOHN DOE et al., Real Parties in Interest.

The petition for review and application for stay are denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D

Court of Appeal, Second Appellate District,
Division Seven - No. B313939

S270849

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE ROMAN CATHOLIC BISHOP OF ORANGE et al., Petitioners,

v.

SUPERIOR COURT LOS ANGELES COUNTY, Respondent;

PLAINTIFFS in cases coordinated in JCCP 5101, Real Party in Interest.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

SUPREME COURT
FILED

NOV 17 2021

Jorge Navarrete Clerk

Deputy

APPENDIX E

Case Number: JCCP 5101

Southern California Clergy Cases

Final Statement of Decision Re Motion to Determine Constitutionality of AB218

Dated: June 11, 2021

(1) This decision is the Court's Final Statement of Decision.

(2) This is a Judicial Council Coordinated Proceeding (JCCP) involving, currently, 190 individual lawsuits. Plaintiffs are alleged victims of childhood sexual assault. They allege that they suffered abuse at the hands of "Doe Perpetrators" when they were minors. Plaintiffs further allege that defendants (defined as "Defendants Religious Entities"), failed to protect plaintiffs from the alleged assault.

(3) The Roman Catholic Archbishop of Los Angeles and the Roman Catholic Bishop of Orange (hereafter the "Defendants"), challenge the constitutionality of Code of Civil Procedure section 340.1 (hereafter "section 340.1") under various

theories.[1] The motion came on for hearing on March 4, 2021, in Department 15, the Hon. David S. Cunningham III presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court requested supplemental briefing and a subsequent hearing was held on May 7, 2021.

(4) The Court will take judicial notice of the legislative history in Defendants' and Plaintiffs' supplemental requests for judicial notice, but not of the truth of any reasonably disputable matters therein. This includes Exhibits 1 through 18 in Defendants' April 7, 2021, second request for judicial notice (hereafter "Second RJN") and Exhibits 20 through 25 in Plaintiffs' April 7, 2021, request for judicial notice in support of Plaintiffs' supplemental opposition brief (hereafter "Supplemental RJN").[2]

(5) The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows:

IT IS HEREBY ORDERED: Defendants' motion for the determination of the constitutionality of section 340.1, subdivisions (b), (q) and (r) is DENIED IN PART AND GRANTED IN PART. The Court has interpreted the challenged provisions and holds that section 340.1, subdivisions (q) and (r) are constitutional under both the ex post facto clauses and the due process clauses of the state and federal constitutions. The Court holds that section 340.1,

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[1] Unless otherwise indicated, all statutory references hereafter are to the Code of Civil Procedure.

[2] The Court's rulings on the parties' requests for judicial notice at the March 4, 2021, initial hearing stand.

subdivision (b)(1) authorizing treble damages for certain "cover up" claims violate the ex post facto clauses of the state and federal constitutions and is therefore unconstitutional as applied retroactively. The Court further holds that section 340.1(b) in its entirety is unconstitutional on its face under the void for vagueness doctrine. The Court holds that subdivision is severable from the remaining portions of the statute and that the balance of the statute remains intact.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. History of Code of Civil Procedure Section 340.1

(6) Historically a one-year statute of limitations governed claims of childhood sexual abuse. (*Tietge v. Western Province of the Servites, Inc.* (1997) 55 Cal.App.4th 382, 385, citing former Code of Civil Procedure section 340(3).) The plaintiff "alleging childhood sexual abuse generally had one year . . . from the time he or she became an adult to file the action." (*Ibid.*) However, over the past several decades the State Legislature (the "Legislature") has changed its approach to childhood sexual abuse by expanding the limitations period in increments and against different categories of defendants. The Legislature has also repeatedly adopted revival statutes for certain lapsed abuse claims.

(7) In 1986, the Legislature added § 340.1 extending the statute of limitations affecting household or family perpetrators only. (*Dutra v. Eagleson* (2006) 146 Cal.App.4th 216, 222; Stats. 1986, ch. 914, § 1, pp. 3165–3166.) The statute "enlarge[ed]

the limitations period to three years for sexual abuse of a child under the age of fourteen by a household or family member[,]" but "actions brought against nonfamily members — such as a scout master or the Boy Scouts — were still governed by the one-year statute of limitations." (*Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 439 (hereafter "*Boy Scouts*").) "The Legislature's intent . . . was to 'allow victims of childhood sexual abuse "a longer time period in which to become aware of their psychological injuries and remain eligible to bring suit against their abusers." [Citation.]'" (*Ibid.*)

(8) In 1990, the Legislature completely rewrote section 340.1 increasing the age limit triggering a time bar and adding a delayed discovery rule. (Stats.1990, ch.1578, § 1, p. 7550 et seq.) In 1994, section 340.1 was amended extending "the statute of limitations to the later of age 26, or three years after the plaintiff discovers or should have discovered that psychological injury was caused by the sexual abuse." (*Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759, 765; Stats.1994, ch. 288, § 1, pp. 1928–1931.) "That amendment, however, extended to only the perpetrator, not to entities that employed or otherwise supervised the perpetrator." (*Ibid.*)

(9) In 1998, the Legislature included non-perpetrator defendants in the scope of section 340.1 for the first time. (*BoyScouts*, *supra*, 206 Cal.App.4th at 440.) "[T]he Legislature expanded the limitations period for actions against entities that employed or supervised abusers until three years from the date the plaintiff discovers that psychological injury occurring

after age 18 was due to childhood sexual abuse, but no later than the plaintiff's 26th birthday." (*Ibid.*; Stats.1998, ch. 1032, § 1, pp. 7785–7788.) "[T]he 1998 amendment imposed an *absolute bar* against instituting a lawsuit against third party defendants once the plaintiff reached the age of 26." (*Quarry v. Doe 1* (2012) 53 Cal.4th 945, 966, italics in original.)

(10) In 2002, the Legislature amended § 340.1 again relating to non-perpetrator defendants' standard of care, the delayed discovery rule and revival of lapsed claims. "The age 26 cut-off still applied . . . except in cases . . . where the non-defendant knew or had reason to know of its agent's or employee's unlawful conduct and failed to take reasonable steps to protect others from the sex abuser." (*Hightower*, *supra*, 142 Cal.App.4th at 766; Stats.2002, ch. 149, § 1, pp. 752–753.) "In those cases, the statute of limitations" ran "until the later of the plaintiff's 26th birthday or three years after the plaintiff discovers or should have discovered that his psychological injuries were the result of childhood sexual abuse." (*Hightower*, *supra*, 142 Cal.App.4th at 766.) For non-perpetrator lapsed claims, the Legislature revived those claims for a one-year period that ended on December 31, 2003." (*Ibid.*)

(11) The Legislature passed another revival amendment (Senate Bill 1779) in 2013, but Governor Jerry Brown vetoed it. (See, e.g., Defendants' Motion, pp. 3–9.) He said "[t]here comes a time when an individual or organization should be secure in the reasonable expectation that past acts are indeed in the past and not subject to further lawsuits. With the passage of time, evidence may be lost or disposed of, memories fade and witnesses move away or die."

(Defendants' Second RJN, Ex. 2, p. 6.) He noted that "public schools and government entities were shielded from the one-year revival of lapsed claims. As a result, the similarly situated victims of these entities were not accorded the remedies of SB 1779." (*Ibid.*) He used the same rationale to veto additional amendments in 2014 and 2018. (See, e.g., Defendants' Motion, pp. 3–9.)

(12) In 2019, Governor Gavin Newsom took office and signed Assembly Bill 218, which amended section 340.1 in three relevant ways. One, it extended the limitations period to the later of the plaintiff's 40th birthday or five years from the date of discovery:

> (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.

(§ 340.1, subd. (a).) Two, it revived time-barred civil causes of action for childhood sexual assault for three years:

> (q) Notwithstanding any other provision of law, 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, or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020. A plaintiff shall have the later of the three-year time period under this subdivision or the time period under subdivision (a) as amended by the act that added this subdivision.
>
> (r) The changes made to the time period under subdivision (a) as amended by the act that amended this subdivision in 2019 apply to and revive any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment.

(§ 340.1, subds. (q) & (r).) Three, it authorized treble damages in "cover up" cases:

> (b)(1) In an action described in subdivision (a), a person who is sexually assaulted and proves it was as the result of a cover up may recover up to treble damages against a defendant who is found

> to have covered up the sexual assault of a minor, unless prohibited by another law.
>
> (2) For purposes of this subdivision, a "cover up" is a concerted effort to hide evidence relating to childhood sexual assault.

(§ 340.1, subds. (b).) Plaintiffs assert that subsections (q) and (r) make the "cover up" treble damages retroactive.

B. Initial and Supplemental Briefings

(13) There have been three JCCP's created to manage the cases that have been filed since the Legislature passed Assembly Bill 218, codified as Code of Civil Procedure section 340.1 (hereafter referred interchangeably as "AB218" or "section 340.1"). The *Southern California Clergy Cases* are identified as JCCP 5101. The *Diocese of San Diego Cases* are identified as JCCP 5105 and the *Northern California Clergy Cases* as JCCP 5108. While Plaintiffs have requested the Court take judicial notice of the rulings on the constitutional issues from JCCP 5108, the Court is making its own independent analysis with the awareness that an identical motion has been considered and ruled upon in the *Northern California Clergy Cases.*

(14) Plaintiffs have drafted a Master Complaint which the Court has approved. Plaintiffs filed the Master Complaint while this Final Statement of Decision was under submission. The Master Complaint includes causes of action for (1) intentional infliction of emotional distress, (2) human trafficking, (3) negligence, (4) negligent supervision, (5) negligent retention/hiring, (6) negligent failure to warn, train or educate, (7) breach of fiduciary duty, (8) constructive

fraud (Civil Code section 1573), (9) sexual harassment (Civil Code section 51.9), (10) fraudulent transfer (Civil Code sections 3439 et seq.), (11) sexual battery (Civil Code section 1708.5), (12) sexual assault, (13) gender violence, (14) violation of Penal Code section 288(A), and (15) violation of Penal Code section 647.6(A). The Master Complaint does not appear to contain an express, specific request for treble damages pursuant to section 340.1(b), but it does contain a general request for "[a]ny appropriate statutory damages, including but not limited to attorneys' fees[.]" (Master Complaint, p. 45.)

(15) Defendants have moved for a determination of the constitutionality of section 340.1, subdivisions (b), (q) and (r) under the ex post facto and due process clauses of the state and federal constitutions.

(16) In their initial briefings, Defendants contended that the provisions of AB218 will have a retroactive punitive effect thereby violating the ex post facto and due process clauses. Defendants argue that the Legislature intended AB218 to punish defendants by depriving them of vested rights of immunity and by allowing retroactive treble damages in violation of the ex post facto clause. Defendants contend they reasonably and detrimentally relied on the 2002 adopted absolute time bar to the childhood sexual assault claims, committed funds to pay pre-enactment occurrences and exhausted insurance coverage for such claims.

(17) In their initial briefings, Plaintiffs contend that the provisions of AB 218 were about the victims and sought to remedy a lifetime of damages that flow from childhood sexual assault. Plaintiffs argue that

the Legislature intended to compensate victims of institutional coverups more fully and encourage victims to come forward upon discovering the psychological impact of the alleged assault through recovered memories of the events. Plaintiffs contend that under the holding in *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155 (hereafter "*Bishop of Oakland*"), the ex post facto clause is inapplicable to revived common law causes of action and damages. Plaintiffs argue that there is no vested right to be free from stale civil claims and even if such right existed the State's significant interest in redressing childhood sexual assault prevails over such an immunity.

(18) At the initial hearing on March 4, 2021, the Court granted a continuance to address the following additional issues:

(a) Whether treble damages are the exclusive remedy for a "cover up" claim pursuant to section 340.1 (b) or are punitive damages also available?

(b) If punitive damages are also available for a "cover up" claim, are Plaintiffs required to make an election between treble damages and punitive damages under Civil Code section 3294 or can Plaintiffs recover both categories of damages?

(c) If Plaintiffs are required to make an election between treble damages and punitive damages for a "cover up" claim, can Plaintiffs still recover punitive damages for "non-cover up" claims?

(d) Whether section 340.1(b) is a damage enhancement provision or cause of action?

(19) In their supplemental briefing, Defendants contend that the "cover up" provisions of section

340.1(b) created a new cause of action and treble damages are the exclusive remedy. Defendants ask the Court to take judicial notice of the legislative history. [3] Defendants argue that no election is necessary because treble damages are the exclusive remedy under the statute for any alleged cover up. Defendants contend that section 340.1(b) is not a damage enhancement because it is a new statutory based cause of action not derived from the common law. Finally, Defendants argue that the statute violates due process because it is fatally vague and ambiguous in that the Legislature provided no express intent to establish either a damages enhancement or standards for the new cause of action.

(20) In their supplemental briefings, Plaintiffs contend that the "cover up" provisions of section 340.1 (b) constitute claims derived from common law negligence causes of action. Relying on the decision in *Rojo v. Kliger* (1990) 52 Cal.3d 65, Plaintiffs argue that the treble damages provision provides a new remedy for previous liabilities that is cumulative and allows Plaintiffs to make an election of remedies. Plaintiffs argue that because an award of punitive damages overlaps with section 340.1(b)'s treble damages provision, the factual basis for punitive damages may still rest on conduct unrelated to alleged "cover up" conduct and may be pursued. Plaintiffs contend that section 340.1(b) is a damages

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[3] As noted earlier, the Court will take judicial notice of Exhibits 1 through 18 in Defendants' Second RJN and Exhibits 20 through 25 in Plaintiffs' Supplemental RJN, but not of the truth of any reasonably disputable matters therein. The rulings on the parties' requests for judicial notice at the March 4, 2021, initial hearing stand.

enhancement provision even though treble damages may overlap with punitive damages because punitive damages apply to broader conduct than the treble damages. Plaintiffs further contend that any challenges to the treble damages and "cover up" provisions are moot in light of their changes to the requested remedy.

C. The Extended Statute of Limitations in Section 340.1(a)

(21) AB218 substantially increased the time by which an individual must bring a childhood sexual assault to age 40 (up from 26) or 5 years from discovery (increased from 3 years). A change in a remedy or procedure can have substantive effect and trigger constitutional concerns about retroactive application. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936–937.) The Court considers the effect of the law on the parties' rights and liabilities, not whether a procedural or substantive label best applies. (*Ibid.*)

(22) The Court recognizes that the parties do not challenge the constitutionality of section 340.1, subdivision (a) per se. However, the statutory framework is interrelated. Subdivision (a)(1) defines the term "childhood sexual assault" to include any act committed by defendant against a minor that is regulated by various penal statutes. Subdivision (a)(2) is based on violation of a duty owed to the plaintiff "if a wrongful or negligent act" is the cause of injury. Subdivision (a)(3) defines liability derived from the "intentional act" by a perpetrator of the childhood sexual assault and a non-perpetrator entity. The analysis turns on the "actions" identified in subdivision (a) and whether section 340.1, subdivision

(b) created a new statutory cause of action for institutional cover ups as that term is defined in AB218.

II. DISCUSSION

A. The Treble Damages Provision of AB218 Presents a Justiciable Controversy

(23) It is the duty of the Court to decide actual controversies by a judgment that can be carried into effect and not give opinions upon moot questions or advisory opinions that cannot affect the matter in issue in the case before it. (*National Assn. of Wine Bottlers v. Paul* (1969) 268 Cal. App.2d 741, 746.) Plaintiffs contend that any challenge to the "cover up" and the "treble damages" provisions are now moot because *"all current Plaintiffs* . . . elected to proceed only with the claim for punitive damages." (Plaintiffs' Supplemental Opposition, p. 1, italics in original.) They argue that without an actual controversy detailing an alleged cover up under section 340.1(b) that triggers treble damages and an election of remedies, "the analysis of whether treble damages are unconstitutional is purely academic." (Plaintiffs' Response to Defendants' Supplemental Brief, p. 2.)

(24) However, case law recognizes three discretionary exceptions to the mootness doctrine. These exceptions are: "(1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the same parties or others [citation]; and (3) when a material question remains for the court's determination. [Citation.]" (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473,

479–480, citing *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1202 fn. 8, *Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 Cal. App.3d 325, 330, and *Viejo Bancorp. Inc. v. Wood* (1989) 217 Cal. App.3d 200, 205.)

(25) The Court believes that the treble damages and "cover up" provisions garner substantial public interest given the related legislative activity regarding childhood sexual assault over the past 33 years. Further, allegations of cover up will surely recur between the Defendants and future plaintiffs in this JCCP. Resolution of these issues is material to the constitutionality of AB218.

(26) Although Plaintiffs contend that they have withdrawn a claim for treble damages from the pleadings, current Plaintiffs' counsel cannot waive their clients' right to seek treble damages in the future or prevent unknown plaintiffs in future "add-on cases" from pursuing treble damages. The issue is (and remains) ripe for decision. (See Cal. Rules of Court, rule 3.541(a)(4) [coordination trial judge can decide "preliminary legal questions that might serve to expedite the disposition of coordinated actions"]; see also *Panoche Energy Center, LLC v. Pacific Gas & Electric Co.* (2016) 1 Cal.App.5th 68, 99–100 [a particular question is ripe for decision when it can resolve a concrete dispute and avoid lingering uncertainty in the law].)

(27) The procedural posture of JCCP 5101 parallels the *Northern California Clergy Cases* (JCCP 5108) in its peculiarity in that the parties should not be able to determine statutory interpretation by agreement or concessions. Initially, Plaintiffs sought treble damages, then all current Plaintiffs withdrew

the claim for treble damages, then argued that treble damages should be treble of all damages, then noted that if that might be unconstitutional that Civil Code section 1431.2 can remedy the constitutional violation by providing a mechanism for allocating damages among the parties and claims. Defendants argued that the statute must be construed as punitive as to them and thereby making the statute unconstitutional under the ex post facto doctrine and due process clause.

(28) The Court finds that this controversy satisfies the exceptions to the mootness doctrine and is ripe for resolution. It presents a justiciable controversy concerning the interpretation and constitutionality of the statute at the heart of the JCCP. The motion addresses issues of law and not the application of particular facts. The terms and nature of the statute are fixed and present a concrete dispute of broad interest and effect in these coordinated proceedings.

B. AB218 and Legislative Intent

(29) The Court must interpret AB218 to assess its constitutionality. Statutory interpretation is a legal issue for the Court to decide. (*Sandler v. Sanchez* (2012) 206 Cal.App.4th 1431, 1438.) The Court first interprets the statute to give effect to the intent of the Legislature. Next, the Court will address the constitutionality of the retroactive application of the act. Finally, the Court will address the ability to sever the constitutional provisions from the unconstitutional sections.

(30) In assessing the punitive versus remedial nature of a challenged statute, the courts employ a two-step intent effects analysis. The court assesses

whether the statutory scheme is civil or criminal and then the court determines whether the scheme is so punitive in effect as to negate the intended label of a civil proceeding. (*Bishop of Oakland*, *supra*, 128 Cal. App.4th 1155); *Smith v. Doe* (2003) 538 U.S. 84, 92–93.)

(31) In evaluating the penal character of the revival statute in *Bishop of Oakland*, the appellate court used the intent-effect test identified by the U. S. Supreme Court in *Kennedy v. Mendoza-Martinez*, (1963) 372 U.S. 144, 168. The *Mendoza-Martinez* intent-effect analysis sets forth seven factors to address whether the legislative intent is so punitive that it appears to exceed the purpose assigned to it.[4] These factors address the nature of punishment but do not necessarily involve the ex post facto clause. (See *Bishop of Oakland*, *supra*, 128 Cal. App.4th 1162 fn. 8.)

(32) To ascertain AB218's purpose, the Court begins with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the

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[4] The *Mendoza-Martinez* analysis reviews guideposts such as: (1) whether there is an affirmative disability or restraint; (2) whether the sanction has historically been regarded as a punishment; (3) whether scienter is a required element; (4) whether it will promote the traditional aims of punishment; (5) whether the behavior is already a crime; (6) the applicability of an alternative purpose assigned to the statute; and (7) whether the sanction seems excessive. Considering the Second District Court of Appeal's ruling in *LAUSD v. Superior Court* (May 21, 2021, B307389) __Cal.Rptr.3d__ [2021 WL 2024615], the Court will not address this analysis in detail.

Legislature's enactment generally is the most reliable indicator of legislative intent. (*People v. Kareem A.* (2020) 46 Cal.App.5th 58, 71.) The plain meaning controls if there is no ambiguity in the statutory language. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387–388.) "If, however, 'the statutory language may reasonably be given more than one interpretation, "'"courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute."'"' [Citation.]" (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198, quoting *People v. Cornett* (2012) 53 Cal.4th 1261, 1265.)

(33) The Court reads the various amendments to section 340.1 both in isolation and as a collective package. This approach is consistent with settled principles of statutory construction. (See *United Riggers & Erectors. Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089–1090.) While the Court is precluded from rewriting the statute as a rule, the Court has greater flexibility when the constitutionality of the statute is at issue. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73–74.) The Court may interpret a statute to effectuate closely the policy judgments articulated by the legislative body and to preserve the act from a constitutional challenge. (See *Koop v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 626–653 [reformation of statutes by California courts]; see also *Legislature v. Padilla* (2020) 9 Cal.5th 867, 875–876 [same].)

(34) On its face, AB218 addresses, "an action for recovery of damages suffered as a result of childhood sexual assault" and extends the civil statute of limitations by 14 years, revives old claims for three years and increases certain penalties for childhood sexual assault. (§ 340.1, subds. (a), (q), (r).) AB218 also adds treble damages for an alleged institutional cover up of childhood sexual assault by non-perpetrator defendants. (§ 340.1, subd. (b).) The ambiguity in AB 218 arises from the increased civil damages and the statutory description of the institutional "cover up" action. An examination of the legislative history of AB 218 reveals mixed motives drove the current changes to section 340.1.

(35) The expressed intent of AB 218 was to punish select institutions for past behavior and to deter future abuse. (Defendants' Second RJN, Ex. 8, pp. 24–25.) The Assembly Judiciary Committee stated that revival was intended to extract "accountability" for despicable past acts. (*Id.* at Ex. 8, p. 25.) The expressed intent of revival was compensation and "deterrence" "to help prevent future assaults "by raising the cost for this abuse." (*Id.* at Ex. 8, p. 24.)

(36) Assemblyperson Gonzalez, the author of AB218, told the Assembly Judiciary Committee that until you "make people hurt," this behavior continues. (*Id.* at Ex. 9, p. 34.) The Assembly Third Reading Floor Analysis states that "to help prevent future assaults by raising the costs for . . . abuse, this bill extends the civil statute of limitations and revives old claims." (*Id.* at Ex. 10, p. 40; see also *id.* at Ex. 14, p. 61 [same].) The Committee Chair added that the egregiousness of these acts warrants special

treatment and noted "we need to make a statement." (*Id.* at Ex. 13, p. 57.)

(37) The Assembly Judiciary Committee similarly observed: "[T]o help prevent future assaults by raising the costs for this abuse, this bill extended the civil statute of limitations . . . [and] revives old claims[.]" (*Id.* at Ex. 8, p. 24; *id.* at Ex. 10, p. 40 [same]; see also *id.* at Ex. 14, p. 61, attaching Assembly Concurrence in Senate Amendments.) There was no consideration of the protective purposes of the statute of limitations noted by the Senate committee and no balancing. (See, generally, *id.* at Exs. 8–18.) Treble damages are expressly intended as "additional punishment" and as an effective deterrent. (See, e.g., *id.* at Ex. 8, p. 25.)

(38) The legislative history also noted that AB218 sought to compensate victims for the psychological harm arising from repressed memories of abuse. The legislators discussed generally how victims faced a lifetime of damages that justified extending the statute of limitations for several more years. Thus, the Legislature opined that AB218 was not solely about its deterrent value but rather to compensate victims of institutional cover ups more fully and encourage them to come forward in the hopes of unraveling an institution's efforts to cover up prior sexual assault by its employees. (See, e.g., id. at Ex. 8, pp. 25, 29; see also, e.g., id. at Ex. 9, pp. 34–35.)

(39) Defendants argue that a civil sanction that serves "retributive or deterrent purposes" and also "some remedial purpose" is punitive in intent. (Defendants' Reply, pp. 5–6, citing *People Ex Rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal. App.4th 1332, 1350.) They contend that while most

regulatory and compensatory statutes have legitimate deterrent effects, intent to use revival for deterrence is a different matter. They contend that whether the statute serves nonpunitive purposes is irrelevant and does not negate the ex post facto violation. They further contend that the AB218 amendments violate due process by retroactively expanding both the scope of potential liability and damages.

(40) Most recently, the Second District Court of Appeal in *LAUSD v. Superior Court* (May 21, 2021, B307389) __Cal.Rptr.3d__ [2021 WL 2024615][5] held that the treble damages provision of AB218 has no compensatory function. The appellate court reversed as error a trial court's ruling declining to strike the request for treble damages arising from a cover up claim against the school district. The court reasoned that Section 340.1 generally serves to ensure perpetrators of sexual assault are held accountable for the harm they inflict but its text unambiguously demonstrates the treble damages provision's purpose is to deter future cover-ups by punishing past cover-ups.

(41) In ruling on the legislative intent behind the treble damages provision, the appellate court noted in *LAUSD v. Superior Court:*

> A solitary statement repeated in some legislative analyses that treble damages are necessary to compensate victims of a cover up does not unambiguously demonstrate the Legislature in fact added the provision to section 340.1 for that purpose.... Moreover, the moral condemnation

[5] Hereafter, the Court will use the Westlaw citation for the *LAUSD v. Superior Court* opinion.

> voiced in the statement—its invocation of "victims who never should have been victims" and "individuals and entities who have chosen to protect the perpetrators of sexual assault over the victims"—while plainly warranted, indicates the bill's author may have had a primarily punitive motivation for imposing treble damages in response to patently heinous conduct. Whether this was indeed the author's motivation is beside the point. The fact that this solitary statement is open to such inferences is enough for us to decline to embrace it as an unambiguous expression of the Legislature's intent.

(*LAUSD v. Superior Court*, *supra*, 2021 WL 2024615 at p. 6.)

C. The Ex Post Facto Doctrine

1. Retrospective Application of AB218

(42) A retrospective law is not invalid as such. Neither the federal nor the state constitution prohibits the enactment of legislation operating on pre-existing matters, rights, or obligations. (7 Witkin, Summary of Cal. Law (11th ed. 2020) Constitutional Law, §691.) A retrospective law is invalid, however, if it conflicts with certain constitutional protections. For example, if the statute creates an ex post facto law, impairs the obligation of a contract, or deprives a person of a vested right or substantially impairs that right, thereby denying due process. (*Ibid.*) An amendment that "merely clarifies existing law may be given retroactive effect even without an expression of legislative intent for retroactivity." (*Negrete v. California State Lottery Commission* (1994) 21 Cal. App.4th 1739, 1744.)

(43) In *Landgraf v. USI Film Products*, the United States Supreme Court explained the "anti-retroactivity principle" — the principle that the "legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265.) The Court observed that this principle is in tension with another — the rule that "the court is to apply the law in effect at the time it renders its decision." (*Ibid.*) *Landgraf* reconciled the conflict by establishing a presumption of anti-retroactivity, but the presumption is applicable only where there is ambiguity about a statute's temporal reach.

