Exhibit A

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

Exhibit 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.	B313939 (Super. Ct. No. JCCP 5101) (David S. Cunningham III, Judge) ORDER
PLAINTIFFS in cases coordinated in JCCP 5101, Real Party in Interest.	

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.

Exhibit C

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, 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

[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.

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. (*Boy Scouts, 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 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.

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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.

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 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, " '

[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.

"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 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.)

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

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]

(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.)

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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.

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

(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 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.)

(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

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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.])

[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

unconstitutional 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,

> [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

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

"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, "[s]ection 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. Subdivison (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

(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." (FreeThesaurus.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.

(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. Subdivison (a)(2) applies to actions based on wrongful or negligent acts, which do not necessarily involve intent.

> than negligent. Further, use of "intentional" in CCP §340.1(a)(3) shows the term "wrongful" as used in CCP 340.1(a)(2) 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.)

(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

David S. Cunningham III

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