(44) The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that an entity should have an opportunity to know what the law is and to conform its conduct accordingly. It is deeply rooted in the Supreme Court's jurisprudence and finds expression in several constitutional provisions, including, in the criminal context, the ex post facto clause. In the civil context, prospective application remains the appropriate default rule unless the Legislature has made clear its intent to disrupt settled expectations. (*Id.* at pp. 265–273.)[6]

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[6] Since AB218 contains a clear reference to the retroactive application of time barred claims in section 340.1, subdivisions (q) and (r), the Court assumes the presumption of anti-retroactivity is inapplicable to those subdivisions. Nonetheless, the Court is analyzing the ex post facto and due process arguments on these provisions. The institutional "cover up" provisions are addressed under the due process issues.

(45) The ex post facto clauses[7] were intended to restrain federal and state legislatures from enacting arbitrary or vindictive legislation and to ensure that legislative enactments provide fair warning of their effect thus permitting individuals to rely on their meaning until explicitly changed. (See *Carmell v. Texas* (2000) 529 U.S. 513, 522–525.) Two critical elements must be present for a law to be classified as ex post facto: first, it must be retrospective in that it applies to events which occurred prior to its enactment; and second, it must disadvantage the individual affected by it. (See *Weaver v. Graham* (1981) 450 U.S. 24, 29–30.) Writing for the majority, Justice Stevens noted that the ex post facto doctrine impacts laws affecting punishment by either creating a punishment or making any existing punishment more severe. (*Carmell*, *supra*, 529 US at 523–525.)

(46) Defendants contend that retroactive revival of time-barred claims is unconstitutional when the statute is punitive in nature. They note that the United States Supreme Court struck down the criminal revival analogous to section 340.1. (*Stogner v. California* (2003) 539 U.S. 607) In *Stogner*, the defendant was indicted in 1998 for sex-related child abuse crimes alleged to have been committed between the years 1955 and 1973. The statutes of limitation for the crimes charged against Stogner had run many years prior to 1993, when Penal Code section 803(g) was enacted. The crux of *Stogner* is that the ex post facto clauses bar revival of expired criminal claims but permit unexpired criminal claims to be extended. Defendants claim *Stogner* applies because the

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[7] (U.S. Const., art. 1, §10; Cal Const., art. 1, §9.)

decision cites civil cases approvingly, calling them "analogous." (Defendants' Motion, p. 2; *Stogner*, *supra*, 539 U.S. at 631–32.)

(47) In response, Plaintiffs contend that under the holding in *Bishop of Oakland*, the ex post facto clause is inapplicable to revived common law causes of action and damages. In *Bishop of Oakland*, the church argued that the 2002 amendment to section 340.1 reviving previously time-barred claims violated the ex post facto doctrine to the extent it permitted victims to allege punitive damages for past conduct. (*Bishop of Oakland*, *supra*, 128 Cal.App.4th at 1162.) The court flatly rejected such a contention. Indeed, while the court detailed the alternative legal framework concerning the *Mendoza-Martinez* intent-effects analysis, the court began by rejecting the very notion that the ex post facto doctrine was implicated in the context of revival of common law claims between private parties. (*Id.* at pp. 1163–69.)

(48) The appellate court in *Bishop of Oakland* explained that the Legislature's 2002 revival permitted victims of childhood sexual abuse the opportunity to pursue common law claims against non-perpetrator defendants that had otherwise expired. "[A] statute reviving the limitations period for a common law tort cause of action, thereby allowing the plaintiff to seek punitive damages, does not implicate the ex post facto doctrine and therefore does not trigger the intent-effects test at all." (*Id.* at pp. 1164–1165.) The court explained that a civil claim for punitive damages brought in a civil trial by private parties cannot be equated to criminal punishment under the ex post facto analysis. (*Ibid.*)

2. The Revival of Time-Barred Punitive Damages Claims Is Constitutional Under the Ex Post Facto Clauses

(49) Defendants challenge subsections (q) and (r). Defendants contend AB218 is unconstitutional under the ex post facto clauses because it revives time-barred civil childhood sexual assault claims, including punitive damages, for three years. First, the Court of Appeal found the ex post facto clause inapplicable to the 2002 version of section 340.1. (*Id.* at pp. 1162–1169.) No reported decision of any federal or state court has ever held that punitive damages awarded pursuant to a common law tort claim might constitute criminal punishment under the ex post facto clause. Our courts and others have held just the opposite. In *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, the defendant auto maker contended that punitive damages for an automotive design defect violated the ex post facto clause because at the time the cars were manufactured it had no warning that such damages might be recoverable under Civil Code section 3294. The appellate court rejected that notion with little discussion, finding it without merit because the doctrine "extends to criminal statutes and penalties, not to civil statutes." (*Id.* at p. 811 .)

(50) Even assuming the ex post facto clauses apply, the Court of Appeal found the 2002 version of section 340.1 awarding punitive damages civil in nature and constitutional under the intent-effects test. (*Bishop of Oakland*, *supra*, 128 Cal.App.4th at pp. 1169–1172.) The court explained that "[b]ecause punitive damages are not automatic and can only be awarded upon a finding of the requisite mental state, and because there are constitutional safeguards limiting the size of

such awards, we do not believe they are necessarily excessive when compared to the ancillary purpose of facilitating claims for compensatory damages." (*Id.* at p. 1172.)

(51) The current version of section 340.1 (subdivisions (q) and (r)) is materially the same as the prior revived version of time-barred claims. The differences between the two versions relate to the addition of treble damages and the "cover up" claims (subdivision (b)). Finally, the differences between the two versions do not inflict greater harm than previously existed. Consequently, *Bishop of Oakland* controls, and AB218's revival of time-barred civil claims, including punitive damages, is constitutional.

3. AB218's Treble Damages Provision is Unconstitutional Under the Ex Post Facto Clauses

(52) The legislative history of AB218 contains multiple expressions of the deterrent effect of damages. Assemblyperson Gonzalez emphasized the need to eliminate the statute of limitations because the current law failed to provide "an effective deterrent." (Defendants' Second RJN, Ex. 8, p. 27, attaching 4/1/19 Transcript, Assembly Floor Session.) Treble damages were specifically identified as an "effective deterrent." (*Id.* at Ex. 10, p. 40, attaching 3/25/19 Assembly Third Reading Floor Analysis; *id.* at Ex. 8, p. 24, attaching 3/12/19 Assembly Judiciary Committee Analysis; id. at Ex. 14, p. 61, attaching 8/30/19 Assembly Concurrence in Senate Amendments.)

(53) Defendants contend AB218 is unconstitutional under the ex post facto clauses

because it authorizes retroactive treble damages. Defendants challenge subsection (b), claiming the Legislature added treble damages to punish Defendants. (§ 340.1(b); see also Defendants' Motion, pp. 3–5, 7–9, 10–12, discussing *Bishop of Oakland* and *Landgraf*.)

(54) Plaintiffs repeat their argument that case law establishes that section 340.1's revival of punitive damages is constitutional as a matter of law. (See *Bishop of Oakland*, *supra*, 128 Cal app 4th at pp. 1169–1172; see also *Coats v. New Haven Unified School Dist.* (2020) 46 Cal.App.5th 415, 426–27 [analyzing the current version of section 340.1, discussing *Bishop of Oakland* with approval, and finding that "allowing the plaintiff to seek punitive damages would not violate the ex post facto clause"]; Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2020) ¶ 3:1509.) Plaintiffs cite *dicta* from the court's analysis of a comparable revival statute that revived punitive damages against Northridge Earthquake insurers in breach of contract and bad faith cases noting "punitive damages are not penal in effect for the purpose of ex post facto analysis." (*21st Century Ins. v. Superior Court* (2005) 127 Cal. App.4th 1351, 1366.) Plaintiffs argue that the analogous Northridge Earthquake statutory scheme failed to negate the civil nature of the proceeding.

(55) Plaintiffs further argue that treble damages must be civil, and constitutional given that (1) punitive damages are more penal than treble damages are, and (2) double punishment is

prohibited. [8] If juries end up awarding punitive damages plus treble damages at future trials, Plaintiffs will have to make elections (see *id.* at ¶ 3:1549), so there is no threat of Defendants incurring greater punishments than what existed before AB218's enactment. The argument is that should Plaintiffs end up electing treble damages, the punishments will be less than what existed before.

(56) However, an ex post facto analysis for new statutory remedies differs from the analysis of punitive damages. The court in *Bishop of Oakland* explained, "to the extent ex post facto concerns were implicated by *Landgraf*, they are substantially different from those at issue here. *Landgraf* did not concern a common law tort claim. Instead, it concerned the retroactive application of a new statutory punitive damage remedy to pre-existing conduct which occurred at a time when no such damages were recoverable. This distinction animated the *Landgraf* court's analysis: 'In cases like this one, in which prior law afforded no relief, [the new law] can be seen as creating a new cause of action, and its impact on party's rights is especially pronounced.'" (*Bishop of Oakland*, *supra*, 128 Cal. App. 4th at p. 1164.)

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[8] Lending support to Plaintiffs' argument, secondary authorities appear to assert that treble damages are less penal than punitive damages when applied to compensatory damages, and arguably, the treble damages provision is necessarily constitutional. (See Haning, *supra*, at ¶ 3:1547 [noting that treble damages equal triple actual damages]; see also *id.* at ¶¶ 3:1462–3:1463 [noting that the Supreme Court permits punitive damages to be 4 to 10 times greater than the compensatory damages.])

(57) Similarly, the analysis in *Coats*, *supra*, 46 Cal.App.5th at pp. 428–429 does not support Plaintiffs' arguments here. Treble damages were not at issue in *Coats*. As explained in this Court's analysis of the due process issues, the Court believes that section 340.1(b) created a retroactive new statutory cause of action and remedy applicable to pre-existing conduct at a time when no such remedy existed.

(58) In *LAUSD v. Superior Court*, *supra*, 2021 WL 2024615, the Second District Court of Appeal expressly ruled those treble damages under section 340.1(b) are primarily exemplary and punitive. The appellate court identified the treble damages provision of subdivision (b) as purely penal. Given the appellate court's view of the Legislature's punitive intent, the statutory scheme embracing treble damages is so punitive in effect as to negate the intended label of a civil proceeding. (Cf. *Bishop of Oakland*, *supra*, 128 Cal. App. 4th at pp. 1169–1172; see also *Smith v. Doe* (2003) 538 U.S. 84, 92–93.) This is enough to invoke the ex post facto clauses consistent with *Bishop of Oakland*, *Landgraf*, and the Second District Court of Appeal's most recent decision analyzing section 340.1(b).

(59) Consequently, *LAUSD v. Superior Court*, *supra*, 2021 WL 2024615 controls even though treble damages have the potential to be less penal than punitive damages. [9] AB218 is unconstitutional

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[9] As discussed in the vagueness section of this order, AB218's plain language and legislative history fail to explain the intended scope of the treble damages provision. It is unclear whether only compensatory damages are meant to be trebled or whether punitive damages can be trebled too. If the Legislature intended the treble damages provision to apply to punitive damages, the

because (1) section 340.1(b) is punitive and serves no compensatory function as a matter of law, and (2) the punitive character of the treble damages negates the civil nature of the remedy. The Court finds that section 340.1(b) regarding treble damages violates the ex post facto clauses of both the state and federal constitutions.

D. *The Due Process Issues*

1. The Revival of Time-Barred Damages Claims Is Constitutional Under the Due Process Clauses on the Face of AB218.

(60) In *Landgraf v. USI Film Products*, the United States Supreme Court noted the impact of the Due Process Clause in the context of retroactive application stating:

> The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. [Citation omitted.]

(*Landgraf*, *supra*, 511 U.S. at p. 266.)

(61) The majority in *Landgraf* explained that statutory retroactivity has long been disfavored but that deciding when a statute operates "retroactively" is not always a simple or mechanical task. (*Id.* at p. 268.) Offering some guidance to the lower courts, the Supreme Court elaborated,

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effect would be to make treble damages more penal than punitive damages by potentially tripling the punitive damages award.

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective ....

(*Ibid.*)

(62) An analysis of Defendants' due process arguments starts with an assessment of whether there is a protected liberty or property interest of which Defendants have been deprived. (*Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 760.) In *Deutsch*, the court held that the 2002 revival provision of section 340.1 did not violate due process, either on its face or as applied, and that no due process violation occurred from the admission of evidence that the owner was unable to rebut due to the passage of time. (*Ibid.*) The 2002 revival provisions of section 340.1 are substantially similar to AB 218.

(63) Defendants contend that retroactive revival of time-barred claims violates due process because of a vested right of repose. They contend that decades of settled law compel striking down AB218 as unconstitutional on due process grounds. Defendants argue that it is "well-settled" in California that a statute of limitations "may be altered or repealed before, but not after, the statutory bar has become complete, to defeat the effect of the statute in extinguishing the rights of action." (Defendants' Motion, pp. 15–16, citing *Carr v. State of California* (1976) 58 Cal.App.3d 139, 147 [where statute of limitations on claims by mentally incapacitated

minors had expired, an amendment tolling the statute during incapacity "did not, and could not, resurrect the claims already barred"] and *Chambers v. Gallagher* (1918) 177 Cal. 704.) In *Chambers*, the California Supreme Court held that a statute that removed the statute of limitations defense in proceedings to enforce payment of inheritance taxes was unconstitutional.

(64) Defendants also place significant reliance on the ruling in *Stogner* noting that the United States Supreme Court identified lengthy delay in asserting claims deprives potential defendants of notice of the need to preserve evidence of innocence while "[m]emories fade, and witnesses can die or disappear." (*Stogner*, *supra*, 539 U.S. at 631.) Defendants point to *dicta* in the *Stogner* decision noting that it is unfair to retroactively withdraw a complete defense to prosecution after it has already attached. (*Id.* at p. 632.) Defendants further argue that they have a vested right in the statute of limitations defense in this case. (See, e.g., Defendants' Motion, pp. 15–21, citing *Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 312 n. 8 [extension of an expired civil limitations period can unconstitutionally infringe upon a "vested right" and amount to a taking of property without due process if a statute creating liability also put a period to the right's existence, then retroactively extended the time after the period expired].)

(65) Defendants contend that the 2002 amendments to section 340.1 (Senate Bill 1779) revived sexual abuse claims by plaintiffs over the age of 26 but only for cases filed in calendar year 2003. (See *Quarry*, *supra*, 53 Cal.4th 945 at pp. 966, 971

[claims by plaintiffs over 26 were absolutely barred after 2003].) Defendants contend that the one-year revival was a statute of repose. Senate Bill 1779 also permitted claims by younger plaintiffs to be filed within three years from discovery, under limited circumstances of notice of prior abuse by the accused perpetrator. (Defendants' Second RJN, Ex. 1, p. 3, attaching Senate Bill 1779, 2002 Stat ch. 149.)

(66) Plaintiffs contend that there is no constitutional right to be free of the obligation to defend stale claims. They contend that AB218 is a procedural statute well within the powers of the state legislature to establish a time limitation and other procedural requirements for actions seeking damages suffered because of childhood sexual assault. Plaintiffs argue that for over a century the Supreme Court has determined that in a civil case, there is no constitutional right of repose. (See, e.g., *Hellinger v. Farmers Group, Inc.*, supra, 91 Cal.App.4th at p. 1061, citing *Campbell v. Holt* (1885) 115 U.S 620. 628–629 [upholding provisions reviving civil actions], *Chase Securities Corp. v. Donaldson*, *supra*, 325 U.S. at p. 314 [revival of a personal cause of action which did not involve the creation of title does not offend due process], *Liebig v. Superior Court* (1989) 209 Cal.App.3d 828, 830 [analyzing former version of section 340.1], and *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1183; see also *Deutsch*, *supra*, 164 Cal.App.4th at p. 762 ["appellant's right of repose is not a constitutionally protected right."].)

(67) Plaintiffs argue that in *Liebig*, the appellate court specifically rejected the same constitutional challenge to a prior version of section 340.1. (*Liebig*, *supra*, 209 Cal.App.3d at pp. 831–835.)

Distinguishing many of the cases relied on by Defendants, the court held: "[T]he Legislature has the power to retroactively extend a civil statute of limitations to revive a cause of action time-barred under the former limitations period." (*Id.* at p. 830; see also *Lent*, *supra*, 40 Cal.App.4th at p. 1184 [rejecting the contention that *Liebig* was decided incorrectly and should not be followed].) After noting, "[t]he *Liebig* court found no constitutional impediment to revival in the case of a traditional common law cause of action where, as here, the Legislature makes express its intent the law be given retrospective application," the *Lent* court noted that "the power of the Legislature to revive lapsed claims are clearly supported" by the authorities cited in the *Liebig* decision. (*Ibid.*)

(68) Similarly, Plaintiffs contend Defendants' reliance in *Chambers v. Gallagher*, *supra*, 177 Cal. 704 is misplaced. They argue that the Ninth Circuit Court explained in *Campanelli v. Allstate Life Ins. Co.* (9th Cir. 2003) 322 F.3d 1086, that *Chambers* "has since been limited in its application" to tax cases. (*Campanelli*, *supra*, 322 F.3d at pp. 1100–1101 [Ninth Circuit rejected argument that reviving Northridge earthquake claims violated the due process clause without sufficient state interest]; see also *Nelson v. Flintkote Co.* (1985) 172 Cal.App.3d 727, 733 [in asbestos personal injury action, the court rejected contention that the mere passage of time granted the defendant a vested right of immunity, and distinguished *Chambers* "since it involved a liability created by statute and, like prescriptive property rights, these have sometimes been deemed substantive, not procedural"].)

(69) Alternatively, relying on *Liebig*, Plaintiffs argue that any alleged vested rights must yield to a significant state interest. In *Liebig*, the appellate court recognized the very interest of protecting children from the lifetime of trauma caused by childhood sexual abuse justifies the Legislature's express revival provision. (*Liebig*, *supra*, 209 Cal.App.3d at pp. 834–835.)

(70) The cases cited by Defendants are distinguishable. The *Carr* decision held that an enlargement of limitations operates prospectively unless the statute expressly provides otherwise. (See *Carr v. State of California*, *supra*, 58 Cal.App.3d at 147.) AB218 has an explicit retroactive provision, thereby distinguishing it. The *Chambers* decision has been limited in its application. In *People v. Frazer* (1999) 21 Cal.4th 737, the California Supreme Court refused to declare a revival statute unconstitutional based on *Chambers*. The state high court reasoned that *Chambers* had not been used by any court to strike down a statute in a civil case not involving some form of tax dispute. (*People v. Frazer*, *supra*, 21 Cal.4th at p. 775 fn. 32; *Campanelli*, *supra*, 322 F.3d at p. 1100.) *Chase Securities Corp. v. Donaldson* stands for the general proposition that statutes of limitation are subject to a large degree of legislative control and only suggested that retroactivity could present a due process problem for a newly created statutory action in certain limited circumstances. (*Chase Securities Corp. v. Donaldson*, *supra*, 325 U.S. at pp. 311–316.)

(71) Assuming arguendo that Defendants establish a vested right in the statute of limitations changed by AB218, it has long been recognized that a

vested right yields to important state interests. (*Calleros v. Rural Metro of San Diego, Inc.* (2020) 58 Cal.App.5th 660, 773, citing *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592.) Several authorities support a finding that subsections (q) and (r) are constitutional on the face of AB218. As has already been recognized by the courts, California's strong interest in protecting victims of childhood sexual abuse and affording access to such victims to recover damages against those responsible for the abuse is unquestionably one such significant state interest. (*Liebig*, *supra*, 209 Cal.App.3d at p. 834; *Lent*, *supra*, 40 Cal.App.4th at p. 1184.)

(72) Lifting the bar to revived actions does not infringe upon a fundamental right. In *Chase Securities Corp. v. Donaldson*, *supra*, 325 U.S. 304, the United States Supreme Court considered a constitutional attack on a Minnesota statute which lifted a time barred claim under Minnesota securities law. The defendant argued that such action amounted to a taking of its property without due process of law. (*Id.* at p. 305.) In rejecting the defendant's constitutional claim, the Supreme Court stated: "[I]t cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." (*Id.* at p. 316.) The high court confirmed that "[s]tatutes of limitation find their justification in necessity and convenience rather than logic ... [t]heir shelter has never been regarded as what now is called a 'fundamental' right." (*Id.* at p. 314.)

73) The Court finds that the statute reviving the childhood sexual assault claims does not violate due

process based on a theory of vested rights. As has been previously held by numerous appellate courts, including in the context of prior amendments to section 340.1, Defendants have no constitutional right to be free of the obligation to defend stale claims. Because subsections (q) and (r) do not deprive a defendant of a protected liberty or property interest encompassed by the Fourteenth Amendment, it is not unconstitutional under the due process clause. (Cf. *Deutsch*, *supra*, 164 Cal.App.4th at p. 760.)

2. The Revival of Time-Barred Damages Claims in AB218 Is Constitutional Under the Due Process Clauses as Applied.

(74) A statute valid on its face may be unconstitutionally applied. (*People v. Wingo* (1975) 14 Cal.3d 169, 180.) Defendants argue that section 340.1, subdivisions (q) and (r) are unconstitutionally applied under the due process clauses in this matter because evidence that Defendants need to defend the claim is likely lost as a result of the passage of time. In support of this argument, Defendants cite to both criminal and civil cases in which "delays resulted in loss of evidence, and thereby violated defendant's due process rights."

(75) Plaintiffs filed the Master Complaint while this order was under submission, and Defendants fail to cite allegations from the underlying individual complaints or specific declarations or documents that demonstrate a loss of needed evidence, so the ripeness of Defendants' "as applied" challenge is questionable. But even assuming the "as applied" challenge is ripe, the Court finds it unavailing. In *Deutsch*, the Second District Court of Appeal found section 340.1's 2002

amendment constitutional on its face and as applied. The court found that the admission of evidence that the owner was unable to rebut due to the passage of time did not create a due process violation. (*Deutsch*, *supra*, 164 Cal.App.4th at p. 760.) In addition, the court stressed that the "right of repose is not a constitutionally protected right [,]" and it found the due process clauses inapplicable. (*Id.* at pp. 761–762.) Subdivisions (q) and (r) are materially the same as the 2002 amendment. They provide another round of revival for the same kinds of un-litigated claims that the 2002 amendment revived. The tort claims, including punitive damages, were available before the Legislature enacted AB218. No state action or restraint on liberty is imposed. Consequently, *Deutsch* is controlling and defeats Defendants' "as applied" challenge.

E. *Treble Damages and the "Cover Up" Provisions of AB218*

1. Section 340.1(b) Sought to Create a New Statutory Cause of Action for the Cover Up of Childhood Sexual Assault.

(76) The Court next analyzes whether section 340.1(b) created a new statutory action identified as an "institutional cover up" claim that raises a retroactivity issue. In their supplemental briefing, Defendants contend "cover up" claims constitute new statutory claims, not old common law causes of action.

(77) Defendants argue that a law creates a new cause of action when it defines a class of plaintiffs (here, victim of child sex abuse) gives them a right of action for a defined claim (cover up) against employers of the perpetrator (entities legally liable for abuse by

an employee or agent) and defines the measure of damages (up to treble damages). (See *Deutsch v. Turner Corp.* (9th Cir. 2003) 324 F.3d 692, 707.) They contend that is what the Legislature intended in adopting AB218.

(78) Pointing to the Senate Judiciary Committee Report, Defendants argue the Legislature observed that it sought to expand the liability creating conduct. "This bill also replaces 'childhood sexual abuse' throughout the statute with 'childhood sexual assault" [and] "This change increases the conduct to which the extended limitations period and the enhanced damages apply." (Defendants' Second RJN, Ex. 12, p. 51.) "Subsection (b), permitting treble damages [for cover up], was first created as a part of AB 218." (Plaintiffs' Supplemental Opposition, p. 13.)

(79) The text of section 340.1(b) refers to an action described in subdivision (a) and requires proof that the assault "was as the result of a cover up" to recover "up to" treble damages. (§ 340.1, subd. (b)(1).) The text of subdivision (b)(2) defines a cover up as "a concerted effort to hide evidence relating to childhood sexual assault." (§ 340.1, subd. (b)(2).) The subdivisions clearly relate to an action for liability against "any person or entity" as a result of an "intentional act" causing the injury. There is very little additional guidance regarding the nature of the duty or obligation that triggers an action for a cover-up claim.

(80) Defendants contend there is no common law claim for destroying or a concerted effort to destroy evidence related to child sex abuse. They assert that under the "new rights-exclusive remedy" doctrine,

where a new right, not existing at common law, is created by statute and provides a statutory remedy "such remedy is exclusive of all others." (*Orloff v. Los Angeles Turf Club, Inc.* (1947) 30 Cal.2d 110, 112.)

(81) Defendants argue that since the question assumes there is a cover-up claim, under the "new rights exclusive remedy" doctrine, up to treble damages is the exclusive remedy. But irrespective of whether it is a new right or new remedy, section 340.1 is unconstitutional because it is fatally void, applied without fair notice, and imposed for past conduct that was not subject to liability or treble damages when it occurred. (Defendants' Supplemental Brief, pp. 17–18.)

(82) Plaintiffs take the opposite position. They contend "cover up" claims constitute old negligence causes of action. They contend treble damages and punitive damages are available for a "cover up" negligence claim. Plaintiffs argue that section 340.1(b) does not expand a defendant's liability beyond existing common law theories.

(83) Plaintiffs argue that reading section 340.1(b) in context with subdivision (a), the treble damages provision is available only in those actions against "any person or entity" who either owed a duty of care to the plaintiff and was negligent, or engaged in an intentional act, that "was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff." (§ 340.1, subds. (a) and (b).) Plaintiffs assert that built into the application of treble damages against a third-party defendant is the existence of a duty owed by the defendant to the child, the breach of which caused the child's sexual abuse, or the presence

of an intentional act by the defendant, which caused the child to be sexually abused. It is only upon a finding that a defendant's conduct falls within either of these categories that treble damages may become available.

(84) Plaintiffs contend subdivision (b) is a damages enhancement provision that attaches to an existing common law claim. Quoting from the *Quarry* case, Plaintiffs assert, "[section 340.1 governs the period within which a plaintiff must bring a tort claim based upon childhood sexual abuse." (*Quarry v. Doe I*, *supra*, 53 Cal.4th at p. 952; see also *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 911 [finding that section 340.1 is procedural in nature and acts as a "tolling" statute, separate from the accrual of a cause of action falling within the ambit of section 340.1].) They assert that the plain language of AB218 confirms that the statute is nothing more than a damages enhancement statute. The text states that Section 340.1 applies "[i]n an action for recovery of damages suffered as a result of childhood sexual assault..." (§ 340.1, subd. (a).)

(85) Plaintiffs further argue that the text of section 340.1(b) likewise conditions its application to "an action" described in subsection (a). (§ 340.1, subd. (b).) Thus, the class of plaintiffs who can assert treble damages for an alleged institutional cover-up are limited to those who have alleged an action for recovery of damages suffered because of childhood sexual assault. (See Plaintiffs' Supplemental RJN, Ex. 20 [to allege and receive treble damages, "the victim would, of course, first have to prove the case."].) Plaintiffs argue that subdivision (b) cannot be read in isolation disconnected from subdivision (a).

(86) A review of the legislative history of AB218 fails to reveal that the Legislature viewed "cover up" claims as old common law negligence causes of action. The parties cite zero legislative history on this topic. Plaintiffs fail to cite to a case that recognizes "cover up" negligence claims. (See Plaintiffs' Supplemental Opposition, pp. 4–6; see also Plaintiffs' Response to Defendants' Supplemental Brief, pp. 3–4, 6–7 [citing *Bishop of Oakland*, which did not involve "cover up" allegations; the plaintiff merely alleged that the Bishop of Oakland failed to act despite actual or constructive knowledge of the priest's alleged misconduct].) Plaintiffs fail to identify any historical, pre-existing example. (See Plaintiffs' Supplemental Opposition, pp. 4–6; see also Plaintiffs' Response to Defendants' Supplemental Brief, pp. 3–4, 6–7.) Thus, Plaintiffs' argument is conclusory, speculative, and unsupported relative to negligence.

(87) AB218 requires more than negligence. Subdivision (b) requires "a concerted effort to hide evidence." (§ 340.1. subd. (b)(2).) Dictionaries define "concerted" as "mutually contrived or agreed upon" "contrived or arranged by agreement," "mutually contrived, planned or arranged," or "planned or done together for a shared purpose." ((Merriam-Webster.com<https://www.merriam-webster.com/dictionary/concerted> [as of June 9, 2021]; Dictionary.com<https://www.dictionary.com/browse/concerted> [as of June 9, 2021].) An example would be that the D-Day invasion was a concerted exercise by the armed forces of Britain, the US, and Canada. In the context of subdivision (b), contriving, agreeing, arranging, and planning constitute intentional acts. They indicate that the defendant intentionally

coordinated with someone else to hide evidence of childhood abuse. They exceed the unintentional, uncontrived, unarranged, and unplanned acts sufficient to breach a duty by negligence.

(88) The prior iterations of section 340.1 are missing a "cover up" provision, and none addressed "concerted" liability. Non-perpetrator entities like Defendants were liable for their own wrongful or negligent acts without reference to concerted misconduct. Whatever the reason for these omissions, perhaps "cover ups" and "concerted" liability had not been brought to the attention of the legislators for drafting purposes.

(89) Given the statutory language and the silent legislative history, plaintiffs need to tie the treble damages provision to a pre-existing, non-spoliation, "cover up" intentional tort. Plaintiffs failed to do so. While there are arguably several common law torts that may come to mind such as spoliation, conspiracy, fraudulent misrepresentation, and fraudulent concealment, the briefings fail to address these common law theories in sufficient detail. The Court will address these issues.

(90) First, there is no common law claim for destroying or a concerted effort to destroy evidence related to childhood sex assault. (See *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1458–59 [there is no tort of intentional or negligent spoliation of evidence common law claim]. Where a new right, not existing at common law, is created by statute and provides a statutory remedy "such remedy is exclusive of all others." (*Orloff v. Los Angeles Turf Club, Inc.* (1947) 30 Cal.2d 110,112.)

(91) Next, a conspiracy theory standing alone is inapplicable. Conspiracy is a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510–11.) The California Supreme Court has found that standing alone a conspiracy does no harm and engenders no tort liability. "It must be activated by the commission of an actual tort." (*Id.* at p. 511.) "'A civil conspiracy, however atrocious, does not give rise to a cause of action unless a civil wrong has been committed resulting in damage.'" (*Ibid.*) "A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action." (*Ibid.*)

(92) The elements of fraud, which give rise to the tort action for deceit (fraudulent misrepresentation) are: (a) misrepresentation; (b) knowledge of falsity; (c) intent to defraud, that is to induce reliance; (d) justifiable reliance; and (e) resulting damage. (5 Witkin, Summary of Cal. Law (11th ed. 2020) Torts, §890.) The plain meaning of the word "cover up" is broader than a misrepresentation since it can be based on actions that would not qualify as a misrepresentation. A cover up may be based on conduct such as inaction, silence, or document destruction. The duty to disclose would not necessarily extend to every person with knowledge of the underlying sexual assault to every potential

victim. Also, the duty is owed by defendants to minor parishioners, minor students, and their parents when children are on the premises of a church or school. Thus, a duty to disclose owed merely to children in Defendants' care would seem foreseeable while on the premises but how far does that duty reach?

(93) The elements of an action for fraud and deceit based on concealment are: (a) the defendant must have concealed or suppressed a material fact; (b) the defendant must have been under a duty to disclose the fact to the plaintiff; (c) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (d) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (e) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. (*Lovejoy v. AT&T Corp.* (2004) 119 Cal.App.4th 151, 157–58.)

(94) There are four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. (*Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870–71, internal quotation marks omitted.)

(95) Case law concerning duties owed by churches to parishioners highlight the necessity of closely

examining the scope of the purported duty to disclose. California recognizes "an affirmative duty to protect students" at church schools. (*Roman Catholic Bishop of San Diego v. Superior Court* (1996) 42 Cal.App.4th 1556, 1567, citing *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, *Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707.)

(96) But a duty to protect is not the same as a duty to disclose. In *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, a former child member of a Jehovah's Witness church was molested by another parishioner. She sued the church's elders and the Jehovah's Witness organization, claiming they failed to warn the congregation about the parishioner's past child sexual abuse (he had molested his stepdaughter prior to molesting the plaintiff). The Court of Appeal held that the elders and the organization had a duty to restrict and supervise the parishioner's church activities with other church members, but the court did not find a duty to warn the congregation or the plaintiff's parents despite the foreseeability that the parishioner would molest again. Applied here, the holding undercuts the notion that Defendants owed a duty to disclose to Plaintiffs, which is necessary for fraudulent concealment.

(97) For fraudulent concealment, "the defendant must have intentionally concealed or suppressed the fact *with the intent to defraud the plaintiff*[.]*"* (*Lovejoy*, *supra*, 119 Cal.App.4th at 157–58, italics added.) Under section 340.1, however, the cover up — which arguably constitutes the act of concealment — predates the plaintiff's childhood sexual assault. It

even likely predates the defendant's knowledge of the plaintiff. How could the defendant have intended to defraud the plaintiff if the cover up/concealment occurred before the defendant (1) knew the plaintiff existed or (2) at least had the plaintiff in mind? Does this timing discrepancy add to or change the fraudulent concealment elements?

(98) While the harm caused by childhood sexual assault is undoubtedly amplified once a victim learns the assault resulted from a deliberate cover up by those charged with the victim's care, noneconomic damages under general tort principles already provide compensation for this added psychological trauma. If the treble damages provision has no compensatory function, then it is reasonable to conclude the legislative intent must have been to create a new statutory cause of action for a cover up. However, section 340.1(b) fails to establish the requisite elements for such a claim and leaves many unanswered questions about the prohibited conduct.

(99) As explained in the section on due process vagueness issues, the treble damages provision is vague because the statutory language is unclear, and the legislative history conflicts. Neither mentions fraudulent concealment. Neither shows clear intent by the Legislature to treat "cover up" treble damages as an enhancement for fraudulent concealment instead of a new cause of action. The "concerted effort" component of a "cover up" claim adds an element to common law fraudulent concealment, arguably converting it into a new or different cause of action. The ambiguity creates a constitutional defect for retroactivity and potentially prospective application.

2. Treble Damages Are the Exclusive Remedy for a "Cover Up" Claim Pursuant to Section 340.1(b), and Should They Survive Challenge, Plaintiffs Would Need to Make an Election of Remedies.

(100) The Court next analyzes whether treble damages are the exclusive remedy for a "cover up" claim pursuant to subdivision (b). Defendants contend treble damages are the exclusive remedy because "cover up" claims constitute new statutory claims, not old common law causes of action as Plaintiffs assert. Defendants argue that punitive damages cannot be recovered for a cover up because treble damages are the only type of damages listed in subdivision (b). Plaintiffs contend that an election of remedies solves the constitutional problem.

(101) Case law instructs that, if a statute only identifies a statutory penalty and fails to expressly authorize punitive damages, the statutory penalty is the exclusive remedy. (See *De Anza Santa Cruz HOA v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 911 [finding punitive damages unavailable under the Mobilehome Residency Law since it only specifies a statutory penalty].) Interpreting treble damages as the exclusive remedy comports with due process. (*Id.* at p. 912.) It gives fair notice to the defendants, and it avoids the double penalty for the same conduct. (*Ibid.;* see also *Troensegaard* (1985) 175 Cal.App.3d 218, 227 ["A defendant has a due process right to be protected against unlimited multiple punishment for the same act."].)

(102) Prohibiting double punishment is key. "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.)

(103) The Court must presume that the Legislature intended not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers. (*Ibid.*; see also *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 581; cf. *Crowell v. Benson* (1932) 285 U.S. 22, 62 ["When the validity of [an] act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."].) The Court can avoid an unconstitutional construction by interpreting AB218 as requiring an election between punitive damages and treble damages, especially because the Legislature is presumed to have known about the constitutional rules against double punishment. However, given the Court's finding that the treble damages and "cover up" provisions have constitutional deficiencies under both the ex post facto clauses and due process clauses, the Court does not believe this is a dispositive issue.

3. Should Plaintiffs Have to Make an Election of Remedies, They May Still Be Able to Recover Punitive Damages for "Non-Cover Up" Claims.

(104) Plaintiffs contend that a plaintiff who pleads both treble damages and punitive damages could recover for "non-cover up" conduct found to be malicious, oppressive, or fraudulent. Defendants contend that the bar against double recovery applies to a single claim so the election requirement should apply in the context of non-cover-up claims that are based on the same alleged conduct, (See, e.g., Defendants' Supplemental Brief, p. 18, citing *Marshall v. Brown* (1983) 141 Cal. App.3d 408.)

(105) Overlapping damage awards violate that sense of fundamental fairness which lies at the heart of constitutional due process. (See *De Anza Santa Cruz HOA*, *supra*, 94 Cal.App.4th at 913.) However, the potential for direct "non-cover up" claims is not merely theoretical. As noted in the previous section, subdivision (b) requires a "concerted effort" to establish a "cover up" claim, meaning Defendants need to agree with someone else to cover up the abuse. "Non-cover up" claims do not have a "concerted effort" element and can be based solely on a defendant's failure to supervise or report on potentially offensive conduct.

(106) Defendants' reliance on the *Marshall* decision is misplaced. *Marshall* does not change the analysis because it requires an election between treble damages and punitive damages when the allegations arise out of the same cause of action based on the same facts. The decision is silent regarding the situation

where the cause of action includes distinct claims based on different facts. Nothing in *Marshall* precludes punitive damages in that scenario. Thus, Plaintiffs may still recover punitive damages for "non-cover-up" claims provided there is a separate and distinct underlying factual support for such claims.

F. *The Due Process Vagueness Doctrine*

1. The Treble Damages and "Cover Up" Provisions of AB218 Are Unconstitutional on Their Face Under the Void for Vagueness Doctrine.

(107) The U.S. Supreme Court has held that "living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids ...." (*Papachristou v. Jacksonville* (1939) 405 U.S. 156, 162.) "The void-for-vagueness doctrine is a component of the constitutional requirement of due process of law. (U.S. Const., 5th & 14th Amends.)" (*Ivory Education Institute v. Department of Fish & Wildlife* (2018) 28 Cal.App.5th 975, 981.) The due process vagueness doctrine addresses at least two connected but discrete due process concerns. First, that regulated parties should know what is required of them so they may act accordingly. Second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. (*FCC v. Fox Television Stations Inc.* (2012) 567 U.S. 239, 253.) It is fundamentally a doctrine based on fair notice.

(108) "The doctrine prevents the government 'from enforcing a provision that "forbids or requires the doing of an act in terms so vague" that people of "common intelligence must necessarily guess at its

meaning and differ as to its application." [Citations.]'" (*Ivory Education Institute*, *supra*, at 28 Cal.App.5th at 981.) "The vagueness may be from uncertainty in regard to persons within the scope of the [statute] . . . or in regard to the applicable tests to ascertain guilt." (*Winters v. New York* (1948) 333 U.S. 507, 515–16.)

(109) "Civil, as well as criminal, statutes must be subjected to a void for vagueness examination. A statute must provide a standard of conduct to be followed and one by which the courts and agencies can measure the conduct after the fact." (*Wingfield v. Fielder* (1972) 29 Cal.App.3d 209, 218.) "There is a strong presumption that statutes must be upheld unless their unconstitutionality is clear, positive, and unmistakable." (*Ivory Education Institute*, *supra*, 28 Cal.App.5th at 981.) "Only a reasonable degree of certainty is required." (*Ibid.*)

(110) The text of subdivision 340.1 (b) provides in relevant part:

> (b)(1) In an action described in subdivision (a), a person who is sexually assaulted and proves it was as the result of a cover up may recover up to treble damages against a defendant who is found to have covered up the sexual assault of a minor, unless prohibited by another law.

(Code Civ. Proc. § 340.1(b)(1).)

(111) Multiple courts have affirmed the constitutionality of the revival provisions of section 340.1, but none have addressed the "cover up" claims in subdivision 340.1(b). In addressing the legislative intent behind subdivision 340.1 (b), the appellate court in *LAUSD v. Superior Court*, *supra*, 2021 WL 2024615 held that the treble damages provision of

AB218 has no compensatory function because of its punitive character. Thus, the Court is left with concluding that the treble damages provision fails to offer much assistance in discerning the purpose of the "cover up" claim other than to expand the actionable conduct.

(112) The text of section 340.1(b)(2) defines the "cover up" as:

> (2) For purposes of this subdivision, a "cover up" is a concerted effort to hide evidence relating to childhood sexual assault.

(Code Civ. Proc. § 340.1(b)(2).)

(113) Based on the plain language, the plaintiff in a subdivision (a) action must establish a cover up and causation to obtain treble damages. The plaintiff must show: (1) the defendant engaged in a concerted effort to hide evidence; (2) the evidence related to childhood sexual assault; (3) subsequently, the plaintiff suffered childhood sexual assault; and (4) the plaintiff's subsequent childhood sexual assault resulted from the defendant's prior concerted effort to hide evidence related to childhood sexual assault.

(114) The language lacks sufficient identification for notice purposes. First, "concerted" is undefined. Section 340.1 and the legislative history say nothing, so we need to turn to other sources. The primary dictionary definition is "mutually contrived or agreed on" (Merriam-Webster.com<https://www.merriam-webster.com/dictionary/concerted> [as of June 9, 2021]) or "contrived or arranged by agreement; planned or devised together; done or performed together in cooperation." (Dictionary.com <https://www.dictionary.com/browse/concerted> [as of

June 9, 2021].) A second or third, minority synonym is "strenuous." (FreeThesaurus.com<https://www.freethesaurus.com/concerted> [as of June 9, 2021].)

(115) Interpreting "concerted" to mean mutually contrived, agreed, planned, etc. has the effect of adding a new element — intentional coordination with another to hide evidence — to the underlying subdivision (a) action. This arguably creates a vagueness problem because some subdivision (a) actions do not require intentional conduct. Subdivision (a)(2), for example, applies to actions based on wrongful or negligent acts:

> (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.

(Code. Civ. Proc. § 340.1(a)(2), italics added.) In law, "wrongful" often means unlawful, malicious, or reckless. The meaning of "negligent" is well known. Neither necessarily involves intent.[10]

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[10] Defendants argue:

> [T]here is no identification of any mental element in a legal sense that guides how to apply the idea of intent to "effort to hide" evidence. CCP §340.1(b) refers to "an action described in Subdivision (a)." By its express terms, a person or entity may be sued under CCP §340.1(a)(2) — even where its conduct was not intentional. The words "negligent" and "wrongful" are used in CCP 340.1(a)(2) separately and divided by the disjunctive word "or," indicating that "wrongful" is something other than negligent. Further, use of "intentional" in CCP §340.1(a)(3) shows the term "wrongful" as used in CCP 340.1(a)(2)

(116) Second, "effort" is undefined. Section 340.1 and the legislative history fail to provide a definition. The dictionary defines it as a "conscious exertion of power" or "serious attempt." (Merriam-Webster.com <https://www.merriam-webster.com/dictionary/effort> [as of June 9, 2021].) Typical synonyms are "try," "endeavor," "attempt," "exert," "toil," "strain," and "struggle." (FrceThesaurus.com<https://www.freethesaurus.com/effort> [as of June 9, 2021].)

(117) Using the common definition arguably creates a vagueness problem because it makes treble damages available for an incomplete act. Attempting to hide evidence is different than successfully hiding evidence. As written, section 340.1 allows treble damages for merely trying to hide evidence — i.e., ***it permits treble damages without causation.*** (See Defendants' Supplemental Brief, pp. 7–11 ["An 'effort to hide' alone cannot cause injury. Subdivision (b)(1) refers to the plaintiff being sexually assaulted as the result of a cover up but defining cover up as simply an effort is inconsistent with causation."].) The potential effect is to give the plaintiff enhanced damages for conduct that is incomplete and fails to rise to the level of fraud or cause harm. The plaintiff potentially could get more damages for proving less than he or she could recover if he or she had proven all elements of common law fraudulent concealment by nondisclosure.

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means something other than negligent or intentional. But CCP §340.1 never defines "wrongful," leaving no guidance for treble damages liability if "wrongful" means something unspecified that is not a negligent or intentional act.

(Defendants' Supplemental Brief, pp. 7–11.)

(118) Next, "hide" is undefined. Section 340.1 and the legislative history avoids defining the term. The dictionary definition is "to put out of sight" or "to conceal for shelter or protection" or "to keep secret." (Merriam-Webster.com<https://www.merriam-webster.com/dictionary/hide> [as of June 9, 2021].) Synonyms include "cloak," "conceal," and "cover." (Merriam-Webster.com<https://www.merriam-webster.com/thesaurus/hide> [as of June 9, 2021].)

(119) A vagueness problem exists, in part, because the statutory language and legislative history fail to provide examples of hiding. What level of hiding is necessary? Actual destruction of evidence? Concealment in a secret location? Mere nondisclosure? Imagine the defendant keeps the evidence in the perpetrator's personnel file in the HR department in a standard filing cabinet with all other employee personnel files and merely fails to disclose it. Would that qualify? What if the evidence is oral instead of written? It is hidden in the defendant's mind. Would that be actionable? The record lacks guidance on what these terms require.

(120) The vagueness problem is exacerbated by the element of intent. "To put out of sight," "to conceal for shelter or protection," "to keep secret," these are intentional acts. As noted above, intent creates a vagueness problem because some subdivision (a) actions do not require intentional conduct. Subdivision (a)(2) applies to actions based on wrongful or negligent acts, which do not necessarily involve intent.

(121) Fourth, "evidence relating to childhood sexual assault" is undefined. Section 340.1 and the

legislative history fail to state definitions or provide examples. What qualifies? Imagine a letter from a former employer alleging sexual activity between the perpetrator and young adults (men or women aged 18 to 19 years old) at the former employer's church or school. Would that relate to childhood sexual assault? Would the current employer be required to disclose it? This is not a farfetched scenario. The Court's understanding is that similar circumstances arose in *The Clergy Cases I* (JCCP 4286) and *The Clergy Cases II* (JCCP 4297).

(122) Fifth, the act fails to identify what gets trebled. Compensatory damages? Punitive Damages? Both? Section 340.1 and the legislative history offer no support. The Court arguably could fix this problem by either limiting trebling to compensatory damages or requiring an election between treble damages and punitive damages. But either option would force the Court to write terms into the statute that are currently missing.

(123) Sixth, the burden of proof is undefined. Section 340.1 and the legislative history are silent. The Court could apply the preponderance standard because Evidence Code section 115 states that the preponderance standard applies unless "otherwise provided by law[.]" (Evid. Code § 115.) The arguable problem with such an approach is that it allows punitive damages to be trebled by less than clear and convincing evidence. To reiterate, the Court arguably could fix this problem by either limiting trebling to compensatory damages or requiring an election, but the Court would have to write terms into the statute.

(124) Seventh, the treble damages provision can be read to apply to multiple defendants. Defense counsel argued at the May 7th hearing that the statutory language permits the plaintiff to sue the perpetrator's prior employer and current employer for treble damages at the same time. It allows for liability based on an undefined "concerted effort" that embraces multiple defendants.

(125) The Court cannot add terms to the statute to correct these deficiencies without rewriting the statute itself. The California Supreme Court has addressed a court's ability to reform a statute as a separation of powers issue. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal. 4th 607,615–616, citing Cal. Const., art. IV, §1 and art. VI, §1.) A court may reform a statute to conform it to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable. (*Ibid.*) However, the guiding principle is consistency with the Legislature's intent. (*Ibid.*) The Court can only judicially reform a statute if it closely effectuates policy judgments clearly articulated by the enacting body and conclude the body would have preferred a reformed version of the statute to invalidating it. (*Ibid.*) The Court concludes that it should not reform section 340.1(b) under the *Kopp* test as the text and legislative history fail to provide the necessary policy insights regarding the statutory cover-up claim and treble damages remedy.

(126) In sum, the Court finds that section 340.1, subdivisions (b)(1) and (2) are unconstitutional because the Legislature failed to provide certain procedural due process elements against a statute motivated by a deterrent intent. The subdivision fails

to ensure a minimum of due process safeguards and meaningful disclosure such that the impacted parties know the prohibited conduct so that they may act consistent with the law. The vagueness arises from knowledge of who is within the scope of the statute and the applicable standards to determine compliance. The Court cannot supply such terms given the missing standards and descriptions in the subdivision.

2. The Court Declines to Decide Whether the Treble Damages and "Cover Up" Provisions of AB218 Are Unconstitutional as Applied Under the Void for Vagueness Doctrine.

(127) "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1310.) An "as applied" challenge, in contrast, "seeks 'relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied.' [Citation.]" (*San Francisco Unified School Dist. v. City and County of San Francisco* (2012) 205 Cal.App.4th 1070, 1079 (hereafter *"SFUSD"*.) "It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*California Assn. of PSES v. California Dept. of Educ.* (2006) 141 Cal.App.4th 360, 376.)

(128) It is unclear whether Defendants assert an "as applied" challenge to the treble damages and "cover up" provisions. To the extent they do, the Court declines to make a ruling at this time. In light of the Court's finding that section 340.1(b) is unconstitutionally vague on its face, a ruling on the "as applied" challenge is unnecessary. (See *SFUSD*, *supra*, 205 Cal.App.4th at p. 1079 [noting that an "as applied" challenge requests "relief from a specific application of a ***facially valid*** statute or ordinance," emphasis added].) A ruling is also premature because the record lacks particularized "cover up" allegations against Defendants. The Master Complaint, which appears comparable to a generalized form complaint, was filed after the May 7, 2021, hearing while this order was under submission. Neither side has directed the Court to specific "cover up" allegations sufficient to tee up an "as applied" challenge. (See *California Assn, of PSES*, *supra*, 141 Cal.App.4th at pp. 377–378 [finding the complaint's allegations unspecific and insufficient to support an "as applied" challenge].)

(129) In the event the "as applied" challenge is found to be ripe; the Court would be inclined to find section 340.1(b) unconstitutional. The reasons supporting the Court's ruling on the facial challenge apply equally to the "as applied" challenge. The several undefined terms, the potential to punish incomplete conduct that fails to cause harm, the failure of the text to state what types of damages can be trebled, and the failure to state a burden of proof renders the treble damages and "cover up" provisions unconstitutionally vague as applied to Defendants.

3. The Treble Damages and "Cover Up" Provisions of AB218 Are Severable from the Balance of AB218.

(130) The next issue is whether section 340.1(b) is severable from the remainder of AB218. Defendants argue that subdivision (b) is so integrated with subdivisions (a), (q), and (r) that it is not susceptible to severance. (See *Bacon Service Corporation v. Huss* (1926) 199 Cal. 21, 32.) They assert that from the beginning to the end of the legislative process, the Legislative Counsel described the subject of AB218 as integrated and interlinked. (See, e.g., Defendants' Second RJN, Ex. 16, p. 73, attaching AB218 Legislative Counsel Digest.) Defendants also contend that AB218 is not severable because section 340.1(b) is missing a severability provision or a savings clause. They argue that absent a savings clause in the legislation, the entirety of AB218 must be invalidated under the *Bacon Service Corp.* decision.

(131) Plaintiffs acknowledge that AB218 lacks any severability or saving clause. Plaintiffs assert that subdivision (b) is severable but cite no evidence of express legislative volitional severability. Plaintiffs note that to the extent this Court finds any aspect of the treble damages provision per se unconstitutional, such a finding would not disrupt the general revival provisions of AB218. (See *Ex Parte Bell* (1942) 19 Cal.2d 488, 498 [where part of a statute is declared unconstitutional, the remainder will stand if severable]; see also *Gerken v. Fair Pol. Practices Com.* (1993) 6 Cal.4th 707, 714.) Plaintiffs further argue that in *Perez v. Roe 1* (2007) 146 Cal.App.4th 171, the Second District Court of Appeal concluded that the 2002 revival of previously expired claims in the prior

section 340.1 was unconstitutional in part (as violating the separation of powers doctrine based on the finality of previous judgements involving some of the same plaintiffs), and yet the appellate court did not invalidate or upset the Legislature's bill to revive time-barred claims for a one-year period. Despite the limited ruling, the *Perez* decision did not address the absence of a formal savings clause or severability.

(132) The Court finds that Defendants' reliance on the absence of a savings clause is misplaced. The effect on the remainder of a statute when certain parts of it are held to be unconstitutional depends on whether the Legislature intended a statute to be severable. In determining whether the valid portions of a statute can be severed, courts must look first to any severability clause. (*Cal. Redevelopment Association v. Matosantos* (2011) 54 Cal.4th 231, 270–271.) Such a clause establishes a presumption in favor of severance. (*Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.) In the instant case, AB218 is silent on the issue of severability. Indeed, the California Supreme Court has opined that "although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment .... (*Cal. Redevelopment Association*, *supra*, 54 Cal.4th at 270.)

(133) But the absence of a severability clause is not determinative. Decisions from both our own high court and the United States Supreme Court confirm this assessment. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 535 (hereafter "*Legislature of Cal.*"); see also *Alaska Airlines Inc. v. Brock*, 480 U.S. 680, 686 (1987); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971); *United States v. Jackson*, 390 U.S. 570, 585 fn.27

(1968).) In *United States v. Jackson*, the Supreme Court noted that "the ultimate decision of severability will rarely turn on the presence or absence of such a [severability] clause." (*United States v. Jackson*, *supra*, 390 U.S. at 585 fn. 27.) The Court observed that many decisions have invalidated statutory provisions and severed portions of a statute absent an explicit severability clause. (*Ibid.*)

(134) In *Legislature of Cal.*, the Legislature challenged Proposition 140, a ballot initiative placing lifetime term limits on state legislators and placing restrictions on the pensions of incumbents. (*Legislature of Cal.*, *supra*, 54 Cal. 3d 492.) The California high court invalidated a portion of Proposition 140 as applied to incumbent legislators noting that its invalidity did not affect the remaining portions of the measure and allowed those provisions to take effect. (*Id.* at 529–535.) Addressing severability, the high court observed that Proposition 140 included a severance clause that pertained only to a portion of the proposition but not the remainder. (*Id.* at 534–535.) Despite the ambiguous scope of the partial severance clause, the Court explained, "But in any event, it is clear that severance of particular provisions is permissible despite the absence of a formal severance clause." (*Ibid*, citations omitted.)

(134) Regardless of the presumptive effect of a severability clause, under California law, three criteria exist for severability: the invalid provision must be grammatically, functionally, and volitionally separable. (*Legislature of Cal*, 54 Cal.3d at 535; *CalFarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821 (hereafter *"Deukmejian"*).) The Court, thus, will

focus on the severability criteria in the absence of a legislative severability clause.

(135) The severability of section 340.1(b) is supported by the text which provides treble damages to only a certain category of defendants, and only upon a showing that a "cover up" caused the plaintiff's sexual abuse. Section 340.1(b) is "grammatically" separable from the remainder of the statute as, from its plain terms, it occupies subsections (b)(1) and (b)(2) and is even less entangled in other provisions than the provision stricken in *Perez*. This excision could be done "without affecting the wording of any other provision." (*Deukmejian*, *supra*, 48 Cal.3d at 822.) The Legislature added the treble damages provision for the first time via AB218. Subdivision 340.1 (b) appears in its own subdivision. It creates a new statutory penalty for "cover up" claims. Since it is new and in a separate subdivision, removing it would not affect the wording of any other part of the statute. It constitutes a distinct and separate provision.

(136) Subdivision 340.1(b) is "functionally" separable from the remainder of the statute. The earlier versions of section 340.1 revived time-barred common law tort causes of action and punitive damages. Those versions survived constitutional challenges. AB218's revival provision does the same; it re-revives un-litigated claims and damages that were previously revived constitutionally. The revival provision, which appears in a separate subdivision, "is complete in itself and can be implemented without the continuation of the invalid [treble damages] provision." (*POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 92.)

(137) Section 340.1(b) is "volitionally" separable from the remainder of the statute. The Legislature primarily intended to provide victims another round of revival to seek compensatory damages and punitive damages. "There is no persuasive reason to suppose the [treble damages provision] was so critical to the enactment of [AB218] that the measure would not have been enacted in its absence." (*Deukmejian*, *supra*, 48 Cal.3d at 822.) Clearly, the Legislature would have adopted the revival provision without the treble damages provision to ensure some remedy instead of nothing. Further, the Second District Court of Appeal has already opined that the treble damages provision served punitive and not compensatory purposes. The legislators undoubtedly would have adopted the remaining provisions relating to the revival statutes had they foreseen that success of Defendants' challenge to section 340.1(b).

THEREFORE, THE COURT RULES AS FOLLOWS:

(138) The Court rules that Code of Civil Procedure section 340.1, subdivisions (q) and (r) are constitutional under both the ex post facto clauses and the due process clauses of the state and federal constitutions on its face.

(139) The Court rules that Code of Civil Procedure section 340.1(b) authorizing treble damages for certain "cover up" claims violates the ex post facto clauses of the state and federal constitutions and is therefore unconstitutional as applied retroactively.

(140) The Court further rules that Code of Civil Procedure section 340.1(b) in its entirety is unconstitutional on its face and violates the due

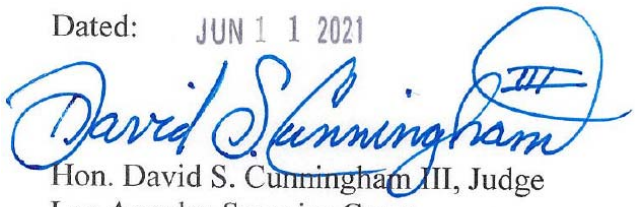
process clauses of the state and federal constitutions under the void for vagueness doctrine.

(141) The Court finds that the unconstitutional provisions of Code of Civil Procedure section 340.1 are severable from the remaining portions of the statute and that the balance of the statute remains intact.

(142) Pursuant to Code of Civil Procedure section 166.1, the Court finds that the issues addressed in this order are "controlling question[s] of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." (Code Civ. Proc. § 166.1.)

IT IS SO ORDERED:

Dated: JUN 1 1 2021



Hon. David S. Cunningham III, Judge
Los Angeles Superior Court

APPENDIX F

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

IN RE BAY AREA CLERGY CASES	No. JCCP 5108 ORDER DENYING MOTION OF DEFENDANTS ON CONSTITUTIONALITY OF CCP 340.1 AMENDMENTS DATE 4/28/21 TIME 10:00 DEPT 21

The motion of defendants for the determination of the constitutionality of CCP 340.1(b), (q), and (r) came on for hearing on 4/28/21 in Department 21, the Honorable Winifred Y. Smith presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED: The

motion of defendants for the determination of the constitutionality of CCP 340.1(b), (q), and (r) is DENIED. The court interprets CCP 340.1(b), (q), and (r), holds that CCP 340.1(b), (q), and (r) are constitutional prospectively, and holds that CCP 340.1(b) is constitutional as applied to revived cases and to actions before the enactment of the statute.

OVERVIEW AND PROCEDURE

In 2019 the legislature approved and the Governor signed AB 218, which amended CCP 340.1. AB 218:

1. Extends the statute of limitations for non-perpetrators to the later of age 40 or five years after 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 (CCP 340.1(a)),
2. Opens a three-year window for filing lapsed claims (CCP 340.1(q)),
3. Applies the new statutes of limitations to cases that would previously have been time barred (CCP 340.1(r), and
4. Provides for treble damages against a person who is found to have covered up the sexual assault of a minor (CCP 340.1(b)).

Northern California Clergy Cases, JCCP 5108, was created to manage the various Northern California cases that have been or will be filed in the three-year window. *Southern California Clergy Cases*, JCCP 5101, is managing cases in Southern California.

Diocese of San Diego Cases, JCCP 5105, is managing cases in the San Diego area.

The parties, through court appointed liaison counsel, agreed to address the facial constitutional challenges to the statute in this motion. (Joint CMC Stmt 12/1/20 p6–7; CMO 1 dated 12/22/20 at p3.) The court as coordination trial judge presiding over complex cases finds this to be an appropriate procedure. (CCP 128(a)(8); CRC 3.400 and 3.541; Std Jud Admin 3.10; *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 704–705.)

On 2/24/21, the court entered an order on this motion setting out its tentative thoughts and requesting supplemental briefing on matter that the parties did not address in the first round of briefing. The tentative decision was that the CCP 340.1(b) provision for treble damages was unconstitutional if applied retroactively. On 2/25/21, the parties submitted a stipulation on the briefing schedule. On 3/18/21, plaintiffs filed a CMC statement stating that all the current plaintiffs had agreed to withdraw their claims for treble damages. (Pltf CMC Stmt 3/18/21 at 3–4.) Plaintiffs argue that this motion is now improper because the issue is not ripe, is moot, is not justiciable, or is an advisory opinion. (Pltf Supp Reply at 19.)

The court will decide the motion despite the decisions of the current plaintiffs to withdraw their claims for treble damages. A coordination trial judge is authorized and encouraged to "Provide a method and schedule for the submission of preliminary legal questions that might serve to expedite the disposition of the coordinated actions." (CRC 3.541(a)(4).) This is

such a motion. The current plaintiffs withdrew their claims only after seeing the court's tentative decision. "Allowing a moving party to withdraw a motion after receiving an adverse tentative ruling, only to refile a different version of the same motion later, would lead to excessive litigation and waste of judicial resources." (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.)

The motion presents a justiciable controversy because it concerns the interpretation and constitutionality of the statute that is at the center of this JCCP. The motion is addresses to issues of law and not to the application of law to fact. The legal issues are ripe for resolution. "[T]he requirement [of ripeness] should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." (*Panoche Energy Center, LLC v. Pacific Gas & Electric Co.* (2016) 1 Cal.App.5th 68, 99.) The legal issues are not mooted by the decision by the current plaintiffs in this JCCP that they will not seek treble damages. (*Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1221–1222 [mootness].) That appears to be a tactical decision by plaintiffs and it is unclear whether defendants can enforce it by equitable estoppel or otherwise.

STRUCTURE OF COURT'S ANALYSIS

The court first interprets the statute. The court interprets the statute to give effect to the intent of the legislature. The court reads the various amendments both in isolation and in light of the amendments as a

collective package. This approach is consistent with settled principles of statutory construction. (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089–1090.) As a general principle, the court must not rewrite the statute in the guise of statutory construction. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73–74.) The courts have greater leeway when the constitutionality of a statute is at issue. "[A] court may reform—i.e., "rewrite"—a statute in order to preserve it against invalidation under the Constitution, when [the court] can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute." (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 661.) (See also *Legislature v. Padilla* (2020) 9 Cal.5th 867, 875–876.)

Statutory interpretation is an issue of law for the court. The court gives no weight to the agreements or concessions of the parties. Parties cannot determine issues of statutory interpretation by agreement. A party's concession in litigation does not relieve the court of the obligation to interpret the statute. The dynamics of this motion are peculiar. The plaintiffs sought treble damages, then stated they would not seek treble damages, then argued that treble damages should be treble of all damages, then noted that if that might be unconstitutional then Civil Code 1431.2 can make it constitutional by providing a mechanism for allocating damages among parties and claims. The defendants argue that the statute must be interpreted to provide for punishment to themselves, presumably

so they can then argue that with that interpretation the statute is unconstitutional.

The court second determines whether a statutory provision is constitutional prospectively or retroactively. The court separately examines each of CCP 340.1(b), (q), and (r). This is primarily a due process analysis but also relies on concepts in the ex post facto analysis.

The court third decides whether it is possible to sever constitutional and unconstitutional provisions. The court's consideration of the amendments as a collective package for purposes of statutory interpretation does not dictate that the court decide that the amendments are an indivisible whole for purposes of severability.

These three issues are interrelated. The opening briefs focused on constitutional issues of retroactivity, but the court cannot determine whether retroactive application of a statute is constitutionally permissible unless the court first interprets the statute. If there are two plausible interpretations of a statute, then the court should construe a statute in a manner that avoids constitutional "difficulties" or "doubts." (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1231.)

There is tension because the court must both interpret each provision in isolation and must also interpret them so that, if possible, the treble damages provision in CCP 340.1(b) can be applied to claims that are revived under CCP 340.1(q) and (r). The court cannot rewrite the treble damages provision but it can reform the provision to make it constitutional as applied retroactively. Furthermore, the

interpretation of the treble damages provision must be consistent — the court cannot interpret a section one way retroactively so that it is constitutional retroactively and then interpret it a different way prospectively when the constitutional concerns of retroactivity do not apply.

EVIDENCE

The court GRANTS all requests for judicial notice. At the court's direction, Defendants filed the entire legislative history. (Filing on 3/16/21.) The court gives substantial weight to documents reflecting the intent and understandings of the legislature. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26.) The court gives less weight to documents reflecting the intent of the executive branch, such as signing statements or emailed bill reports. (*People v. Tarkington* (2020) 49 Cal.App.5th 892, 904–906.) The court does not give any weight to the intent of third parties that were commenting on proposed legislation. (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 505.)

CONCERNS WITH RETROACTIVITY OF LEGISLATION

Whether new statutes and case law can have retroactive effect depends on the nature of the prior law, the nature of new law, and other factors. The initial round of briefing at times conflated the various factual situations and constitutional concerns. The general categories for analysis are:

1. Civil statutes that retroactively revive previously existing but currently time barred civil liabilities. These implicate due process concerns. (E.g.,

Quarry v. Doe I (2012) 53 Cal.4th 945, 955–960 [revival of claims]; *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247 [revival of claims].) These concerns apply to the revival of lapsed claims through the CCP 340.1(q) and (r) three-year window and the revival of lapsed claims.

2. Civil statutes that retroactively revive previously existing but currently time barred civil remedies. These implicate due process concerns. (E.g., *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155 [revival of punitive damages]; *21st Century Ins. Co. v. Superior Court* (2005) 127 Cal.App.4th 1351 [revival of punitive damages].) These concerns apply to the revival of punitive damages through the CCP 340.1(q) and (r) three-year window and the revival of lapsed claims.
3. Civil statutes that retroactively create civil liabilities that did not exist when the defendants did the relevant actions. These implicate due process concerns. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828.) These concerns apply to the creation of CCP 340.1(b) liability for treble damages.
4. Civil statutes that retroactively alter civil procedures or remedies that did not exist when the defendants did the relevant actions. These implicate due process concerns. (*ARA Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1564 [retroactive change in remedy].) These concerns apply to the creation of

CCP 340.1(b) treble damages and the burden of proof for treble damages.

5. Civil statutes that retroactively create duties or penalties that are so punitive in nature they are effectively criminal. These implicate ex post facto concerns. (*Hipsher v. Los Angeles County Employees Retirement Association* (2020) 58 Cal.App.5th 671, 681.) CCP 340.1 is punitive in nature. These concerns apply to CCP 340.1(b) liability for cover up treble damages.
6. Criminal statutes that retroactively create crimes or criminal penalties. These implicate ex post facto concerns. (*Barri v. Workers' Comp. Appeals Bd.* (201 8) 28 Cal.App.5th 428. 472 ["the ex post facto prohibition applies only to criminal statutes"].) CCP 340.1 is not a criminal statute.
7. Criminal statutes that retroactively alter criminal procedures. These implicate ex post facto concerns. CCP 340.1 is not a criminal statute.
8. Case law that retroactively interprets existing law. (E.g., *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151–152.) CCP 340.1 is a statute, so the retroactivity of judicial decisions is not at issue.

CCP 340.1 is a statute. As a general principle, "No part of [a statute] is retroactive, unless expressly so declared." (CCP 3; Civil Code 3.) (See also *Quarry v. Doe I* (2012) 53 Cal.4th 945, 955.) As a general principle, "the presumption against retrospective construction does not apply to statutes relating merely to remedies and modes of procedure." (*ARA Living Centers - Pacific, Inc. v. Superior Court* (1993)

18 Cal.App.4th 1556, 1561.) (See also *Sierra Pacific Industries v. Workers' Comp. Appeals Bd.* (2006) 140 Cal.App.4th 1498, 1506.) A change in a remedy or procedure can, however, have substantive effect and trigger constitutional concerns about retroactive application. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936–937 ["We consider the effect of a law on a party's rights and liabilities, not whether a procedural or substantive label best applies"].)

"[R]etrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract." (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756.) (See also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 266 [same three constitutional concerns].) CCP 340.1 is civil, so the concerns about criminal ex post facto laws do not apply unless the statute is so punitive that they to apply. There appears to be no concern in these case with impairment of contracts.

The constitutional issues in this case are based on due process concerns. "Retroactive civil laws are analyzed not under the ex post facto clause, but the due process clause, and the question is whether they deprive a party of vested rights." (*21st Century Ins. Co. v. Superior Court* (2005) 127 Cal.App.4th 1351, 1358 fn 3.) The due process concerns parallel the ex post facto concerns, but the due process analysis gives deference to the policy decisions of the legislature.

In *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161, citing

Calder v. Bull (1798) 3 U.S. 386, 390, stated that there are four different types of ex post facto laws:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence in order to convict the offender.

The court uses the four different concerns as a framework for its analysis of the due process concerns with retroactivity. The creation of additional liability for a "cover-up" implicates the 1st concern of retroactively punishing actions that were lawful when done. The creation of treble damage liability implicates the 3rd concern of inflicting greater punishment than when the action was taken. The burden of proof for "cover-up" and the amount of "up to treble damages" implicates the 4th concern of altering the legal rules of evidence to permit proof by a lesser standard than applied when the action was taken.

NEW STATUTE OF LIMITATIONS – CCP 340.1(a)

Defendants do not challenge the constitutionality of CCP 340.1(a). (Reply at 3:7–8.)

The amendment to CCP 340.1(a) sets the statute of limitations for three categories of cases related to "childhood sexual assault."

The amendment to CCP 340.1(a) does not create a new cause of action for "childhood sexual assault." CCP 340.1(c) states: "Nothing in this subdivision shall be construed to constitute a substantive change in negligence law." The definition of "childhood sexual assault" in CCP 340.1(d) is for the purpose of identifying when the statute of limitations in CCP 340.1(a) applies to the claims in an action. The underlying civil claims would presumably be in the nature of common law tort claims for torts that are statutory violations defined as "childhood sexual assault" and thus failure to exercise due care under Evid Code 669 (CCP 340.1(a)(1)), or torts of a breach of a duty of care (aka negligence) (CCP 340.1(a)(2)), or intentional torts (CCP 340.1(a)(3)).

THREE YEAR WINDOW – CCP 340.1(q).

The amendment to CCP 340.1(q) states: "(q) Notwithstanding any other provision of law, 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. A plaintiff shall have the later of the three-year time period under this subdivision or the time period under subdivision (a) as amended by the act that added this subdivision."

The effect of this is that claims that would otherwise be time-barred are revived during the three-year window. This is a retroactive change in the statute of limitations. This is permitted by California statute and is constitutional.

The CCP 340.1(q) reopening of the statute of limitation is permitted by statute. CCP 3 states, "No part of it is retroactive, unless expressly so declared." (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 955.) The text of the CCP 340.1(q) expressly declares that the amendment revives claims that would otherwise be time-barred.

The CCP 340.1(q) reopening of the statute of limitation is not a violation of constitutional due process. *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161–1162, sets out the relevant law:

> [L]legislation reviving the statute of limitations on civil law claims does not violate constitutional principles. In *Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, ..., the court held that due process notions were not affected by the revival of a civil law claim because civil limitations periods "find their justification in necessity and convenience rather than in logic. ... Their shelter has never been regarded as ... a 'fundamental' right ... the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." ... In *Liebig v. Superior Court* (1989) 209 Cal.App.3d 828, 831–834, ..., the court held that the Legislature had the power to revive lapsed common law claims

based on childhood sexual abuse under an earlier version of section 340.1.

(See also *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1181.) The legislative history demonstrates that the legislature considered this issue. The Assembly Committee on the Judiciary's report on AB 218 expressly cites to *Chase Securities* for the federal law and to *Liebig* for the California law. (LIS-3, page 6.) The Senate Committee on the Judiciary's report on AB 218 expressly cites to *Chase Securities* for the federal law and to *Liebig* for the California law. (LIS-6, page 8.)

The CCP 340.1(q) reopening of the statute of limitation for the thee year window is not a violation of the constitutional prohibition against ex post facto legislation. The Court of Appeal resolved this issue in *Coats v. New Haven Unified School District* (2020) 46 Cal.App.5th 415, 424–428.)

Significantly, however, the constitutional ability of the legislature to change a statute of limitations is limited to the revival "of a traditional common law cause of action" and the pursuit of the damages that were permitted at common law. That limiting framework is in *Bishop of Oakland*, 128 Cal.App.4th at 1165, where the court states, "we hold that a statute reviving the limitations period for *a common law tort cause of action*, thereby allowing the plaintiff to seek punitive damages, does not implicate the ex post facto doctrine and therefore does not trigger the intent-effects test at all." (Italics added.) Similarly, *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1181, states that there is "no constitutional impediment to revival in the case of *a traditional common law cause of action*

where, as here, the Legislature makes express its intent the law be given retrospective application." (Italics added.)

The limiting framework also applies to the recovery of compensatory and punitive damages. In *Bishop of Oakland*, 128 Cal.App.4th at 1165, and *21st Century Ins. Co. v. Superior Court* (2005) 127 Cal.App.4th 135, the court held that the legislature could revive claims that permitted punitive damages because punitive damages are not criminal in nature. The legislature was, however, reviving the remedy of punitive damages that existed when the underlying torts occurred and was not creating a new remedy that did not exist when the tort occurred.

REVIVING TIME BARRED CASES WITH THE NEW STATUTE OF LIMITATION – CCP 340.1(r).

The amendment to CCP 340.1(r) states: "The changes made to the time period under subdivision (a) as amended by the act that amended this subdivision in 2019 apply to and revive any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment."

This means the new statute of limitations applies to and revives cases that would previously have been time barred. This is a retroactive change in the statute of limitations. This is permitted by California statute and is constitutional.

The CCP 340.1(r) revival of claims is permitted by statute. CCP 3 states, "No part of it is retroactive, unless expressly so declared." (*Quarry v. Doe I* (2012)

53 Cal.4th 945, 955.) The text of the CCP 340.1(r) expressly declares that the amendment revives claims that would otherwise be time-barred.

The CCP 340.1(r) revival of claims is not a violation of constitutional due process. *Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 760, contains the required analysis, stating:

> [T]he Supreme Court has determined that "in a civil case, there is no constitutional right of repose. ... Thus, appellant has no constitutional right to be free of the obligation to defend stale claims. Because section 340.1(c) [which permitted revival of lapsed claims] does not deprive a defendant of a protected liberty or property interest encompassed by the Fourteenth Amendment, it is not unconstitutional under the due process clause.

Even if defendants had a vested interest in a statute of limitation or a statute of repose, "Vested rights may be impaired with due process of law ..., and a statute's retroactive application does not offend due process if the change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." (*Calleros v. Rural Metro of San Diego, Inc.* (2020) 58 Cal.App.5th 660, 773.) The legislative history of AB 218 demonstrates that the legislature considered the constitutional issue and expressly decided that the retroactive effect of CCP 340.1's amendments were sufficiently necessary to the public welfare as to justify the impairment of due process.

The CCP 340.1(r) revival of claims is not a violation of the constitutional prohibition against ex post facto

legislation. The Court of Appeal resolved this issue in *Coats v. New Haven Unified School District* (2020) 46 Cal.App.5th 415, 424–428.)

Again, the ability of the legislature to change a statute of limitations is limited to the revival "of a traditional common law cause of action" and the pursuit of the damages that were permitted at common law. (*Bishop of Oakland*, 128 Cal.App.4th at 1165; *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1181.) Whether the legislature can retroactively create a new duty, obligation, cause of action, remedy, or evidentiary standard is a different issue.

COVER-UP – CCP 340.1(b) – INTRODUCTION.

The amendment to CCP 340.1(b) states:

> (b)(l) In an action described in subdivision (a), a person who is sexually assaulted and proves it was as the result of a cover up may recover up to treble damages against a defendant who is found to have covered up the sexual assault of a minor, unless prohibited by another law.
>
> (2) For purposes of this subdivision, a "cover up" is a concerted effort to hide evidence relating to childhood sexual assault.

CCP 340.1(b) contains more than a few uncertainties or ambiguities. The court interprets the statute using the familiar rules of statutory interpretation. (*Riverside County Sheriffs Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630.) The court interprets the amendments so that, if possible, the court both gives effect to all parts of the AB 218 amendments and finds them to be constitutional both prospectively and retroactively. (*Monster, LLC*, 12 Cal.App.5th at 1231.)

Defendant argue that CCP 340.1(b) is unconstitutionally vague. (Def Supp Brief at 10–11.) The statute is not unconstitutionally vague. The court can give the statute "a reasonable and practical construction in accordance with the probable intent of the Legislature." This order makes the statute "more precise by judicial construction and application of the statute in conformity with the legislative objective." (*Schweitzer v. Westminster Investments, Inc.* (2007) 157 Cal.App.4th 1195, 1206.)

COVER-UP – THE STATUTE.

The statute permits an award of treble damages injuries for caused by a prior "cover up", which is defined as "a concerted effort to hide evidence relating to childhood sexual assault." This is the total definition.

As introduced on 2/16/18, the predecessor bill, AB 3120, included the proposed text of: "(2) For purposes of this subdivision, a "cover up" is a concerted effort to hide evidence relating to childhood sexual assault, which includes moving a perpetrator to another location without notifying authorities and adults at the new location, giving an accused perpetrator a positive recommendation for further employment without disclosing the accusations of childhood sex assault, or destroying documents to conceal childhood sex assault." (LH 586.) (See also LH 586, 593 [4/19/18].) The Assembly Judiciary Committee Report on AB 3120 dated 4/24/18 at p9 suggested that the text add the phrase "but is not limited to" to clarify that the examples of what might amount to a cover-up was not meant to be exhaustive. (LH at 658.) The text of AB 3120 then eliminated the

examples. (LH at 585, 599 [5/21/18].) When AB 218 was enacted it has no examples.

The legislative history provided by the parties provides no further indication about what the legislature intended by the phrase "cover up."

The phrase "cover-up" is not used elsewhere in CCP 340.1, so the court cannot consider other uses of the same phrase in the same section or act for context. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1113.)

The phrase "cover-up" is used elsewhere in unrelated California statutes, so the court can consider those other uses for context. The court does so with caution because the same word or phrase can have a different meaning depending on context. (*Russ-Field Corp. v. Underwriters at Lloyd's, London, England* (1958) 164 Cal.App.2d 83, 96.) The phrase "cover up" is used repeatedly in the context of statutes that state, "It is unlawful for any person to knowingly alter, destroy, mutilate, conceal, *cover up*, falsify, or make a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the administration or enforcement of this division." (Corp Code 28716(a); Corp Code 29105(a); Corp Code 31204(a); Fin Code 12332(a), Fin Code 30218(a); Fin Code 50512(a).) The inclusion of "cover up" in the string of words suggests that the CCP 340.1(b) definition of "a concerted effort to hide evidence" has a meaning similar to or has a purpose similar to the other words in those other statutes. (*MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration* (2018) 28 Cal.App.5th 635, 645–646.)

The court has reviewed case law. The court has found no definition of "cover-up."

The court has considered the dictionary definition of "cover-up." Black's Law Dictionary defines "concealment" as "The act of refraining from disclosure; esp. an act by which one prevents or hinders the discovery of something; a cover-up." (Black's Law Dictionary (8th ed.2004) p. 306.) This suggests that there is some equivalency between an effort to hide evidence and an effort to refrain from disclosure.

Looking within the statutory definition of "cover-up" in CCP 340.1(b)(2), the court has considered the phrase "a concerted effort." It is unclear whether "a concerted effort" is defined as collective effort, an effort on behalf of a group or entity, or a strenuous effort.

Dictionaries mostly define "concerted" as collective, but also define it as "strenuous." (Merriam-Webster.com/dictionary ["mutually contrived or agreed on"]; Dictionary.com [contrived or arranged by agreement; planned or devised together: a concerted effort.].) (See also https://www.lexico.com/en/definition/concerted ["(l) Jointly arranged, planned or caried out; coordinated, (1.1) Strenuously carried out; done with great effort."].)

Other California statutes are inconsistent. The vast majority of statues use the word "concerted" to mean "collective." (E.g. CCP 527.3; Fin Code 5100.7; Ins Code 1853.5, 12401.6; Govt Code 11410.30(c); Labor Code 1118, 1132.6, 1152; Penal Code 213(a)(1)(A), 264.1(a), 287(d), 490.4(a)(1) and (2), and 538c(a).) A few statutes us the word "concerted" to

mean "strenuous." (E.g., Govt Code 16279.1, H&S 104875 and W&I 15400.) A few statutes are ambiguous and "concerted" could arguably mean either "collective" or "strenuous." (Ed Code 67433, H&S 104875 and Govt Code 1027.5, Govt Code 14998.1.) Looking to federal statutes, 22 USCA 7101(b)(21) refers to "concerted and vigorous action", suggesting that concerted action and vigorous action are distinct concepts.

In case law, the phase "concerted effort" means a collective effort or an effort on behalf of a group or entity, but the case law is itself usually based on a statute regarding collective efforts. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 634 ["individual action is on behalf of a group and therefore concerted if "engaged in with or on the authority of other employees.""].) (See also *Nash-DeCamp Co. v. Agricultural Labor Relations Bd.* (1983) 146 Cal.App.3d 92, 104–107 [concerted activity].) Case law on civil conspiracy suggest that the word "concert" means persons acting collectively, but the nature of conspiracy is collective action. (*Spencer v. Mowat* (2020) 46 Cal.App.5th 1024, 1036 ["A conspiracy requires evidence that each member of the conspiracy acted in concert ..."]; *AREI II Cases* (2013) 216 Cal. App.4th 1004 1022. [A party seeking to establish a civil conspiracy "must show that each member of the conspiracy acted in concert...].)

The court holds as a matter of statutory interpretation that in the context of CCP 340.1(b)(2) the word "concerted" means "strenuous." The text of CCP 340.1(b)(1) uses the phrase "a defendant," suggesting that a single person can conduct a "cover up." The text of the statue is the most persuasive tool

of statutory construction. A few other statutes us the word "concerted" to mean "strenuous." A dictionary definition of "concerted" is "strenuous." Looking at the possibility that "concerted" might mean "collective," the legislative history contains no mention or suggestion that collective action is required for a "cover up." A requirement that a plaintiff prove collective action for a "cover up" would be significant requirement in the statute. The court will not infer the requirement of collective action without clearer legislature direction.

Looking within the statutory definition of "cover-up" in CCP 340.1(b)(2), the court has considered the word "hide." The common meaning of the word "hide" strongly suggests that the conduct be intentional. There is a distinction between losing or forgetting something and hiding that same thing. *People v. Irvin* (1968) 264 Cal.App.2d 747, 754–755, states "A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way; the mere looking at that which is open to view is not a search." The definition of "hide" can also plausibly draw on the definition of "accessories" in Penal Code 32. "[T]he gist of the [section 32] offense is that the accused harbors, conceals or aids the principal with the requisite knowledge and intent." (*People v. Partee* (2020) 8 Cal.5th 860, 869.) Knowledge requires "Knowledge that the principal committed a felony or has been charged with the commission of one is an essential element of accessory liability." (*People v. Moomey* (2011) 194 Cal.App.4th 850, 858.) Intent requires "intent that the principal avoid or escape from arrest, trial, conviction, or punishment." (*People*

v. Partee (2020) 8 Cal.5th 860, 873.) Knowledge and intent are "separate and distinct from the requirement of overt or affirmative assistance." (*Id.*) These collectively suggest that "hide evidence relating to childhood sexual assault" means "intentionally conceal, suppress, or destroy evidence relating to childhood sexual assault with knowledge of childhood sexual assault or of a credible accusation of childhood sexual assault."

The result is the statutory definition of a "cover up" as "a concerted effort to hide evidence relating to childhood sexual assault" with "concerted effort" meaning "strenuous effort" and "hide evidence relating to childhood sexual assault" meaning "intentionally conceal , suppress, or destroy evidence relating to childhood sexual assault with knowledge of childhood sexual assault or of a credible accusation of childhood sexual assault."

In the Order of 2/24/21, the court asked the parties to address several issues regarding the further interpretation of CCP 340.1. The court tracks the issues in that order.

ISSUE #1 – COVER-UP – DAMAGES ENHANCEMENT OR SEPARATE CLAIM?

The court holds as a matter of statutory construction that under CCP 340.1(b) a "cover-up" is a prerequisite for an enhancement to the damages that can be awarded on an underlying claim. A "cover-up" is not a separate claim. The parties agree on this. (Pltf Supp Brief at 7; Def Supp Brief at 1; Pltf Supp Reply at 4.)

Reading CCP 340.1(b) as an enhanced damages provision gives effect to the plain language of the

statute. CCP 340.1(b)(1) starts with the phase "In an action described in subdivision (a), ..." The plain language of the statute is that CCP 340.1(b) applies only if the case is already "action described in subdivision (a)." CCP 340.1(b)(1) then states that a plaintiff may recover up to treble damages against "a defendant." The context of the sentence suggests that "a defendant" means a defendant in an "action described in subdivision (a)." Furthermore, the context suggests that "a defendant" must be a defendant who has been found to be liable on a CCP 340.1(a) claim for breach of "childhood sexual assault" statute, negligence, or an intentional tort. (CCP 340.1(a)(1), (2), or (3).) The plain language of the statute indicates that CCP 340.1(b) enhances or augments the damages that are awarded on a CCP 340.1(a) claim are that CCP 340.1(b) does not establish a separate and free-standing statutory claim for participating in a "cover-up."

The concept of civil enhanced damages is well established in other California statutes. As relevant to the question of whether CCP 340.1(b) is a claim or enhanced damages, the statutes fall into two categories — those that enhance damages based on proof of some additional facts or elements and those that enhance damages based on nothing more than proof of the underlying liability. CCP 340.1(b) is in the first category and other statutes in the first category include:

- Civil Code 3345. Act against senior citizens or disabled persons. Permits the award of up to treble damages if "the trier of fact makes an affirmative finding in regard to one or more of the following factors ..."

- Civil Code 3345.1. Commercial sexual exploitation of minor. Permits the award of up to treble damages if "the trier of fact makes an affirmative finding in regard to one or more of the following factors ..."
- Civil Code 3346. Injuries to timber. Permits treble damages for "wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof," double damages "where the trespass was casual or involuntary," and actual detriment damages "where the wood was taken by the authority of highway officers for the purpose of repairing a public highway." (CCP 733 [also timber]; *Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094.)
- Probate Code 859. Transfer of property belonging to conservatee, minor, or elder. Provides for double damages if court "finds that a person has in bad faith wrongfully taken, concealed, or disposed of property."
- Welfare and Institutions Code 15657. Elder abuse. Lifts the MICRA cap on damages if there is clear and convincing evidence of recklessness, oppression, fraud, or malice in the commission of the abuse.

Statutes in the second category that enhance damages based on nothing more than proof of the underlying liability include Bus & Prof 16750(a) [Combinations in Restraint of Trade]; Bus & Prof 17082 [Unfair Trade Practices]; Civil Code 1812.94 [contracts for health studio services]; Civil Code 1812.123 [Contracts for Discount Buying Services]; Labor Code

Section 970, 972 [False representations that induce people to relocate for work].)

Reading CCP 340.1(b) as an enhanced damages provision minimizes the retroactivity concern that the amendment "makes an action, done before the passing of the law, and which was innocent when done, [actionable] and punishes such action." (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161.) If CCP 340.1(b) is enhanced damages, then proof of a previously existing common law claim is a precondition to potential eligibility for the treble damages. This avoids constitutional "difficulties" or "doubts." (*Monster, LLC*, 12 Cal.App.5th at 1231.)

ISSUE #2 – COVER-UP – BROADER THAN EXISTING COMMON LAW CLAIMS?

The court holds as a matter of statutory construction that the definition of "cover-up" is in the nature of an intentional tort and is therefore within the scope of some common law claims and is outside the scope of others. The parties disagree on this issue. Plaintiffs assert that "cover-up" is consistent with existing common law claims, including negligence. (Pltf Supp Brief at 8–9; Pltf Supp Reply at 5.) Defendants argues that "cover-up" creates new duties that did not exist at common law. (Def Supp Brief at 2.)

CCP 340.1(b) permits a plaintiff to obtain enhanced damages based on proof of a "cover-up." The court examines whether a "cover-up" is within the scope of any existing common law duty and, if so, which ones.

NEGLIGENCE – BREACH OF GENERAL DUTY. A "cover-up" is not within the scope of the common law

general duty to not be negligent. The general duty to not be negligent does not impose a duty to report bad behavior or a suspected criminal activity to law enforcement, to an employer, or to any other organization. It is "well established that, as a general matter, there is no duty to act to protect others from the conduct of third parties." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) "[L]iability may not be imposed for mere nondisclosure or other failure to act, at least in the absence of some special relationship." (In *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1078.) (See also *Williams v. State of California* (1983) 34 Cal.3d 18, 23.) Nonfeasance generally does not give rise to a legal duty because "as a general matter, there is no duty to act to protect others from the conduct of third parties." (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531.) In addition, a "cover up" requires "a concerted effort to hide evidence," which is the description of an intentional tort and not negligence. As plaintiff state, "The notion that one could engage in a 'negligent' cover up is simply unfounded and contrary to basic statutory construction." (Pltf Supp Reply at 7:7–8.)

NEGLIGENCE – BREACH OF DUTY TO PERSON WITH SPECIAL RELATIONSHIP. A "cover-up" is not within the scope of any common law duty arising from a special relationship to care for another person. The existence of a special relationship can create a duty to act. Assuming such a duty, a "cover up" requires "a concerted effort to hide evidence," which is the description of an intentional tort and not a mere failure to meet a duty arising from a special relationship.

Mandated reporters have a statutory duty to report under the Child Abuse and Neglect Reporting Act (CANRA). (Pen. Code § 11164 et seq.) A person can have a duty to protect a specific individual when there is CANRA reporting obligation with that specific individual. Assuming such a duty, a "cover up" requires "a concerted effort to hide evidence," which is the description of an intentional tort and not a mere failure to meet a reporting responsibility under CANRA.

Assuming such a duty, a "cover-up" is not within the scope of any common law or statutory duty to protect every person who might be injured as a result of a failure to take reasonable action to prevent future sexual assaults. The duty arising from a special relationship extends only to the person in that special relationship. A special relationship does not extend to every person who might be injured as a result of a failure to report the sexual assault or take other action. In *P.S. v. San Bernardino City Unified School Dist.* (2009) 174 Cal.App.4th 953, 965, the Court of Appeal interpreted CANRA and stated, "Necessarily, the child intended to be protected is the child about whom the reporting party is in a position to observe or to know anything regarding known or suspected abuse or neglect. For this reason, [*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066] was not intended to extend an open-ended liability to all future children who might conceivably be harmed, even years later, for the failure to report suspected injury to one child within the knowledge and observation of the reporter." *San Bernardino* concluded, "Quite simply, nothing in the amendment indicates any legislative intent whatsoever to extend

a duty or to create liability to all future children who might be harmed by a suspected abuser." (*San Bernardino*, 174 Cal.App.4th at 966.)

NEGLIGENT MISREPRESENTATION. A "cover-up" is not within the scope of negligent misrepresentation. There is an existing common law duty to not make negligent affirmative negligent misrepresentations. (*Borman v. Brown* (2021) 59 Cal.App.5th 1048, 1060.) Negligent misrepresentation is a variety of negligence. "[N]egligent misrepresentation does not require proof of an intent to defraud." (*Borman*, 59 Cal.App.5th at 1060.) A "cover up" requires "a concerted effort to hide evidence," which is the description of an intentional tort and not a negligent misrepresentation.

FRAUDULENT MISREPRESENTATION. A "cover-up" is within the scope of the duty to not make intentional fraudulent misrepresentation. There is an existing common law duty to not make intentional fraudulent misrepresentations. (Civil Code 1709, 1710; *Borman v. Brown* (2021) 59 Cal.App.5th 1048, 1060–1061.) In *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1076–1077, the California Supreme Court addressed the potential liability of an employer for misrepresentations in the form of providing a letter of recommendation that failed to disclose information regarding charges or complaints of sexual misconduct. The court concluded, "the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial,

foreseeable risk of physical injury to the third persons." (*Randi W.*, 14 Cal.4th at 1081.)

FRAUDULENT CONCEALMENT. A "cover-up" is within the scope of the duty to not make intentional fraudulent concealment. There is an existing common law duty to not engage in fraudulent concealment. That noted, "[a] fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1185–1186.) (See also Civ. Code, 1710(3) [a deceit includes "[t]he suppression of a fact, by one who is bound to disclose it ..."].)

Concealment or nondisclosure may constitute fraud when the defendant is in a fiduciary or other special relationship with the plaintiff. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 311.) (*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1076–1077, 1078 ["[L]iability may not be imposed for mere nondisclosure or other failure to act, at least in the absence of some special relationship."].) A "cover up", however, requires "a concerted effort to hide evidence," which is the description of an intentional tort and not a mere failure to meet a duty to disclose.

Nondisclosure or concealment may also constitute fraud when the defendant is in a transactional relationship with the plaintiff. (*Bigler-Engler*, 7 Cal.App.5th at 311.) The transaction must be in the course of a relationship that gives rise to the duty, such as "seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." (*Bigler-Engler*,

7 Cal.App.5th at 311–312.) (See also *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 749–751 [non-fiduciary has duty to disclose when it is in transactional relationship]; (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1186–1193 [need for transactional relationship]; *Shin v. Kong* (2000) 80 Cal.App.4th 498, 509 [same].) A transaction that supports a duty to disclose "must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Bigler-Engler*, 7 Cal.App.5th at 311–312.) Assuming such a duty, a "cover up" requires "a concerted effort to hide evidence," which is the description of an intentional tort and not a mere failure to meet a duty to disclose.

SPOLIATION OF EVIDENCE. A "cover up" is not within the scope of a common law claim for spoliation because there is no common law claim for spoliation. "[T]he [California] Supreme Court declined to recognize intentional spoliation as a tort because it found the societal burdens associated with permitting tort remedies for intentional spoliation outweighed the benefits." (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 459.) (See also *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464.) Similarly, "there is no tort remedy for first party or third-party negligent spoliation of evidence." (*Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081, 1089.) It is, however, a misdemeanor to willfully destroy, erase, or conceal evidence owned by another person if a person knows that the evidence is about to be produced in evidence

for a trial, inquiry, or investigation authorized by law. (Penal Code 135.)

BROADER THAN EXISTING COMMON LAW CLAIMS – SUMMARY.

For purposes of CCP 340.1(b), a "cover up" is a concerted effort to hide evidence relating to childhood sexual assault. For the treble damages provision to apply in revived cases, however, a "cover-up" must be limited to preexisting common law claims. The court reads the statute to avoid constitutional "difficulties" or "doubts." (*Monster, LLC*, 12 Cal.App.5th at 1231.)

The court holds as a matter of statutory interpretation that a "cover up" describes an intentional tort. A plaintiff must prove an intentional tort in the nature of intentional fraudulent misrepresentation (to anyone) or intentional fraudulent concealment (where there is a duty to disclose, report, preserve, etc.) as a precondition to seeking cover up treble damages. A plaintiff that proves a CCP 340.1(a)(3) common law claim for an intentional tort that was the legal cause of the childhood sexual assault can also pursue "cover up" treble damages for that same intentional act. A plaintiff cannot prove a CCP 340.1(a)(3) common law claim for one intentional act and then pursue "cover up" treble damages for a different intentional act.

A CCP 340.1(a)(1) common law claim against a perpetrator for childhood sexual assault would not be a "cover up" of that same sexual assault and thus could not support treble damages. (LH at 137; Def Supp Oppo at 3:19–24 [legislative history].) A CCP 340.1(a)(2) common law claim for a breach of a duty of care would not be a "cover up" because a

negligent breach of duty or an unintentionally wrongful act is not "a concerted effort to hide evidence relating to childhood sexual assault."

This is relevant to the constitutional due process issue because the legislature can only revive claims that existed at common law. Claims for intentional fraudulent misrepresentation or intentional fraudulent concealment existed at common law. The legislature can plausibly create retroactive cover up enhanced damages if those damages are based on conduct that would have supported common law tort claims.

Reading the CCP 340.1(b) definition of "cover up" as an intentional tort and requiring proof of an intentional tort as a precondition to seeking cover up treble damages based on that same tort minimizes the retroactivity concern that the amendment "makes an action, done before the passing of the law, and which was innocent when done, [actionable] and punishes such action." (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161.) If "cover up" is within the scope of existing intentional torts, then the "cover up" enhancement is not making a defendant newly liable for actions that would not have subjected the defendant to liability when the defendant took the action. This avoids constitutional "difficulties" or "doubts." (*Monster, LLC*, 12 Cal.App.5th at 1231.)

At the hearing on 4/28/21, both defendants and plaintiffs disagreed with the court's interpretation of how CCP 340.1(b) interacts with CCP 340.1(a).

Defendants reasonably focused on the plain language of CCP 340.1(b). Defendants argued that

the plain text of CCP 340.1(b) permits a plaintiff to seek treble damages based on a violation of CCP 340.1(a)(1), (2), or (3), which would permit the retroactive imposition of treble damages for actions that were only negligent, which would arguably be the unconstitutional retroactive creation of treble damages.

Plaintiffs reasonably focused on interpreting CCP 340.1(b) to avoid concerns with retroactive application. Plaintiffs argued that CCP 340.1(b) permits a plaintiff to seek treble damages based on any violation of CCP 340.1(a)(1), (2), or (3), that would have supported punitive damages, which would permit the retroactive imposition of treble damages for acts that were done with "conscious disregard for the rights or safety of others" (Civil Code 3294(c)(1)), which would arguably be constitutional because a plaintiff could recover treble damages on the same fact patterns under which a plaintiff would previously have been able to recover punitive damages.

The court sticks with its interpretation. The plain language of CCP 340.1(b)(1) is that liability under CCP 340.1(a) is a precondition for treble damages and the plain language of CCP 340.1(b)(2) is that a "cover up" is an intentional tort. The combination of CCP 340.1(b)(1) and (b)(2) compels the conclusion that a plaintiff can recover treble damages only if the plaintiff can prove both an intentional tort generally and a "cover up" specifically. The overlap between existing common law intentional torts and "cover up" are facts that support intentional fraudulent misrepresentation or intentional fraudulent concealment. If a plaintiff cannot prove one of those common law intentional torts, then the plaintiff by

definition cannot prove a "cover up." As noted above, a plaintiff cannot prove a CCP 340.1(a)(3) common law claim for one intentional act and then pursue "cover up" treble damages for a different intentional act. It would be absurd to permit a plaintiff to seek enhanced "cover up" treble damages based on a set of facts if the plaintiff could not prove an existing common law intentional tort based on the same set of facts. (*Taylor v. Department of Industrial Relations* (2016) 4 Cal.App.5th 801, 810 ["absurd results should be rejected" as they "are not supposed to have been contemplated by the legislature"].)

ISSUE #3 – COVER-UP – BURDEN OF PROOF

The court holds as a matter of statutory construction that under CCP 340.1(b) a plaintiff can prove a "cover-up" by a preponderance of the evidence. The parties agree on this. (Pltf Supp Brief at 10; Def Supp Brief at 2–3; Pltf Supp Reply at 6.)

CCP 340.1(b) does not address the burden of proof on the cover-up claim. CCP 340.1(e) states "This section shall not be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this section." Evidence Code section 115 states: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Preponderance of the evidence is the standard "unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, or decisional law." (*Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1085–1086.) (See also *Baxter*

Healthcare Corp. v. Denton (2004) 120 Cal.App.4th 333, 368.)

There is no Constitutional requirement that a plaintiff prove punitive or other non-compensatory damage by more than a preponderance of the evidence. (*Colombo v. BRP US Inc.* (2014) 230 Cal.App.4th 1442, 1456 ["punitive damages are allowable under federal maritime law and are awarded under a preponderance of the evidence standard of proof"].)

The enhancement of damages does not convert the damages into punitive damages and trigger the use of the "clear and convincing evidence" standard of proof. A statute that provides for enhanced damages can use the preponderance of the evidence standard. A finding by a preponderance of the evidence can support an award of treble damages. (*Brocke v. Naseath* (1955) 134 Cal.App.2d 23, 25–26.) The Unfair Practices Act requires proof by a preponderance of the evidence but the plaintiff recovers treble damages. (*Bay Guardian Co. v. New Times Media LLC* (2010)187 Cal.App.4th 438, 466–467; Bus & Prof 17082.) The Cartwright Act requires proof by a preponderance of the evidence, but the plaintiff recovers treble damages. (*Quidel Corporation v. Superior Court of San Diego County* (2020) 57 Cal.App.5th 155.)

Some case law, however, suggests that when a cause of action can lead to the imposition of treble damages then the claim requires proof by clear and convincing evidence. In *Siry Investment, L.P. v. Farkhondehpour* (2020) 45 Cal.App.5th 1098, 1136, recently held that a plaintiff in a civil suit could not

leverage Penal Code 496 to get treble damages. The court stated, "Until now, a plaintiff seeking greater than compensatory damages had to prove, by clear and convincing evidence, that the defendant was "guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) If Penal Code section 496 applied to these torts, a plaintiff could obtain treble damages merely by proving the tort itself by a preponderance of the evidence." (See also *Lacagnina v. Comprehend Systems, Inc.* (2018) 25 Cal.App.5th 955, fn 8 [Penal Code 496 did not apply to wage theft, and if it did, then plaintiffs arguably would need to prove the claim by more than a preponderance of the evidence].) The case law on Penal Code 496 and applicable burden of proof is distinguishable because it concerns the incorporation of a Penal Code penalty into civil law.

The court holds as a matter of statutory construction that the preponderance of the evidence standard applies to proof of a CCP 340.1(b) cover-up. This is consistent with the Evidence Code 115 presumption regarding the burden of proof. The text of CCP 340.1(b) makes no mention of the clear and convincing standard, and the legislature knows how to specify the use of the standard for enhanced damages. (Welfare and Institutions Code 15657 [Elder abuse].) The legislative history of the amendments never mentions either the word "preponderance" or the phrase "clear and convincing."

Reading the CCP 340.1(b) as permitting a plaintiff to prove a cover-up and the up to treble damages by a preponderance of the evidence implicates the due process concern with a "law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission

of the offence in order to convict the offender." (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161.) The court has identified several non-California cases addressing retroactive changes in the burden of proof. (*Woodward v. Department of Justice* (Fed Cir., 2010) 598 F.3d 1311, 1315; *Streicher v. Prescott* (DC Cir., 1987) 663 F.Supp. 335, 340 fn 11; *People v. McRunels* (Ct App Mich, 1999) 237 Mich.App. 168, 603 N.W.2d 95.) These cases also suggest that a retroactive change in the burden of proof raises constitutional due process questions.

Consistent with the due process concerns, recent California case law holds that changes in the rules of evidence may trigger ex post facto concerns. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 179; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936–937; *Strong v. Superior Court* (2011) 198 Cal.App.4th 1076, 1083–1084; *People v. Treadway* (2008) 163 Cal.App.4th 689, 698.) These California cases refer to and are consistent with United States Supreme Court case law. (*Stogner v. California* (2003) 539 U.S. 607, 612.) A single older California case states "changes in a statute regulating the burden of proof are to be applied as changes in procedure only." (*Estate of Giordano* (1948) 85 Cal.App.2d 588, 592.)

The court considered whether to interpret CCP 340.1(b) as requiring proof under the clear and convincing standard. This would minimize the constitutional concern because pre-enactment a defendant was liable for punitive damages under the clear and convincing. That would, however, require the court to ignore CCP 340.1(e) and case law that preponderance of the evidence is the standard "unless

a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, or decisional law." (*Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1085–1086.) The court will not rewrite the statute. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73–74.) The court cannot interpret CCP 340.1(b) cover-up as having the clear and convincing standard for pre-enactment conduct and the preponderance of evidence standard for post-enactment conduct.

ISSUE #4 – COVER-UP – UP TO TREBLE DAMAGES

The court holds as a matter of statutory construction that under CCP 340.1(b) a plaintiff can recover up to treble damages. The parties agree on this. (Pltf Supp Reply Brief at 6; Def Supp Brief at 3–4.)

CCP 340.1(b) creates the new remedy of treble damages. The legislature has the ability to enact legislation that includes up to treble damages.

ARA Living Centers - Pacific, Inc. v. Superior Court (1993) 18 Cal.App.4th 1556, 1564, sets out the methodology for evaluating retroactivity when the legislature has created a new remedy for a previously existing claim. ARA Living Centers states that the court should "consider whether the Legislature (1) has merely affected a change in the conduct of trials ... or (2) has changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct. … If the latter is the case, [the court] must consider also whether the Legislature

intended retroactive application and, if so, whether it could properly make it retroactive."

The creation of cover up treble damages "has changed the legal consequences of past conduct by imposing new or different liabilities based upon such conduct."

The court finds that the Legislature intended retroactive application. The structure of AB 218 and the legislative history indicate that the legislature intended the amendments to be a package. The legislative history indicates that the legislature intended that when the three-year window for reviving lapsed claims opened up that the treble damages provision would apply to those claims. Legislative documents state "The bill also exposes those who cover up the sexual abuse of children to additional punishment" (LH p 57, 657.) A statement by the bill sponsor states "AB 218 will [expand the statute of limitation] while increasing the amount of damages." (LH 111.) A legislative bill analysis states AB218 "Subjects all [employers] to potentially decades-old claims, and authorizes a court to award treble damages. (LH 112.) (See also 117 [cover up damages needed "both to compensate victims" and as "an effective deterrent]; 122 [similar].)

Legislative documents show that the legislature knew that others understood the treble damages provision applied retroactively. (LH at 56–57 [noting "particular objection to the application of treble damages retroactively"]; 138–139 ["the coalition specifically urges the removal of the treble damages provisions" that concern "claims that are decades old"].) Letters by opponents of the bill state the

concerns that were transmitted to the legislature. (LH 70–71; 99; 106; Pltf filing on 4/5/21, Exhs 20, 21, 22.) Letters by supporters of the bill suggest that they also understood the treble damages provision would applied retroactively. Those letters state that current law did not "provide an effective deterrent or enough remedy and that AB 218 would "increase[e] the amount of damages a victim may recover" (LH 80). (See also LH 83 [current law did not "provide an effective deterrent or sufficient remedy"].)

The legislative history contrasts this case with *ARA Living Centers*, 18 Cal.App.4th at 1564, where the Court of Appeal stated:

> We strongly suspect that, if asked a question about retroactive application, the Legislature would have said the change should apply to past abuse. However, we also suspect the Legislature never considered whether to make the amendment retroactive. We find no clear indication of retroactive intent. The Legislature pointed out that few civil actions were being brought in connection with elder abuse due in part to lack of incentives. It then provided some incentives. However, it said nothing to indicate an intent both to improve incentives for bringing actions based on future abuse and to vindicate past abuse. In light of this silence, the presumption of prospective intent prevails.

Whereas in *ARA Living Centers*, 18 Cal.App.4th at 1564–1565, the legislature "said nothing to indicate an intent ... to improve incentives for bringing actions ... to vindicate past abuse," the legislative

history of CP 340.1 strongly suggests legislative intent to encourage actions to vindicate past abuse.

The legislative intent is very significant. (Compare *Sanders v. Allison Engine Co., Inc.* (6th Cir. 2012) 703 F.3d 930, 949 [retroactive application of treble damages constitutional where clear legislative intent] with *Resolution Trust Corp. v. S & K Chevrolet* (C.D. IL., 1994) 868 F.Supp. 1047, 1063–1064 [retroactive application of treble damages not constitutional where no clear legislative intent].)

The legislative intent is a fact question and record could support different inferences. The text of CCP 340.1 does not expressly state that the treble damages provision has retroactive application. The AB 218 amendments are part of a package but exist independent of each other. The legislative history consistently lists the three topics in separate bullet points or paragraphs. The court has considered the text of the statute and the legislative history. The court concludes that the legislature intended to have CCP 340.1 apply to revived cases and to actions before enactment. The legislative history compensates for the lack of an express statement in in the statute itself.

The legislature "could properly make [cover up treble damages] retroactive." The application of treble damages to revived cases implicates the due process concern with "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161.) Viewed in isolation, the retroactive creation of a new treble

damages remedy is problematic, but arguably permissible given the legislative intent. Viewed in the context of CCP 340.1(b) as interpreted by the court, the new treble damages remedy is consistent with due process and ex post facto analysis because it is in the alternative to the existing common law punitive damages remedy.

ISSUE #5 – COVER-UP – WHAT IS TREBLED

The court holds as a matter of statutory construction that under CCP 340.1(b) that the trebling is based on the damages suffered as a result of the "cover-up." Both parties disagree with the court on this. (Pltf Supp Brief at 16–17; Def Supp Brief at 4–6; Pltf Supp Reply Brief at 6–7.) As noted above, the court is responsible for statutory construction without regard to the agreement of the parties.

CCP 340.1(b) does not address whether the CCP 340.1(b) "up to treble damages" is treble the damages on the underlying claim or is treble the damages suffered as a result of the "cover-up." The statute could be read either way.

CCP 340.1(b) could permit treble damages based on the damages on the underlying claim. Subsection (b) starts with the phrase "In an action described in subdivision (a)" and then states that a plaintiff may recover up to treble damages against "a defendant." The context suggests that "a defendant" means a defendant who has been found to be liable on a claim described in a CCP 340.1(a) claim. This in turn suggest that the damages that can be trebled is the damages awarded on any underlying claim.

CCP 340.1(b) could alternatively permit treble damages based solely on the damages suffered as a

result of the "cover-up." Subdivision (b) states that plaintiff must prove that they were sexually assaulted "as the result of a cover up" before they can "recover up to treble damages." The "as a result of" language suggests that the legislature intended a causal relationship between the cover-up and the treble damages. This suggests that the damages that can be trebled is only the damages suffered as a result of the "cover-up."

The court interprets CCP 340.1(b) as meaning that the treble damages are based solely on the damages suffered as a result of the "cover-up." This is consistent with the statutory text and appears to reflect the intent of the legislature. It ensures that a defendant that engaged in a cover up is assessed treble damages related to the cover up and is not assessed treble damages related to the actions of the perpetrator, the actions of some other person or entity, or actions of the defendant unrelated to the cover up.

This interpretation of CCP 340.1(b) will require that any verdict form require the jury to define what damages are the result of the intentional tort that is the precondition to the possibility of treble damages and also define the damages suffered as a result of the "cover-up." Both plaintiffs and defendants argue in their supplemental opening briefs that this would be impossibly confusing for a jury. (Pltf Supp Brief at 17:20–24; Def Supp Brief at 5:24–28.)

Plaintiffs' supplemental reply brief then points out that Civil Code 1431.2 already requires a jury to apportion non-economic damages among joint tortfeasors based on principles of comparative fault

for claims accruing after 6/6/86. Plaintiffs' supplemental reply also points out that in *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 23, the California Supreme Court states "stated: "in *all* cases in which a negligent actor and one or more others jointly caused the plaintiff's injury, the jury should be instructed that, assuming 100 percent represents the total causes of the plaintiff's injury, liability must be apportioned to each actor who caused the harm in direct proportion to *such actor's respective fault*, whether each acted intentionally or negligently or was strictly liable [citations], and whether or not each actor is a defendant in the lawsuit …." *B.B.*, 10 Cal.5th at 24, 29, also holds that Civil Code 1431.2 does not authorize a reduction in liability of intentional tortfeasors for noneconomic damages based on the negligence of other actors. Existing California law already requires a jury to allocate liability to a defendant and to state what allocation is the result of an intentional tort. A jury can also be asked to state whether those intentional torts also meet the statutory definition of cover up and then to determine the amount of any up to treble damages based on those intentional torts.[1]

At the hearing on 4/28/21, defendants expressed concern that even if Civil Code 1431.2 does permit apportionment of damages a defendant might still have joint and several liability for treble damage

[1] The court does not decide how the limitation of Civil Code 1431.2 to claims accruing after 6/6/86 might affect the constitutionality of the retroactive application of CCP 340.1(b). A plaintiff could presumably stipulate to the application of Civil Code 1431.2 to claims accruing before 6/6/86 to avoid the constitutional issue.

based on participation in a civil conspiracy to commit an intentional tort. (*Kesmodal v. Rand* (2004) 119 Cal.App.4th 1128, 1142–1145.) The court is not troubled by that result. Under existing common law, all parties to a civil conspiracy to commit tortious acts must have a duty to the plaintiff. (*Chavers v. Gatke Corp.* (2003) 107 Cal.App.4th 606, 614.) Under existing common law, if a plaintiff proves a conspiracy to commit an intentional tort, then all defendants in a conspiracy are liable for all damages caused as a result of the conspiracy. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.) The interpretation of "concerted" to mean "strenuous" rather than "collective" does not preclude a plaintiff from asserting that several defendants participated in a conspiracy to engage in an intentional tort. The damages caused by the conspiracy and intentional tort can presumably be enhanced for all coconspirators if the plaintiff proves a conspiracy to "cover up."

This interpretation regarding what damages are trebled is not directly related to the constitutional issues of retroactive application of CCP 340.1(b), but it is a necessary step before addressing the relationship between CCP 340.1(b) treble damages and Civil Code 3294 punitive damages.

ISSUE #6 – COVER UP – ARE TREBLE DAMAGES MULTIPLICATIVE OF, IN ADDITION TO, IN THE ALTERNATIVE TO, OR INSTEAD OF PUNITIVE DAMAGES

The court holds as a matter of statutory construction that an award of treble damages under CCP 340.1(b) is in the alternative to punitive

damages. Plaintiff agrees with this. (Pltf Supp Brief at 20:15–17.) Defendants argue that the legislature intended the treble damages to be in addition to punitive damages, and defendants then argue that this interpretation has the effect of making the statute unconstitutional. (Def Supp Brief at 8–10.)

CCP 340.1(b) does not address whether the CCP 340.1(b) "up to treble damages" is multiplicative of, in addition to, in the alternative to, or instead of Civil Code 3294 punitive damages.

Cover-up treble damages are arguably multiplicative of punitive damages. The plain language of CCP 340.1(b) is that a plaintiff "may recover up to treble damages against a defendant who is found to have covered up the sexual assault of a minor." The word "damages" includes both compensatory and punitive damages, so arguably the jury could award compensatory and punitive damages and then treble that combined damage award. The court found no California appellate law on that issue. A federal trial judge held that the trebling of punitive damages would be constitutional. (*Hood v. Hartford Life and Acc. Ins. Co.* (E.D. Cal. 2008) 567 F.Supp.2d 1221, 1226–1227.) Under this scenario, a jury could award compensatory damages of $300,000, punitive damages of $200,000, and then CCP 340.1 could treble the total of $500,000 to reach a judgment of $1,500,000.

Cover-up treble damages are arguably in addition to punitive damages. A court can award both enhanced statutory damages and punitive damages if they serve different "social objectives. (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 418–419.) In

Greenberg v. Western Turf Assn. (1903) 140 Cal. 357, 73 P. 1050, the Supreme Court authorized both punitive damages, under Civil Code section 3294, and a statutory penalty of $100 in addition to actual damages. (See also *Hill v. Superior Court* (2016) 244 Cal.App.4th 1281 [double damages under Probate Code 858 are not punitive damages].) Under this scenario, a jury could award compensatory damages of $300,000, punitive damages of $200,000, and then CCP 340.1 could treble the compensatory damages of $300,000 to reach a judgment of $1,100,000.

Cover-up treble damages are arguably in the alternative to punitive damages. "If the purpose of the [treble damages] is the same as that of punitive damages, ..., the plaintiff cannot obtain a double recovery and must elect to have judgment entered in an amount which reflects either the statutory trebling or the compensatory and punitive damages." (*Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826.) (See also *Marshall v. Brown* (1983) 141 Cal.App.3d 408, 418–419.) The legislative history indicates that "cover-up" treble damages was designed to be "an effective deterrent against individuals and entities who have chosen to protect the perpetrators of sexual assault over the victims." (DEF RJN, Assembly Report 3/12/19, page 4.) This serves the same social purpose as a punitive damages award against a person who made material misstatements or who intentionally hid material information when they had a duty to disclose the information. Under this scenario, a jury could award compensatory damages of $300,000, punitive damages of $200,000, and then the plaintiff would elect between the treble damages total judgment of

$900,000 or the punitive damages total judgment of $500,000.

Cover-up treble damages are arguably instead of punitive damages. "As a general rule, where a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 70.) In *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 906–917, the court held that the statutory penalty in the Mobilehome Residency Law (Civil Code 798.86) was the exclusive penalty and precluded an award of punitive damages. Under this scenario, a jury could award compensatory damages of $300,000, there would be no instruction or verdict on punitive damages, and then CCP 340.1 could treble the compensatory damages of $300,000 to reach a judgment of $900,000.

The court discards "multiplicative of" because there is no California authority for this option. In addition, the idea of awarding punitive damages and then trebling the punitive damages is constitutionally suspect as unreasonably punitive. The court discards "in addition to" because cover-up treble damages and punitive damages serve the same social purpose when the cover up treble damages are awarded based on an underlying claim for intentional fraudulent misrepresentation or intentional fraudulent concealment.

The court discards "instead of" because the actions that comprise a cover up were an intentional tort at common law. This is not a situation where the

legislature created a new cause of action with a new and adequate remedy. Assuming that cover-up were a new statutory claim with a new remedy, then treble damages would be an adequate remedy. Although punitive damages can be awarded at ratios greater than 2-1 (which is the same as treble damages), California law has noted Supreme Court authority that "ratios of 3 or 4 to 1 were 'instructive' as to the due process norm." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1181–1182.)

The court holds that cover-up treble damages are in the alternative to punitive damages. This is consistent with the law that "where a statutory remedy is provided for a preexisting common law right, the newer remedy is generally considered to be cumulative, and the older remedy may be pursued at the plaintiffs election." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 70.) This is consistent with most of the case law on situations where a plaintiff can recover both punitive damages and some other statutory enhanced damages. (Def Supp Brief at 7; *Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826; *Marshall v. Brown* (1983) Cal.App.3d 408, 418–419.) A jury can award both cover-up treble damages based on a preponderance of the evidence and punitive damages based on clear and convincing evidence and the plaintiff must then elect their remedy. This has the benefit of following an established procedural roadmap and being "workable and reasonable in practice." (*Allende v. Department of Cal. Highway Patrol* (2011) 201 Cal.App.4th 1006, 1018.)

The interpretation of CCP 340.1(b) treble damages as being in the alternative to punitive damages avoids

constitutional "difficulties" or "doubts." (*Monster*, 12 Cal.App.5th at 1231.) Furthermore, it avoids those "difficulties" or "doubts" whether the statute is applied to revived cases or prospectively.

COVER UP – SUMMARY OF INTERPRETATION AND CONSTIUTIONALITY

The court interprets CCP 340.1(b) as follows: (1) a "cover-up" is a requirement for enhanced damages; (2) a plaintiff must prove an intentional tort in the nature of intentional fraudulent misrepresentation or intentional fraudulent concealment as a precondition to seeking "cover up" enhanced damages; (3) proof of a "cover-up" permits the award of "up to treble damages"; (4) a plaintiff must prove a "cover up" by a preponderance of the evidence; (5) the treble damages apply only to the damages that the plaintiff suffered as a result of the "cover-up"; and (6) the treble damages are in the alternative to the punitive damages based on the relevant intentional tort.

This interpretation gives effect to the plain language of CCP 340.1(b) and is consistent with the legislative intent gleaned from the legislative history. The court can say with confidence that (i) this interpretation closely effectuates policy judgments clearly articulated by the legislature, and (ii) the legislature would have preferred this statutory construction to invalidation of the statute or limiting the statute to prospective operation. (*Legislature v. Padilla* (2020) 9 Cal.5th 867, 875–876; *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 661.)

Addressing retroactivity specifically, the court tracks the due process and ex post facto concerns

identified in *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161.

Retroactive application of CCP 340.1(b) does not "make[] an action, done before the passing of the law, and which was innocent when done, criminal; and punish[] such action." The CCP 340.1(b) "cover up" is an intentional tort in the nature of intentional fraudulent misrepresentation or intentional fraudulent concealment and the defendant was liable for those intentional torts when it did the action. A "cover up" is within the scope of and encompassed by the existing intentional torts, but "cover up" has narrower and more clearly defined elements. The statute does not create the possibility of liability for actions that were previously blameless.

Retroactive application of CCP 340.1(b) does not "aggravate[] a crime, or makes it greater than it was, when committed. This concern is not at issue.

Retroactive application of CCP 340.1(b) is a "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." This is the retroactive creation of treble damages and is a concern.

Retroactive application of CCP 340.1(b) is a "law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence in order to convict the offender." This is the retroactive application of the preponderance of evidence standard to enhanced damages that previously required proof by clear and convincing evidence and is a concern.

The court concludes that CCP 340.1(b) can be applied retroactively despite the concerns about newly

created and retroactive treble damages and the award of those damages based on proof by a preponderance of the evidence. Most importantly, the legislative history shows the legislature understood AB 218 would expand the statute of limitation "while increasing the amount of damages" (LH 111), that it would "Subject[] all [employers] to potentially decades-old claims, and authorize[] a court to award treble damages (LH 112), and that cover up damages served the dual purpose of compensating victims (retroactive) and as an effective deterrent (prospective) (LH 117, 122.) This legislative history strongly suggests that the legislature intended that the treble damage provision would be applied retroactively. The legislature was certainly informed that opponents understood that it would be applied retroactively. (LH at 56–57 and 138–139.)

In addition, the legislature indicated that there were "important state interests" in compensating the victims of childhood sexual abuse, punishing persons and entities who has covered up childhood sexual abuse, and deterring future cover ups of childhood sexual abuse. (*Calleros v. Rural Metro of San Diego, Inc.* (2020) 58 Cal.App.5th 660, 668; *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42, 55.)

The court has also considered, "the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (*Calleros*, 58 Cal.App.5th at 668.) The legislative history's statements that the prior law was not adequate to deter cover ups and that that the new

law should change behavior suggest that some persons or entities (not necessarily defendants in this case) might have relied on the lack of a sufficient deterrent when in the past they decided to cover up childhood sexual abuse. There is, however, no legitimacy to any such reliance. The law would not give effect to an argument that a person or entity legitimately relied to their detriment on the lack of an adequate deterrent when they engaged in intentional torts.

Central to the finding of constitutional retroactivity is the interpretation that "cover up" is an intentional tort, that "cover up" is encompassed in existing intentional torts, that a plaintiff must prove a relevant common law intentional tort related to the cover up as a precondition to seeking cover up treble damages, that the treble damages are based solely on the damages suffered as a result of the "cover up", and that the treble damages are in the alternative to punitive damages. If any of part of that interpretation changes, then retroactive application of CCP 340.1(b) starts looking unconstitutional because of the combination of the retroactive creation of new duties and liabilities, the retroactive change in the burden of proof, the retroactive creation of the treble enhanced damages, the trebling of damages based on underlying damages that are unrelated to the cover up, and the cumulative imposition of treble and punitive damages for the same cover up actions.

SEVERABILITY OF PROVISIONS

The court does not need to reach the issue of severability because (as the court has interpreted the statute) CCP 340.1(b) can be constitutionally applied

to revived cases and to claims arising before the enactment of the statute. The court sets out its severability analysis in the event plaintiffs or defendant seek appellate review and the Court of Appeal determines· that it is unconstitutional to apply CCP 340.1(b) retroactively.

The severability analysis concerns only whether the retroactive application of the CCP 340.1(b) treble damages provision can be severed from the remainder of the amendments. The severability analysis does not concern the prospective application of the CCP 340.1(b) treble damages provision. The severability analysis is focused on the retroactive application of the treble damages provision in the context of the AB 218 amendments rather than in the context of CCP 340.1 as a whole or the CCP 312 et seq statutes of limitation as a whole.

The severability analysis is well established. (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 165–168.)

The court starts with express legislative intent. There is no severability clause in AB 218 so there is no specific presumption that the AB 218 amendments are severable. (*Borikas*, 214 Cal.App.4th at 165.) There is, however, an implicit presumption in favor of severability based on "the general presumption in favor of statutes' constitutionality." (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 639 fn 7.)

The court then turns to whether the potentially unconstitutional retroactive application of CCP 340.1(b) is "grammatically, functionally, and volitionally separable." (*Borikas*, 214 Cal.App.4th at 165.)

To be grammatically separable, the valid and invalid parts of the statute can be separated by paragraph, sentence, clause, phrase, or even single words. (*Abbott Laboratories v. Franchise Tax Bd.* (2009) 175 Cal.App.4th 1346, 1358.) CCP 340.1(b) is its own subsection and is "grammatically separable" from the remaining portions of the statute.

To be functionally separable, the remainder after separation of the invalid part must be "complete in itself" and "capable of independent application." (*Abbott*, 175 Cal.App.4th at 1358.) If retroactive application of CCP 340.1(b) were unconstitutional, then it would not affect the application of CCP 340.1(a), (q) and (r) and it would not affect the prospective application of CCP 340.1(b). A finding that CCP 340.1(b) was unconstitutional as applied retroactively would simply mean that a plaintiff seeking treble damages would need to prove that the defendant did the "cover up" after the effective date of the statute.

To be volitionally separable, "[t]he final determination depends on whether 'the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute' ... or 'constitutes a completely operative expression of the legislative intent[.]' " (*Abbott*, 175 Cal.App.4th at 1358.) The legislative history of AB 218 consistently lists the three topics in separate, but sequential, bullet points or paragraphs. The legislature has repeatedly revised CCP 340.1 and reopened the statute of limitations to permit persons to bring previously time barred claims under CCP 340.1 without having a related integrated provision for increased damages. These strongly

suggest that the legislature expected that the CCP 340.1(a), (q), and (r) provisions to revise and reopen the statute of limitations could operate separately from the 340.1(b) provision for treble damages. In addition, the legislature's prior amendment of CCP 340.1(b) in 2002 (SB 1779 to re-open the statute of limitation suggest that the legislature thought that reopening the statute of limitations was a statutory change that can stand on its own.

At the hearing on 4/28/21, defendants argued that the treble damages are inseparable because they are the "teeth" or "life force" of AB 218. Defendants argue that he legislature determined that simply amending and reopening the statute of limitations was insufficient to address the legislative concern. Defendants referred to the statements at a hearing by Senator Hananh-Beth Jackson where she described AB 218 as "pretty draconian" and stated "the egregiousness of these acts really, In think, does warrant special treatment under the law" and I think we need to make a statement here." (Def RJN filed 1/8/21, Exh K at p 12, 14.) Defendants also cited to statements by Assemblywoman Lorena Gonzalez at a hearing that "But until you make people hurt, this behavior doesn't stop and we've seen that" and "that's why it's appropriate to give treble damages to the coverup, and that's why it's important that we actually make institutions face the consequences of their past behavior so that we are never in this position again," (Def RJN filed 1/8/21, Exh L at p 15, 16–17.) These are the statements of individual legislators rather than statements by legislative committees or by the legislature as a whole. They are

of minimal relevance regarding legislative intent. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 297 fn 18.)

The court holds that any unconstitutional retroactive application of the CCP 340.1(b) treble damages provision would be severable from the constitutional prospective application of CCP 340.1(b) as well as from CCP 340.1(q) and (r).

SUITABILITY FOR REVIEW

This order is suitable for interlocutory review regarding the interpretation of CCP 340(b) and whether as interpreted it can be applied retroactively consistent with constitutional due process. These are controlling questions of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of all case in this coordinated proceeding as well as in both *Southern California Clergy Cases*, JCCP 5101, and *Diocese of San Diego Cases*, JCCP 5105. (CCP 166.1; *Crestwood Behavioral Health, Inc. v. Superior Court* (2021) 60 Cal.App.5th 1069, 1074, fn 2.)

The interpretation and constitutionality of CCP 340(a), (q), and (r) do not raise issues as to which there is substantial grounds for difference of opinion.

OTHER ISSUES

The Order of 2/24/21 identified several issues that the court looked at in the course of considering the interpretation of CCP 340.1(b), (q), and (r). The issues were not directly relevant to the issues presented on this motion. The court issues no orders on those other issues.

Dated: April 29, 2021

Winifred Y. Smith
Judge of the Superior Court

APPENDIX G

U.S. Const. art I, § 10, cl. 1
Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto Laws; Impairment of Contracts; Title of Nobility

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const. amend. XIV
Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Cal. Civ. Proc. Code § 340.1
Childhood sexual assault; certificates of merit executed by attorney; violations; failure to file; name designation of defendant; periods of limitation; legislative intent

(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.

(b)(1) In an action described in subdivision (a), a person who is sexually assaulted and proves it was as the result of a cover up may recover up to treble damages against a defendant who is found to have covered up the sexual assault of a minor, unless prohibited by another law.

(2) For purposes of this subdivision, a "cover up" is a concerted effort to hide evidence relating to childhood sexual assault.

(c) An action described in paragraph (2) or (3) of subdivision (a) shall not be commenced on or after the plaintiff's 40th birthday unless the person or entity knew or had reason to know, or was otherwise on notice, of any misconduct that creates a risk of childhood sexual assault by an employee, volunteer, representative, or agent, or the person or entity failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard. Nothing in this subdivision shall be construed to constitute a substantive change in negligence law.

(d) "Childhood sexual assault" as used in this section includes any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by Section 266j of the Penal Code; Section 285 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 286 of the Penal Code; subdivision (a) or (b) of Section 288 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 287 or of former Section 288a of the Penal Code; subdivision (h), (i), or (j) of Section 289 of the Penal Code; any sexual conduct as defined in paragraph (1) of subdivision (d) of Section 311.4 of the Penal Code; Section 647.6 of the Penal Code; or any prior laws of this state of similar effect at the time the act was committed. This subdivision does

not limit the availability of causes of action permitted under subdivision (a), including causes of action against persons or entities other than the alleged perpetrator of the abuse.

(e) This section shall not be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this section.

(f) Every plaintiff 40 years of age or older at the time the action is filed shall file certificates of merit as specified in subdivision (g).

(g) Certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, setting forth the facts which support the declaration:

(1) That the attorney has reviewed the facts of the case, consulted with at least one mental health practitioner who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action.

(2) That the mental health practitioner consulted is licensed to practice and practices in this state and is not a party to the action, that the practitioner is not treating and has not treated the plaintiff, and that the practitioner has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of the practitioner's knowledge of the facts and issues, that in the practitioner's professional

opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificates required by paragraphs (1) and (2) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificates required by paragraphs (1) and (2) shall be filed within 60 days after filing the complaint.

(h) If certificates are required pursuant to subdivision (f), the attorney for the plaintiff shall execute a separate certificate of merit for each defendant named in the complaint.

(i) In any action subject to subdivision (f), a defendant shall not be served, and the duty to serve a defendant with process does not attach, until the court has reviewed the certificates of merit filed pursuant to subdivision (g) with respect to that defendant, and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action against that defendant. At that time, the duty to serve that defendant with process shall attach.

(j) A violation of this section may constitute unprofessional conduct and may be the grounds for discipline against the attorney.

(k) The failure to file certificates in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(l) In any action subject to subdivision (f), a defendant shall be named by "Doe" designation in any pleadings or papers filed in the action until there has been a showing of corroborative fact as to the charging allegations against that defendant.

(m) At any time after the action is filed, the plaintiff may apply to the court for permission to amend the complaint to substitute the name of the defendant or defendants for the fictitious designation, as follows:

(1) The application shall be accompanied by a certificate of corroborative fact executed by the attorney for the plaintiff. The certificate shall declare that the attorney has discovered one or more facts corroborative of one or more of the charging allegations against a defendant or defendants, and shall set forth in clear and concise terms the nature and substance of the corroborative fact. If the corroborative fact is evidenced by the statement of a witness or the contents of a document, the certificate shall declare that the attorney has personal knowledge of the statement of the witness or of the contents of the document, and the identity and location of the witness or document shall be included in the certificate. For purposes of this section, a fact is corroborative of an allegation if it confirms or supports the allegation. The opinion of any mental health practitioner concerning the plaintiff shall not constitute a corroborative fact for purposes of this section.

(2) If the application to name a defendant is made before that defendant's appearance in the action, neither the application nor the certificate of corroborative fact by the attorney shall be served on

the defendant or defendants, nor on any other party or their counsel of record.

(3) If the application to name a defendant is made after that defendant's appearance in the action, the application shall be served on all parties and proof of service provided to the court, but the certificate of corroborative fact by the attorney shall not be served on any party or their counsel of record.

(n) The court shall review the application and the certificate of corroborative fact in camera and, based solely on the certificate and any reasonable inferences to be drawn from the certificate, shall, if one or more facts corroborative of one or more of the charging allegations against a defendant has been shown, order that the complaint may be amended to substitute the name of the defendant or defendants.

(*o*) The court shall keep under seal and confidential from the public and all parties to the litigation, other than the plaintiff, any and all certificates of corroborative fact filed pursuant to subdivision (m).

(p) Upon the favorable conclusion of the litigation with respect to any defendant for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the court may, upon the motion of a party or upon the court's own motion, verify compliance with this section by requiring the attorney for the plaintiff who was required by subdivision (g) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (g) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be

disclosed to the trial judge in camera and in the absence of the moving party. If the court finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by the defendant for whom a certificate of merit should have been filed.

(q) Notwithstanding any other provision of law, 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. A plaintiff shall have the later of the three-year time period under this subdivision or the time period under subdivision (a) as amended by the act that added this subdivision.

(r) The changes made to the time period under subdivision (a) as amended by the act that amended this subdivision in 2019 apply to and revive any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment.

APPENDIX H

OFFICE OF THE GOVERNOR

OCT 12 2013

To the Members of the California State Senate:

I am returning Senate Bill 131 without my signature.

This bill makes amendments to the statute of limitations relating to claims of childhood sexual abuse. Specifically, it amends and significantly expands a 2002 law to "revive" certain claims that previously had been time barred.

Statutes of limitation reach back to Roman law and were specifically enshrined in the English common law by the Limitations Act of 1623. Ever since, and in every state, including California, various limits have been imposed on the time when lawsuits may still be initiated. Even though valid and profoundly important claims are at stake, all jurisdictions have seen fit to bar actions after a lapse of years.

The reason for such a universal practice is one of fairness. There comes a time when an individual or organization should be secure in the reasonable expectation that past acts are indeed in the past and

not subject to further lawsuits. With the passage of time, evidence may be lost or disposed of, memories fade and witnesses move away or die.

Over the years, California's laws regarding time limits for childhood sexual abuse cases have been amended many times. The changes have affected not only how long a person has to make a claim, but also who may be sued for the sexual abuse. The issue of who is subject to liability is an important distinction as the law in this area has always and rightfully imposed longer periods of liability for an actual perpetrator of sexual abuse than for an organization that employed that perpetrator. This makes sense as third parties are in a very different position than perpetrators with respect to both evidence and memories.

For claims against a perpetrator of abuse, the current law is that a claimant must sue within eight years of attaining the age of majority (i.e. age 26) or "within three 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 abuse, whichever period expires later…" However, for claims against a third party—e.g. an organization that employed the perpetrator of the abuse—the general rule since 1998 was that a claimant must sue before he or she turns 26. A later discovered psychological injury—no matter how compelling—could not be brought against a third party by a person older than 26.

When a number of high profile sex abuse scandals in both public and private institutions came to light, many felt that the third party limitation rule

described above was too harsh and that claimants over 26 should be able to recover damages for later discovered injuries from certain, more culpable entities.

In 2002, the California Legislature weighed the competing considerations on this issue and enacted SB 1779, which did the following: (1) It identified for the first time a new subcategory of third party defendants which no longer would have the protection of the age 26 cutoff for claims. Going forward these defendants—entities who knew or should have known of the sexual abuse and failed to take action—now could be sued within three years of the date of discovery of a claim. (2) Looking backwards, SB 1779 also revived for one year only (2003) all claims that had previously lapsed because of the statute of limitation. This very unusual "one year revival" of lapsed claims allowed victims relief but also set a defined cut-off time for these lapsed claims.

In reliance on the clear language and intent of this statute, the private third party defendants covered by this bill took actions to resolve these legacy claims of victims older than 26. Over 1,000 claims were filed against the Catholic Church alone, some involving alleged abuse as far back as the 1930s. By 2007, the Catholic Church in California had paid out more than $1.2 billion to settle the claims filed during this one year revival period. Other private and non-profit employers were sued and paid out as well.

For the public third parties covered by this bill, however, a very different result occurred. There is no doubt that in 2002, when SB 1779 was enacted, it was intended to apply to both public and private entities.

Indeed, it would be unreasonable, if not shocking, for the Legislature to intentionally discriminate against one set of victims, e.g. those whose abusers happened to be employed by a public instead of a private entity. However, due to a drafting error, the California Supreme Court held in 2007 that SB 1779 did not actually apply to public or governmental agencies. So, unlike private institutions, public schools and government entities were shielded from the one year revival of lapsed claims. As a result, the similarly situated victims of these entities were not accorded the remedies of SB 1779.

In 2008, the Legislature addressed this unfair distinction between victims of public as opposed to private institutions. Note, however, that the bill enacted, SB 640, did not restore equity between these two sets of victims. Instead of subjecting public/governmental entities to all of the provisions of the 2002 law, the Legislature only allowed victims of public institutions to sue under the new rules prospectively—from 2009 forward—and provided no "one year revival" period.

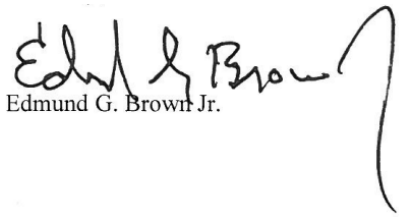
In passing this 2008 law, I can't believe the legislature decided that victims of abuse by a public entity are somehow less deserving than those who suffered abuse by a private entity. The children assaulted by Jerry Sandusky at Penn State or the teachers at Miramonte Elementary School in Los Angeles are no less worthy because of the nature of the institution they attended. Rather, I believe that legislators, in good faith, weighed the merits of such claims against the equities of allowing claims to be brought against third parties years after the abuse occurred. The Legislature concluded that fairness required that

certain claims should be allowed, but only going forward.

This brings us to the bill now before me, SB 131. This bill does not change a victim's ability to sue a perpetrator. This bill also does not change the significant inequity that exists between private and public entities. What this bill does do is go back to the only group, i.e. private institutions, that have already been subjected to the unusual "one year revival period" and makes them, and them alone, subject to suit indefinitely. This extraordinary extension of the statute of limitations, which legislators chose not to apply to public institutions, is simply too open-ended and unfair.

For all these reasons, I am returning SB 131 without my signature.

Sincerely,



Edmund G. Brown Jr.

APPENDIX I

OFFICE OF THE GOVERNOR

SEP 30 2014

To the Members of the California State Assembly:

I am returning Senate Bill 924 without my signature.

This bill would extend the time a victim may bring a civil child sex abuse case from age 26 to age 40.

Until 1990, the statute of limitations for civil cases involving sex abuse against a minor was within one year of the victim's 18th birthday. That law was changed in 1990 to allow a claim against the perpetrator up until the victim's 26th birthday. It was expanded again in 1998 to allow a claim up to age 26 against third parties, and yet again in 2002 to allow a delayed-discovery claim against third parties.

Statutes of limitations exist as a matter of fundamental fairness. As I wrote last year, there comes a time when an individual or organization should be secure in the reasonable expectation that past acts are indeed in the past and not subject to further lawsuits. With the passage of time, evidence

may be lost or disposed of, memories fade and witnesses move away or die.

There needs to be a compelling reason to lengthen the statute of limitations for civil claims against third parties. I do not see evidence of that here.

Sincerely,

APPENDIX J

OFFICE OF THE GOVERNOR

SEP 30 2018

To the Members of the California State Assembly:

I am returning Assembly Bill 3120 without my signature.

This bill makes amendments to the statute of limitations relating to claims of childhood sexual abuse.

In 2013 I vetoed a substantially similar bill, SB 131 (Beall). My views have not changed. As I said then:

> Statutes of limitation reach back to Roman law and were specifically enshrined in the English common law by the Limitations Act of 1623. Ever since, and in every state, including California, various limits have been imposed on the time when lawsuits may still be initiated. Even though valid and profoundly important claims are at stake, all jurisdictions have seen fit to bar actions after a lapse of years.
>
> The reason for such a universal practice is one of fairness. There comes a time when an individual or organization should be secure in the reasonable

expectation that past acts are indeed in the past and not subject to further lawsuits. With the passage of time, evidence may be lost or disposed of, memories fade and witnesses move away or die.

Over the years, California's laws regarding time limits for childhood sexual abuse cases have been amended many times. The changes have affected not only how long a person has to make a claim, but also who may be sued for the sexual abuse. The issue of who is subject to liability is an important distinction as the law in this area has always and rightfully imposed longer periods of liability for an actual perpetrator of sexual abuse than for an organization that employed that perpetrator. This makes sense as third parties are in a very different position than perpetrators with respect to both evidence and memories.

For claims against a perpetrator of abuse, the current law is that a claimant must sue within eight years of attaining the age of majority (i.e. age 26) or "within three 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 abuse, whichever period expires later…" However, for claims against a third party—e.g. an organization that employed the perpetrator of the abuse—the general rule since 1998 was that a claimant must sue before he or she turns 26. A later discovered psychological injury—no matter how compelling—could not be brought against a third party by a person older than 26.

When a number of high profile sex abuse scandals in both public and private institutions came to light, many felt that the third party limitation rule described above was too harsh and that claimants over 26 should be able to recover damages for later discovered injuries from certain, more culpable entities.

In 2002, the California Legislature weighed the competing considerations on this issue and enacted SB 1779, which did the following: (1) It identified for the first time a new subcategory of third party defendants which no longer would have the protection of the age 26 cutoff for claims. Going forward these defendants—entities who knew or should have known of the sexual abuse and failed to take action—now could be sued within three years of the date of discovery of a claim. (2) Looking backwards, SB 1779 also revived for one year only (2003) all claims that had previously lapsed because of the statute of limitation. This very unusual "one year revival" of lapsed claims allowed victims relief but also set a defined cut-off time for these lapsed claims.

In reliance on the clear language and intent of this statute, the private third party defendants covered by this bill took actions to resolve these legacy claims of victims older than 26. Over 1,000 claims were filed against the Catholic Church alone, some involving alleged abuse as far back as the 1930s. By 2007, the Catholic Church in California had paid out more than $1.2 billion to settle the claims filed during this one year revival period. Other private and non-profit employers were sued and paid out as well.

For the public third parties covered by this bill, however, a very different result occurred. There is no doubt that in 2002, when SB 1779 was enacted, it was intended to apply to both public and private entities. Indeed, it would be unreasonable, if not shocking, for the Legislature to intentionally discriminate against one set of victims, e.g. those whose abusers happened to be employed by a public instead of a private entity. However, due to a drafting error, the California Supreme Court held in 2007 that SB 1779 did not actually apply to public or governmental agencies. So, unlike private institutions, public schools and government entities were shielded from the one year revival of lapsed claims. As a result, the similarly situated victims of these entities were not accorded the remedies of SB 1779.

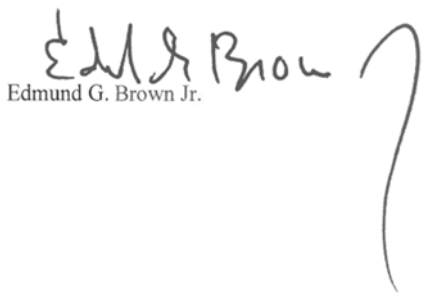
In 2008, the Legislature addressed this unfair distinction between victims of public as opposed to private institutions. Note, however, that the bill enacted, SB 640, did not restore equity between these two sets of victims. Instead of subjecting public/governmental entities to all of the provisions of the 2002 law, the Legislature only allowed victims of public institutions to sue under the new rules prospectively—from 2009 forward—and provided no "one year revival" period.

In passing this 2008 law, I can't believe the legislature decided that victims of abuse by a public entity are somehow less deserving than those who suffered abuse by a private entity. The children assaulted by Jerry Sandusky at Penn State or the teachers at Miramonte Elementary School in Los Angeles are no less worthy because of the nature of

> the institution they attended. Rather, I believe that legislators, in good faith, weighed the merits of such claims against the equities of allowing claims to be brought against third parties years after the abuse occurred. The Legislature concluded that fairness required that certain claims should be allowed, but only going forward.

The bill now before me, AB 3120, is broader than SB 131, does not fully address the inequity between state defendants and others, and provides a longer revival period for otherwise barred claims. For these reasons, as well as those previously enumerated in the veto message referenced above, I cannot sign this bill.

Sincerely,



APPENDIX K

Date of Hearing: March 12, 2019

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair

AB 218 (Gonzalez) – As Introduced January 16, 2019

SUBJECT: CHILDHOOD SEXUAL ASSAULT: EXTENSION OF STATUTE OF LIMITATIONS AND INCREASE IN DAMAGES

KEY ISSUES:

1) IN ORDER TO ENSURE THAT VICTIMS OF CHILDHOOD SEXUAL ASSAULT ARE NOT PREVENTED FROM RECOVERING FOR THEIR INJURIES, SHOULD THE STATUTE OF LIMITATIONS FOR CHILDHOOD SEXUAL ASSAULT CIVIL ACTIONS BE EXTENDED BY 14 YEARS AND SHOULD THAT EXTENSION APPLY RETROACTIVELY, FOR JUST THREE YEARS, TO ANY CASE FOR WHICH THERE WAS NOT A FINAL ADJUDICATION PRIOR TO THE ENACTMENT OF THIS BILL?

2) SHOULD A VICTIM OF CHILDHOOD SEXUAL ASSAULT BE PERMITTED TO COLLECT TREBLE DAMAGES AGAINST A DEFENDANT WHOSE ACTIONS IN COVERING UP A PRIOR SEXUAL ASSAULT AGAINST A MINOR RESULTED IN THE ASSAULT OF THE VICTIM?

3) SHOULD CASES OF CHILDHOOD SEXUAL ASSAULT BASED ON CONDUCT OCCURRING

BEFORE 2009 BE EXEMPTED FROM THE GOVERNMENT TORT CLAIMS ACT?

SYNOPSIS

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. Whether the abuse occurred through gymnastics, swimming, school, or a religious institution, too many children have been victims of abuse and their lives have been forever impacted by that abuse. Despite the lifetime of damage that this abuse causes its victims, the state's statute of limitations restricts how long actions can be brought to recover for damages caused by childhood sexual abuse.

Many states have special, extended statutes of limitations for childhood sexual abuse because of the uniqueness of childhood sexual abuse and the difficulty that younger victims may have fully understanding the abuse, coming to terms with what has occurred, and then coming forward in a timely fashion. Seven states — Alaska, Connecticut, Delaware, Florida, Illinois, Maine, and Minnesota — have gone as far as to eliminate the civil statute of limitations with respect to some or all claims based on childhood sexual abuse. Many other states allow for lengthy discovery periods in adulthood. California law, as amended in 1990, requires that such actions be brought within 8 years of the age of majority (generally up to 26 years old) or within 3 years of the date the plaintiff discovers or reasonably should have

discovered that the psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later. (SB 108 (Lockyer), Chap. 1578, Stats. 1990.)

This bill, sponsored by the Victim Policy Institute, makes significant changes to address childhood sexual abuse. First and foremost, this bill extends the statute of limitations for bringing an action for recovery of damages suffered as the result of childhood sexual assault by 14 years — from 26 years of age to 40 years of age — and revives, for just three years, any action for childhood sexual assault that may have expired due to the existing statute of limitations, except for cases that have a final adjudication prior to the enactment of this bill. It expands the existing exemption from the Government Tort Claims Act, which today only applies to conduct occurring after January 1, 2009, to include all claims of childhood sexual assault against a local public entity, regardless of when the abuse occurred. Thus local public entities, including schools, could be liable for damages for childhood sexual assaults that occurred before 2009. Lastly, this bill allows a victim of childhood sexual abuse to recover tremble damages against a defendant if the victim's sexual assault is the result of a cover-up by the defendant of a prior sexual assault of a minor. This measure is almost identical to the author's AB 3120 from last year, which easily passed the Legislature, but was vetoed by the former governor.

This measure is supported by, among others, children's advocates, the police chiefs, the PTA, and crime victims' organizations, who write that the

psychological injuries from sexually assault emerge later in life and that victims routinely need decades to reach the psychological place where they can come forward. If the statute of limitations is too short, then there can be no justice and more children will be abused. The bill is opposed (unless amended) by the 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 ask for various amendments to the bill, particularly eliminating the revival of old claims and the allowance of treble damages. The bill is opposed outright by the California Civil Liberties Advocacy.

SUMMARY: Extends the civil statute of limitations for childhood sexual assault by 14 years, revives, for three years, old claims, and increases certain penalties for childhood sexual assault. Specifically, **this bill:**

1) Redefines childhood sexual abuse as childhood sexual assault and expands the definition slightly.
2) Extends the time for commencing a civil action based on injuries resulting from childhood sexual assault to twenty-two years after the plaintiff reaches majority (i.e., until 40 years of age) or within five years of the date the plaintiff discovers or reasonably should have discovered that the psychological injury or illness occurring after the

age of majority was caused by the abuse, whichever occurs later.

3) Prohibits suit against third parties after the plaintiff's 40th birthday unless the person or entity knew or had reason to know, or was otherwise on notice, of any misconduct that creates a risk of childhood sexual assault by an employee, volunteer, representative, or agent, or failed to take reasonable steps, or to implement reasonable safeguards, to avoid acts of childhood sexual assault.

4) Revives, until three years of January 1, 2020 or the time period under 2), above, whichever is later, any actions for childhood sexual assault that has not been litigated to finality and that

would otherwise be barred as of January 1, 2020 because of applicable statute of limitations, claims presentation deadline, or any other time limit.

5) Allows a person, in an action for recovery of damages suffered as the result of childhood sexual assault, to recover tremble damages against a defendant if the sexual assault is the result of a cover-up by the defendant of a sexual assault of a minor. Defines "cover-up" as a concerted effort to hide evidence relating to childhood sexual assault.

6) Eliminates the existing limitation on exemption from the Government Tort Claims Act and instead exempts, from the Government Tort Claims Act, all claims for childhood sexual assault against a local public entity, including those arising out of conduct occurring before January 1, 2009.

EXISTING LAW:

1) Generally provides that the time for commencing a civil action for damages is within two years of the injury or death caused by the wrongful act or neglect of another. (Code of Civil Procedure Section 340. All further references are to this code unless otherwise noted.)

2) Provides that the time for commencing a civil action based on injuries resulting from childhood sexual abuse, as defined, is eight years after the plaintiff reaches majority (i.e., until 26 years of age) or within three years of the date the plaintiff discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by the abuse, whichever occurs later. (Section 340.1 (a).)

3) Allows suit against the perpetrator or specified third parties, but prohibits suit against third parties after the plaintiff's 26th birthday, unless the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, as specified. (Section 340.1 (b).)

4) Exempts, from the Government Tort Claims Act, claims for childhood sexual abuse against a local public entity, arising out of conduct occurring on or after January 1, 2009. (Government Code Sections 905, 935.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Childhood sexual abuse continues to ruin children 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 cither choose not to get involved or actively cover-up the abuse. Whether the abuse occurred through gymnastics, swimming, school, or a religious institution, too many children have been victims of abuse and their lives have been forever impacted by that abuse. Despite the lifetime of damage that this abuse causes its victims, the state's statute of limitations restricts how long actions can be brought to recover for damages caused by childhood sexual abuse. In an effort to allow more victims of childhood sexual assault to be compensated for their injuries and, to help prevent future assaults by raising the costs for this abuse, this bill extends the civil statute of limitations for childhood sexual assault by 14 years, revives old claims for three years, and eliminates existing limitations for claims against public institutions. This bill applies equally to abuse occurring at public and private schools and

applies to all local public entities. Lastly, the bill allows a victim of childhood sexual abuse to recover tremble damages against a defendant if the sexual assault is the result of a cover-up by the defendant of a prior sexual assault of a minor.

In support of the bill, the author writes:

> California law already recognizes childhood sexual abuse as a unique circumstance with regards to the civil statute of limitations, but has not gone far enough to ensure that victims will have access to

justice. It is clear due to psychological trauma, shame, fear, and various other reasons, it can take a long time for victims of childhood sexual assault to come forward publically, to recognize or remember the assault, or want to pursue legal recourse.

AB 218 would expand access to justice for victims of childhood sexual assault by removing the arbitrary time limits upon victims to pursue a case. Several states have already taken this step and have eliminated the civil statute of limitations for these cases. There should not be a reasonable expectation that if simply enough time passes, there will be no accountability for these despicable past acts by individuals and entities. This bill ensures that "time's up" for the perpetrators of childhood sexual assault, not for victims.

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.

It often takes victims of childhood sexual abuse years to come forward and face their abusers. All too often, victims of childhood sexual abuse fail to

report their abuse timely or sometimes even fail to report it at all. While the victims almost always know their abusers, they often fail to come forward timely because of threats of harm, being ashamed, blaming themselves, fear of not being believed, failing to fully appreciate the wrongfulness of the conduct, or suppressing very painful memories. Writes the sponsor, the Victim Policy Institute:

> It often takes decades before victims recognize what was done to them as abuse, realize how they have been harmed by the abuse, or simply find the strength to come forward. When victims are able to disclose the abuse, they often find that the civil statute of limitations has already expired.
>
> The current law lets too many abusers avoid accountability for their actions. The only good thing to come out of recent scandals was an environment that encouraged well-known women — actors or Olympians — who were victims of childhood sexual assault to come forward. It is time for the law to recognize what we all now know — that it can take decades before some survivors are capable of coming forward. Children being assaulted today may not be ready to come forward until decades in the future.

* * *

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(2) Termination of a prior action on the basis of the statute of limitations does not constitute a claim that has been litigated to finality on the merits.

This measure applies retroactively to local public agencies. The Government Tort Claims Act

(GTCA) generally governs damage claims brought against public entities. The GTCA requires that a claim relating to a cause of action for death or for injury to a person be presented in writing to the public entity not later than six months after the date upon which the cause of action would be deemed to have accrued within the meaning of the applicable statutes of limitation. In *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, the California Supreme Court held that, notwithstanding the childhood sexual abuse statute of limitations timeframes in Section 340.1 and its delayed discovery rule, an abuse victim must follow the six-month presentation rule in the GTCA and cannot, without having done so, take advantage of the delayed-discovery rule otherwise applicable to abuse victims.

However, the Legislature in 2008 waived, *going forward,* the local government six-month notice of claim limitation requirement that applies to all other tort claims for victims of child sexual abuse. (SB 640 (Simitian), Chap. 383, Stats. 2008.) Thus, beginning in 2009, victims, have the same time period to file a claim against local public entities as against private institutions. This bill now extends that GTCA exemption to conduct occurring before 2009. As a result, this bill treats local public and private entities the same. It does not change the law with respect to state public entities.

The bill also exposes those who cover up the sexual abuse of children to additional punishment. In addition to extending the statute of limitations for childhood sexual assault, reviving old claims, and removing the protections of the GTCA from local public entities, this bill allows a victim of

childhood sexual assault to recover tremble damages against a defendant if the victim's assault was the result of a cover-up by the defendant of a prior sexual assault of a minor. For example, if the defendant moved a perpetrator to another location without notifying authorities or gave the defendant a positive job recommendation without disclosing the sexual assault accusations, and the victim was assaulted as *a result,* the victim could recover treble damages. The victim would, of course, first have to prove the case.

Opponents believe that the bill would be financially devastating to, among others, schools, religious institutions, and insurers, and is unfair, especially as applied to third parties. 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.

In particular, the Association of California School Administrators, California Association of Joint Powers Authorities, California Association of School Business Officials, California School Boards Association, Schools Excess Liability Fund, and Schools Insurance Authorities write:

> As drafted, AB 218 exposes local public schools and others, to claims of abuse going back 40 years ago and longer. It will be impossible for employers to effectively defend against these claims when

evidence is likely gone, witnesses have moved or passed away, and there has been a turnover of staff. With these barriers, schools will be unable to adequately respond to these claims. This failure will result in diversion of funding intended to educate students and serve communities to financing increased legal costs, whether or not the claim is valid. This

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Audio Transcription
Assembly Judiciary Committee
March 12, 2019

AB218 Gonzalez

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and since it seems to be in our culture the remedy for all kinds of harm is money — write a check and you're all better, which we know is not exactly true — I'm not sure what else to do.

And so arbitrarily kind of closing the door to — and statute of limitations are arbitrary statements. Closing the door to the one remedy, money, that seems to be what we can provide, is a real challenge, so I completely understand the fiscal impact. I think that's — but that's not the question here.

Essentially, Appropriations or someone else is going to need to deal with that. From a policy standpoint, ensuring that victims have redress is really what this bill is about, and that's why it enjoys that aye recommendation. Other questions, comments from committee members?

All right. Seeing none, Ms. Gonzalez, you may close.

ASSEMBLYWOMAN LORENA GONZALEZ: Well, in some way, I'm heartened that I finally got an

estimated cost from schools. In another way, I'm horrified, because if we think that because of coverups that they clearly know about and incidences of abuse that they clearly know about,

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that there's hundreds of millions of dollars in damage and billions of dollars of damage of suits that are going to have to be — and I heard this — they're just going to have to be settled, the lack of evidence goes on both sides after years, so if they're suggesting these numbers, I would suggest that they've known about this for a long time, an they've held the keys to changing behavior.

I have another bill to deal with that situation, but it's — money is not the panacea in our society. It shouldn't be. But until you make people hurt, this behavior doesn't stop and we've seen that. This was talked about years ago in this building. People knew. Oh, we can open it up for a year and we'll take a little bit of hurt and then we'll move forward, and yet, this continues to happen.

I would claim that protecting our children is the most important thing we can do, and protecting our children, in particular, from childhood sexual assault, something that will stay with them, and we know stays with them their entire life and upsets every aspect of their life and we're seeing more and more that it takes

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years and sometimes decades to deal with that type of pain, if we don't get serious about the coverup of adults who are hurting children, something that has happened systematically in this country for far too

long and in this state, then we will never stop it in the future.

Somebody who abuses has on average 512 victims. Fifty-one. Yeah, I want to put in place something that'll prevent Victim No. 2, not to say Victim 3, 4, 5, 6. This is — it's enough. It's enough, and every day we see in the media the extent to which this is growing, the extent to which people are willing to say, that's not too serious.

I'm horrified as some of the things I read about suggestions that statutory rape between a teacher and a child aren't that serious, that somehow, we're doing that child a favor by introducing them to sex, and that was in the news today.

This is what people think, and that's why this has never been taken seriously and that's why it's appropriate to give treble damages to the coverup, and that's why it's important that we actually make institutions face

* * *

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019–2020 Regular Session

AB 218 (Gonzalez)
Version: March 25, 2019
Hearing Date: July 2, 2019
Fiscal: No
Urgency: No
CK

SUBJECT

Damages: childhood sexual assault: statute of limitations

DIGEST

This bill extends the time for commencement of actions for childhood sexual assault to 40 years of age or five years from discovery of the injury. It provides enhanced damages for a cover up, as defined, of the assault. It also provides a three-year window in which expired claims would be revived.

EXECUTIVE SUMMARY

This bill lengthens the limitations period for claims of childhood sexual assault from eight years past the age of majority, which amounts to 26 years of age, to 22 years past the age of majority, or 40 years of age. In addition, it would extend the period tied to the discovery of the childhood sexual assault from within three years to within five years.

This bill also provides that the claims provided for in Section 340.1 that would otherwise be barred as of January 1, 2020 because an applicable statute of limitations, claim presentation deadline, or any other time limit had expired, and that have not been

litigated to finality, are explicitly revived for a three-year period or, if later, within the statute of limitations period established by the bill.

The bill is sponsored by the author and supported by various groups, including the Victim Policy Institute, the California Police Chiefs Association, the Consumer Attorneys of California, and the National Association of Social Workers. It is opposed by various associations that would likely be affected by these revived or extended claims periods, including the California School Boards Association, the California Association of Joint Powers Authorities, and the Independent Insurance Agents and Brokers of California.

* * *

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against a public entity relating to a cause of action for death or for injury to a person be presented in writing to the public entity not later than six months after accrual of the cause or causes of action. (Gov. Code § 911.2.)

In *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, the California Supreme Court held that, notwithstanding Section 340.1, a timely claim to a public entity pursuant to the Act is a prerequisite to maintaining an action for childhood sexual abuse against a public entity school district. The Court based its holding primarily on its finding that nothing in the express language of SB 1779 or the bill's legislative history indicated an intent by the Legislature to exempt Section 340.1 claims from the Act and its six-month claim presentation requirement.

Essentially, many claims for childhood sexual abuse against a public entity could not benefit from the change to Section 340.1 because the six-month presentation requirement for such claims was not addressed by SB 1779.

To address this loophole for childhood sexual abuse claims against public entities, SB 640 (Simitian, Ch. 383, Stats. of 2008) was enacted into law. It added an explicit exception to the claims presentation requirements to Section 905 of the Act for "[c]laims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual abuse." (Gov. Code § 905(m).) Section 905(m) applied to claims arising out of conduct occurring on or after January 1, 2009.

This bill modifies the statute of limitations for these claims in various ways and provides another revival period for bringing expired claims.

2. Extending the statute of limitations period

A statute of limitations is a requirement to commence legal proceedings (either civil or criminal) within a specific period of time. Statutes of limitations are tailored to the cause of action at issue - for example, cases involving injury must be brought within two years from the date of injury, cases relating to written contracts must be brought four years from the date the contract was broken, and, as commonly referenced in the media, there is no statute of limitations for murder. Although it may appear unfair to bar actions after the statute of limitations has elapsed, that limitations period serves important policy goals that help to preserve both the integrity of our legal system and the due process rights of individuals.

For example, one significant reason that a limitations period is necessary in many cases is that evidence may disappear over time - paperwork gets lost, witnesses forget details or pass away, and physical locations that may be critical to a case change over time. Limitations periods also promote finality by encouraging an individual who has been wronged to bring an action sooner rather than later - timely actions arguably ensure that the greatest amount of evidence is available to all parties.

* * *

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age, whichever is later. In signing the legislation, the New Jersey Governor stated: "Survivors of sexual abuse deserve opportunities to seek redress against their abusers. This legislation allows survivors who have faced tremendous trauma the ability to pursue justice through the court system."

3. Reviving expired claims

This bill provides that the claims provided for in Section 340.1 that would otherwise be barred as of January 1, 2020, because an applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is explicitly revived by the bill. The bill creates a three-year window in which such claims can be brought, or, if later, within the statute of limitations period newly established by the bill.

The California Supreme Court has squarely addressed the modification of statutes of limitations and the revival of stale claims:

> The Legislature has authority to establish — and to enlarge — limitations periods . . . . [H]owever,

> legislative enlargement of a limitations period does not revive lapsed claims in the absence of express language of revival. This rule of construction grows out of an understanding of the difference between prospective and retroactive application of statutes . . . . As long as the former limitations period has not expired, an enlarged limitations period ordinarily applies and is said to apply prospectively to govern cases that are pending when, or instituted after, the enactment took effect. This is true even though the underlying conduct that is the subject of the litigation occurred prior to the new enactment. . . . However, when it comes to applying amendments that enlarge the limitations period to claims as to which the limitations period has expired before the amendment became law — that is, claims that have lapsed — the analysis is different. Once a claim has lapsed (under the formerly applicable statute of limitations), revival of the claim is seen as a retroactive application of the law under an enlarged statute of limitations. Lapsed claims will not be considered revived without express language of revival.

(*Quarry v. Doe I* (*Quarry*) (2012) 53 Cal.4th 945,955–957, internal citations omitted.)

The court continues, specifically addressing the policy reasons against revival:

> "The reason for this rule is a judicial perception of unfairness in reviving a cause after the prospective defendant has assumed its expiration and has conducted his affairs accordingly." As one court commented, "a statute of limitations grants

> prospective defendants relief from the burdens of indefinite exposure to stale claims. By reviving lapsed claims, the Legislature may appear to renege on this promise. As Judge [Learned] Hand wrote, there may be something 'unfair and dishonest' in after-the-fact withdrawal of this legislative assurance of safety." Individuals, as well as businesses and other enterprises ordinarily rely upon the running of the
>
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>
> limitations period: "The keeping of records, the maintenance of reserves, and the commitment of funds may all be affected by such reliance . . . . To defeat such reliance . . . deprives [enterprises] of the ability to plan intelligently with respect to stale and apparently abandoned claims."

(*Quarry,* at 958, internal citations omitted.)

The California Supreme Court thus makes the case against reviving claims that have expired, highlighting the principle that such revival, while within the Legislature's power, should not be provided lightly. (*See also Chase Sec. Corp. v. Donaldson* (1945) 325 U.S. 304, 314 [finding statutes of limitations are "good only by legislative grace and to be subject to a relatively large degree of legislative control"]; *Liebig v. Superior Court* (1989) 209 Cal. App. 3d 828, 831–834; *Lent v. Doe* (1995) 40 Cal.App.4th 1177,1181 [finding the Legislature has the power to revive causes of action].) The courts have made clear that important state interests must be at stake to justify such a disruption of the law.

"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." [1] Given the horrific damage and life-long trauma that can be caused by childhood sexual assault, these claims are arguably worthy of such revival, despite the general disregard for doing so. In fact, one of the only examples found where claims have been revived is in this context. SB 1779 (Burton, Ch. 149, Stats. 2002) provided a one-year revival period for otherwise expired claims for childhood sexual abuse.

As argued by the author, there has been a dramatic shift in cultural sensitivities around sexual abuse and a more accepting societal climate for victims. Rather than fearing stigma, victims of past abuse are more likely to be willing to come forward now with claims. There are complex psychological effects that result from being victimized in this way. In addition, the systematic incidence of childhood sexual assault in numerous institutions in this country and the cover-ups that accompanied them arguably make both a revival period and an extended statute of limitations warranted. This bill provides another chance for victims, who are currently barred from pursing claims based solely on the passage of time, to seek justice.

California would not be alone. Georgia passed a law that created a two-year window starting July 1, 2015, in which victims could file actions for claims of

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[1] Melissa Hall and Joshua Hall, *The long-term effects of childhood sexual abuse: Counseling implications* (2011) https://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf? [as of June 6, 2019].

childhood sexual abuse that were otherwise time barred as of the enactment of the statute. Guam created a similar two-year window. Hawaii has created similar windows several times. Laws

in both New York and New Jersey, discussed above and passed earlier this year, create revival periods of one and two years, respectively.

4. Recent revival attempts

In 2013, SB 131 (Beall, 2013) was passed by the Legislature. It would have, among other things, provided a one-year period of revival for otherwise time-barred claims arising from childhood sexual abuse. However, it would only have applied to private entities and not public entities.

In his veto message, Governor Jerry Brown traced the history of Section 340.1 and highlighted the fact that public entities were not subject to the revival of claims as private entities were. The Governor wrote:

> [D]ue to a drafting error, the California Supreme Court held in 2007 that SB 1779 did not actually apply to public or governmental agencies. So, unlike private institutions, public schools and government entities were shielded from the one-year revival of lapsed claims. As a result, the similarly situated victims of these entities were not accorded the remedies of SB 1779.
>
> In 2008, the Legislature addressed this unfair distinction between victims of public as opposed to private institutions. Note, however, that the bill enacted, SB 640, did not restore equity between these two sets of victims. Instead of subjecting

> public/governmental entities to all of the provisions of the 2002 law, the Legislature only allowed victims of public institutions to sue under the new rules prospectively—from 2009 forward—and provided no "one year revival" period.
>
> In passing this 2008 law, I can't believe the legislature decided that victims of abuse by a public entity are somehow less deserving than those who suffered abuse by a private entity. . . .
>
> This brings us to the bill now before me, SB 131. This bill does not change a victim's ability to sue a perpetrator. This bill also does not change the significant inequity that exists between private and public entities. What this bill does do is go back to the only group, i.e. private institutions, that have already been subjected to the unusual "one year revival period" and makes them, and them alone, subject to suit indefinitely. This extraordinary extension of the statute of limitations, which legislators chose not to apply to public institutions, is simply too open-ended and unfair.

In 2018, AB 3120 (Gonzalez, 2018) attempted to create another revival period for childhood sexual assault claims as well as extend the limitations period. The bill was nearly identical to the current bill. Governor Brown again vetoed the bill, asserting the same grounds as above and further arguing that AB 3120 was broader than SB 131, did

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This bill modifies the provisions of subdivision (b)(2) [now subdivision (c) in the bill]. First, it provides that

the nonperpetrator defendant only needs to know, have reason to know, or otherwise be on notice, of *any misconduct* creating a risk of childhood sexual assault, whereas current law requires the relevant misconduct to be specifically "unlawful sexual conduct." This drastically expands the actionable conduct pursuant to the statute. In addition, the bill modifies the second factor to requiring proof that the defendant failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault.

Most importantly, this bill replaces an "and" with an "or" and only requires one of the two factors to be proven to move forward with a claim after the relevant limitations period. These changes lessen the burden on a victim to bring such a case after having passed the cutoff age.

6. Expanded definition, penalties, and reach

This bill also replaces "childhood sexual abuse" throughout the statute with "childhood sexual assault." The only difference in the relevant definition is the addition of "any sexual conduct" as defined in Penal Code Section 311.4(d)(1). That definition includes certain sexual acts or displays whether actual or simulated. (Pen. Code § 311.4.) This change increases the conduct to which the extended limitations period and the enhanced damages apply.

This bill also provides that, in any action described therein, a victim who is sexually assaulted *as the result of* a cover up may recover treble damages against a defendant who has engaged in that cover up of the sexual assault. The bill defines "cover up" to mean a concerted effort to hide evidence relating to

childhood sexual assault. Therefore, the cover up of a victim's assault does not trigger these enhanced damages. Rather, the victim's assault must result from a prior cover up of childhood sexual assault.

Existing Section 905 of the Government Code exempts from the Government Tort Claims Act all claims made pursuant to Section 340.1 that arise out of conduct occurring on or after January 1, 2009. This bill deletes the time component from the provision and makes the change retroactive. Therefore, claims arising from relevant misconduct on the part of public entities and their employees occurring before 2009 that would have been barred by the Government Tort Claims Act, are now subject to the statute of limitations laid out in Section 340.1 and are revived pursuant to the relevant provision creating the three-year window. As discussed above, most of these claims were not eligible for the revival established by SB 1779.

* * *

Audio Transcription
Senate Judiciary Committee
July 02, 2019

AB218 Gonzalez

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* * *

Thank you.

CHAIR HANNAH-BETH JACKSON: Thank you.

LEN WELSH: Len Wels, on behalf of the Schools Insurance Authority. We're opposed only because of lack of prevention and because of the fiscal —

CHAIR HANNAH-BETH JACKSON: Thank you.

LEN WELSH: — it will cause.

CHAIR HANNAH-BETH JACKSON: Thank you.

Next witness.

SHIRLEY DOW: Good afternoon, Chair and members. Shirley Dow on behalf of the California School Board Association and oppose unless amended.

CHAIR HANNAH-BETH JACKSON: Thank you. Were there any other witnesses here in opposition? All right. Bringing it back to the dais, let me just start by saying, this is pretty draconian, but I was just listening. I was thinking that — of the case of the

young boy who had been sexually abused and ultimately ended his life.

I can't tell you how many stories I've heard of young boys and girls, young men and women who are struggling to this day, and

* * *

APPENDIX L

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SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES - SPRING STREET COURT HOUSE

In Re: SOUTHERN CALIFORNIA CLERGY CASES	JCCP No. 5101 BC679844 *(Honorable David S. Cunningham, III)* **DECLARATION OF MARGARET G. GRAF IN SUPPORT OF MOTION FOR DETERMINATION OF PRELIMINARY ISSUE OF CONSTITUTIONALITY OF CERTAIN SUBSECTIONS OF CCP §340.1, AS AMENDED BY AB218)** Date: March 4, 2021 Time; 1:45 p.m. Dept.: 15 Coordination Order: August 17, 2020 **RES ID: Not Required**

I, Margaret G. Graf, declare:

1. I am General Counsel of the Roman Catholic Archdiocese of Los Angeles. I have served in that position since 2003.

2. There are 288 Parishes and 265 schools with more than 70,000 students in the Archdiocese of Los Angeles. In California, it is second only to LAUSD in the number of students. Approximately 16,000 persons serve in the Archdiocese as clergy, teachers, professional staff and employees.

3. The Archdiocese of Los Angeles created a Clergy Misconduct Oversight Board in 2002 which includes lay professionals in health care, law and social sciences as well as a victim-survivor and clergy. The Board receives all reports of suspected misconduct by Priests or Deacons, whether involving a child or adult, is assisted by retired FBI special agents as investigators and makes disciplinary recommendations concerning Priests and Deacons to the Archbishop. The Board's mandate covers behavior involving both adults and minors and includes boundary violations and certain harassment and use of pornography which are not covered as reportable behavior under State civil law for Mandated Reporters.

4. The Archdiocese provides Safeguard the Children Programs to assist in assuring safe environments and to provide training for the identification of victims and creation of an environment in which victims would be comfortable in coming forward to report. Since 2004 nearly 400,000 adults, over 1000 priests, approximately 400 deacons and approximately 150 candidates for priestly

ordination have participated in trainings, and each year over 160,000 children and youth have received age-appropriate child abuse prevention training.

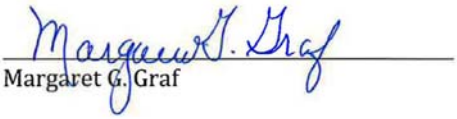
5. In pursuit of transparency about the issue of sex abuse in the Archdiocese, the Report to the People of God: Clergy Sexual Abuse in the Archdiocese of Los Angeles, 1930–2003 was issued by the Archdiocese in 2004 listing names of individuals publicly or credibly accused from 1930 onward and giving specific examples of handling of abuse allegations by the Archdiocese. In 2013, the Archdiocese also publicly released files of 128 accused Priests under a protocol that allowed a Retired Federal Judge to review Priest personnel files and determine which materials in them were appropriate for public disclosure. The Report to the People of God has been supplemented over the years and in 2018 a comprehensive updated listing of publicly or credibly accused living clergy and plausibly accused deceased clergy was issued. It currently is up-dated with additional information. The listing as up-dated is publicly available on the Archdiocese's website. It currently names 269 Priests accused of sexual misconduct, including boundary violations that would not rise to actionable civil law torts or crimes.

6. In November 2006 and July 2007 Cardinal Mahony publicly disclosed that the Archdiocese had entered into a two-part settlement of more than 550 cases that had been filed as a result of the one-year revival window created by the 2002 amendments of the California Statute of Limitations for amounts totaling approximately $660 million. The Archdiocese agreed to the massive settlement in reliance on the closed-end, 2003 absolute time-bar. In order to fund

the settlements the Archdiocese incurred bank debt and sold and mortgaged properties including its headquarters and, as a result, incurred significant, burdensome indebtedness. In addition to massive commitment of funds, the Archdiocese relinquished all insurance coverage for then-current and future sex abuse claims.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11th day of January 2021.



APPENDIX M

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Attorneys for Defendant, THE ROMAN CATHOLIC BISHOP OF ORANGE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

In Re:	JCCP No. 5101 BC679844
SOUTHERN CALIFORNIA CLERGY CASES	Honorable David S. Cunningham, III Dept. 15 **DECLARATION OF STEPHEN S. DOKTORCZYK IN SUPPORT OF MOTION FOR DETERMINATION OF PRELIMINARY ISSUE**

OF CONSTITUTIONALITY OF AB218)

Date: March 4, 2021
Time; 1:45 p.m.
Dept.: 15

Coordination Order: August 17, 2020

RES ID: Not Required

DECLARATION OF STEPHEN S. DOKTORCZYK

I, Stephen S. Doktorczyk, do hereby declare:

1. I have personal knowledge of the facts set forth herein, which are known by me to be true and correct, and if called as a witness, I could and would competently testify thereto.

2. I am Vicar General and Moderator of the Curia of the Diocese of Orange ("RCBO"). In that capacity, I have knowledge of RCBO's policies and procedures regarding responding to claims of sexual abuse, RCBO's prior global resolution of claims of sexual abuse, and clergy members affiliated with RCBO who have been credibly accused of sexual misconduct and removed from ministry.

3. In 2002, RCBO created an Oversight Review Board ("ORB"), formerly known as the Sexual Misconduct Oversight Review Board and first known as the Sensitive Issues Committee, which has played a critical role in eradicating abuse, evaluating claims of abuse, and advancing policies and procedures to prevent abuse. ORB is comprised of lay individuals with extensive professional experience in criminal justice, law, local, state, or federal law enforcement agencies, mental health, and social work. ORB

receives all reports of suspected misconduct, whether involving a child or an adult, and utilizing their formal investigative experience and/or experience with allegations of sexual abuse by virtue of their current or former employment, recommend disciplinary and investigative actions for RCBO to take in response to allegations of misconduct.

4. ORB's recommendations have resulted in significant efforts by RCBO to protect the faithful by investing heavily in programs, processes, and tools to provide a safe environment for all. To that end, RCBO created the Office of Child and Youth Protection to support parishes and schools and promote a safe environment to learn and worship free from any threat of harm. Since 2002, all clergy, employees, and volunteers have been required to undergo safe environment training.

5. In the period of July 1, 2019 – June 30, 2020, 26,512 adults were in compliance with RCBO's safe environment requirements for working or volunteering with or around minors, composed as follows: 244 Priests, 148 Deacons, 64 Seminarians and Permanent Diaconate Candidates, 1,763 teachers, and 24,293 school and parish employees and volunteers.

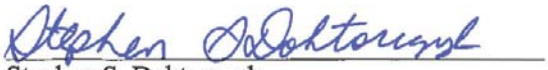
6. In 2003–2004, RCBO undertook a bold initiative to settle pending abuse cases following the change in the law that created a one-year window in calendar year 2003 to file abuse lawsuits against Catholic Church-related defendants. RCBO paid $100 million as part of a global settlement of all lawsuits filed against RCBO for alleged abuse during the 2003 window, rather than challenging the mass of

individual claims. As a result of this global settlement, RCBO exhausted all available insurance coverage available to it for occurrences related to alleged sexual misconduct that occurred prior to 2004.

7. Moreover, RCBO maintains an updated list, available to the public, of credibly accused priests incardinated in RCBO. Following the most recent revision in December 2020, it currently names 18 clergy credibly accused of sexual misconduct who have been removed from ministry and indicates their status.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 8, 2021, at Garden Grove, California.



Stephen S. Doktorczyk

APPENDIX N

STATES WITH SEXUAL ABUSE REVIVAL STATUTES

State Statute	Information
Ariz. Rev. Stat. Ann. § 12-514 (2019)	Session Law: 2019 Ariz. Legis. Serv. Ch. 259 (H.B. 2466) Time Period: May 2019 – Dec. 2020 Description: Window
Ark. Code Ann. § 16-118-118 (2021)	Session Law: 2021 Arkansas Laws Act 1036 (S.B. 676) Time Period: Jan. 2022 – Jan. 2024 Description: Window
Colo. Rev. Stat. Ann. §§ 13-80-103.7, 13-20-1203 (2022)	Session Law: 2021 Colo. Legis. Serv. Ch. 442 (S.B. 21-088) Time Period: Jan. 2022 – Dec. 2024 Description: Window (for claims arising between 1960–2021)
Conn. Gen. Stat. Ann. § 52-577d (2002)	Time Period: Indefinite Age Limit to Bring Claim: 48 Description: Revival
D.C. Code Ann. § 12-301(11) (2019)	Session Law: 2018 District of Columbia Laws 22-311 (Act 22-593) Time Period: May 2019 – May 2021 Description: Window

State Statute	Information
Del. Code Ann. tit. 10, § 8145 (2009)	Time Period: July 2007 – July 2009 Description: Window
Ga. Code Ann. § 9-3-33.1(d)(1) (2017)	Session Law: 2015 Georgia Laws Act 97 (H.B. 17) Time Period: July 2015 – July 2017 Description: Window
Haw. Rev. Stat. Ann. § 657-1.8 (2018)	Session Law: 2012 Hawaii Laws Act 68 (S.B. 2588); 2014 Hawaii Laws Act 112 (S.B. 2687); 2018 Hawaii Laws Act 98 (S.B. 2719) Time Period: Began in 2012 for two years, extended three separate times for additional two-year increments. Description: Window + Three Extensions
Ky. Rev. Stat. Ann. § 413.249(7)(b) (2021)	Session Law: 2021 Kentucky Laws Ch. 89 (HB 472) Time Period: Mar. 2021 – Mar. 2026 Description: Window
La. Stat. Ann. § 9:2800.9 (2021)	Session Law: 2021 La. Sess. Law Serv. Act 322 (H.B. 492) Time Period: June 2021 – June 2024 Description: Window
Me. Rev. Stat. tit. 14, § 752-C (2021)	Time Period: Indefinite Description: Revival

State Statute	Information
Mass. Gen. Laws Ann. ch. 260, § 4C (2014)	Session Law: 2014 Mass. Legis. Serv. Ch. 145 (H.B. 4126) Time Period: Indefinite Age Limit to Bring Claim: 53 Description: Revival
Mich. Comp. Laws Ann. § 600.5851b(3) (2018)	Time Period: June 2018 – Sept. 2018 Description: Window
Minn. Stat. Ann. § 541.073 (2013)	Session Law: 2013 Minn. Sess. Law Serv. Ch. 89 (H.F. 681) Time Period: May 2013 – May 2016 Description: Window
Mont. Code Ann. § 27-2-216 (2019)	Session Law: 2019 Montana Laws Ch. 367 (H.B. 640) Time Period: May 2019 – May 2020 Description: Window
Nev. Rev. Stat. §§ 11.215, 41.1396	Session Law: 2021 Nevada Laws Ch. 288 (S.B. 203) Time Period: Indefinite Age Limit to Bring Claim: 38 Description: Revival
N.J. Stat. Ann. 2A:14-2a, 2A:14-2b (2019)	Session Law: 2019 NJ Sess. Law Serv. Ch. 120 (Senate No. 477) Time Period: Dec. 2019 – Nov. 2021 Age Limit to Bring Claim: 55 Description: Window + Revival

State Statute	Information
N.Y. C.P.L.R. § 214-g (McKinney 2020)	Session Law: 2020 Sess. Law News of N.Y. Ch. 130 (S. 7082) Time Period: Aug. 14, 2019 – Aug. 13, 2020, extended until Aug. 14, 2021 Description: Window + 2 Extensions
N.Y.C. Admin. Code § 10-1105 (New York City)	Session Law: New York City, N.Y., Code § 10-1105 Time Period: Mar. 2023 – Feb. 2025 Description: Window
N.C. Gen. Stat. Ann. § 1-17(d), (e) (2019)	Session Law: 2019 N.C. Sess. Laws 245 (S.B 199) Time Period: Jan. 2020 – Dec. 2021 Description: Window
Or. Rev. Stat. Ann. § 12.117 (2010)	Session Law: 2009 Oregon Laws Ch. 879 (H.B. 2827) Time Period: Indefinite Age Limit to Bring Claim: 40 Description: Revival
9 R.I. Gen. Laws Ann. § 9-1-51(a)(4) (2020)	Time Period: Indefinite Age Limit to Bring Claim: 53 Description: Revival
Utah Code Ann. § 78B-2-308(6)(a)–(c), (7)	Time Period: May 2016 – May 2019 Description: Window (struck down by *Mitchell v. Roberts*, 469 P.3d 901 (Utah 2020))

State Statute	Information
Vt. Stat. Ann. tit. 12, § 522 (2019)	Session Law: 2019 Vermont Laws No. 37 (H. 330) Time Period: Indefinite Description: Revival
W. Va. Code § 55-2-15	Session Law: 2020 West Virginia Laws Ch. 2 (H.B. 4559) Time Period: Indefinite Age Limit to Bring Claim: 36 Description: Revival

APPENDIX O

STATES WITH PENDING BILLS PROVIDING SEXUAL ABUSE REVIVALS OR WINDOWS

Bill Number	Information
H.B. 358, 2022 Reg. Sess. (Ala. 2022)	Age Limit to Bring Claim: 55 Description: Revival
H.B. 370, 2022 Reg. Sess. (Ala. 2022)	Time Period: Indefinite; 2 Years Age Limit to Bring Claim: 55 Description: Revival (for all claims up to age 55) + Window (for all barred claims)
S.F. 572, 89th Gen. Assemb., 2022 Sess. (Iowa 2021)	Time Period: 3 Years Description: Window
S.B. 420 & H.B. 2603, 2022 Leg. Sess. (Kan. 2022)	Time Period: Indefinite Description: Revival (for all post-July 1, 1984 claims)
S.B. 271, 2022 Leg. Sess. (Kan. 2021)	Time Period: Indefinite Description: Revival (for all claims commenced on or after July 1, 1992)
S.B. 117, 55th Leg., 2d Sess. (N.M. 2022)	Time Period: Indefinite; Nov. 2022 – Nov. 2024 Description: Revival (for all expired claims) + Window (for claims previously dismissed on timeliness grounds)

Bill Number	Information
H.B. 266, 134th Gen. Ass., Reg. Sess. (Ohio 2022)	Time Period: 3 Years Description: Window
H.B. 3406, 58th Leg., 2d Sess. (Okla. 2022)	Age Limit to Bring Claim: 55 Description: Revival
H.B. 1002, 58th Leg., 1st Sess. (Okla. 2021)	Time Period: Nov. 2021 – Nov. 2026 Description: Window
H.B. 951, S.B. 8, S.B. 406, & S.B. 407, 2021–2022 Reg. Sess. (Pa. 2021)	Time Period: 2 Year Description: Window

APPENDIX P

RESPONDENTS IN THIS PROCEEDING

Roman Catholic Bishop of Oakland v. Superior Court, No. B313278 (Cal. Ct. App.); *In re Northern California Clergy Cases*, No. JCCP 5108 (Cal. Super. Ct.).

John Doe Plaintiffs

Jane Doe Plaintiffs

Andrew Bartko

Ann Darling

Benjamin McMorries

Brian Barnes

Carlo Martina

Christopher Smith

Danielle Bartko

Gary Johnson

Gilbert Damian

Gustavo Bernal

Jacques LeFebvre

James Brogan

Jeffery Zink

Juan Ricardo Torres

Kathleen Stonebraker

Kevin Crawford

Kimberly Crow

Manuel Nazzal

Marc Crowther
Marcus Raymond Hill
Mark Staley
Michael Holden
Michael Lopez
Michael Thomas
Norma Borghi
Richard Pfisterer
Sara Waldrop
Shawn Dennison
Siobhann Shore
Steven Cantrell
Steven Chavez
Susan Burrows
Susan Quimby
Teresa Rosson Saia
Toni Moreland

Roman Catholic Bishop of Orange v. Superior Court, No. B313939 (Cal. Ct. App.); *In re Southern California Clergy Cases*, No. JCCP 5101 (Cal. Super. Ct.).

John Doe Plaintiffs

Jane Doe Plaintiffs

Aimee Galicia Torres

Alisa Ahedo

Anthony Amaya

Anthony Brazas

Anthony M. Schow

Arthur Scicluna

Brent Wiggins

Charles Beamish

Christopher Blydenburgh

Christopher Martinez

Daniel Conway

Daniel Seeley

David Deninno

Eric Donaldson

Eric Michael Quincey

Erik Wiggins

Faith King

Frank Marquez

Frank Verrengia

Gerald Prunty

Gregory Donaldson

James Apodaca

James Lott
James Merz
Jennaffer Townley
John Hanson
John Keating Meade
John Machado
Jose Angel Viera
Joseph Ferraro
Karen McGarry
Kurt Mikell
Lennie Roan Jr.
Louis Origel
Luis Carlos Deluna
Mark Alvarez
Mark Head
Mark Wiggins
Matthew Garza
Matthew Wiggins
Michael Crawley
Michael Dysthe
Michael Provencio
Michael Siler
Michael Spillman
Nicolas Retana
Patrick Lowrey
Paul Olsen
Robert Nichols

Robert Sawyer
Russell Weaver
Scott Maziar
Stephen Wiggins
Steven Lewis
Taylor Eslick
Ted Gammage
Theresa Cinocco
Thomas Duran
Thomas Martinez
Timothy Klega
Victor Esquer
Vincent J. Garcia
William Dennis Matheson
William Manderville