

No. \_\_\_\_\_

In The

SUPREME COURT OF THE UNITED STATES

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The Roman Catholic Bishop of Oakland, the Roman Catholic Bishop of Sacramento,  
The Roman Catholic Archbishop of San Francisco, The Roman Catholic Bishop of  
San Jose, the Roman Catholic Bishop of Monterey, California, the Roman Catholic  
Bishop of Santa Rosa and the Roman Catholic Bishop of Fresno,

Applicants/Petitioners,

v.

Superior Court of the State of California; Plaintiffs in cases  
coordinated in JCCP-5108 (Real Parties In Interest),

Respondents

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**On Petition for Writ of Certiorari to the  
Supreme Court of California**

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI**

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JEFFREY R. BLEASE  
LISA GLAHN  
DAVID GOROFF\*  
FOLEY & LARDNER LLP  
321 North Clark Street, Suite 3000  
Chicago, IL 60654-4762  
Telephone: (312) 832-4500  
E-mail: dgoroff@foley.law.com

Attorneys for Applicant/Petitioner  
The Roman Catholic Bishop of Oakland  
\*Counsel of Record

**GREENE & ROBERTS**

Stephen Greene, Jr.

Attorneys for Applicant/Petitioner

The Roman Catholic Bishop of Sacramento

**WEINTRAUB TOBIN**

Paul Gaspari

Daniel Zamora

Attorneys for Applicant/Petitioner

The Roman Catholic Archbishop of San Francisco,

The Roman Catholic Bishop of San Jose, and

The Roman Catholic Bishop of Monterey, California

**SHAPIRO, GALVIN, SHAPIRO & MORAN**

Adrienne Moran

Attorneys for Applicant/Petitioner

The Roman Catholic Bishop of Santa Rosa

**MCCORMICK BARSTOW LLP**

Mart Oller, IV

Attorneys for Applicant/Petitioner

The Roman Catholic Bishop of Fresno

## **CORPORATE DISCLOSURE STATEMENT**

Applicants/Petitioners The Roman Catholic Bishop of Fresno, The Roman Catholic Bishop of Monterey, California, The Roman Catholic Bishop of Oakland, The Roman Catholic Bishop of Sacramento, The Roman Catholic Bishop of Santa Rosa, The Roman Catholic Archbishop of San Francisco, and The Roman Catholic Bishop of San Jose, each a corporation sole, is each a non-stock corporation sole under the law of California. No Petitioner has any parent corporation and no publicly held company owns 10% or more of the corporation's stock.

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Applicants/Petitioners The Roman Catholic Bishop of Fresno, The Roman Catholic Bishop of Monterey, California, The Roman Catholic Bishop of Oakland, The Roman Catholic Bishop of Sacramento, The Roman Catholic Bishop of Santa Rosa, The Roman Catholic Archbishop of San Francisco, and The Roman Catholic Bishop of San Jose, each a corporation sole (collectively “Petitioners”), respectfully apply to this Supreme Court for an extension of 60 days, pursuant to Supreme Court Rule 13.5, to file their petition for certiorari (“Petition”). Jurisdiction before this Supreme Court is proper under 28 U.S.C § 1257. *See also Cox Broadcasting v. Cohn*, 420 U.S. 469, 482-83 (1975).

The Petition follows from a final summary denial by the California Supreme Court of Petitioners’ petition for review challenging the constitutionality of California Assembly Bill 218 (“AB218”) under the United States Constitution. (Order dated November 17, 2021, Case No. S271532, attached as Ex. A<sup>1</sup>)(Petitioners also attach the Order of the California Court of Appeal Denying Petition for Writ of Mandate, as Ex. B, and the Order of the California Superior Court Denying Motion Of Defendants On Constitutionality of CCP 340.1 Amendments in JCCP No. 5108, as Ex. C).

AB218 is a three-year revival statute allowing long-lapsed claims against entities and individuals who are alleged to have aided perpetrators of childhood

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<sup>1</sup> While the Supreme Court order uses the proper case number and cites to the proper case number from the Court of Appeal, it erroneously refers to respondent as the Superior Court of Los Angeles County rather than the Superior Court of Alameda County, as the filings and docket reflect.

sexual assault. Importantly, AB218 not only revived lapsed claims, it enhanced them, enabling a plaintiff to pursue treble damages—which were previously unavailable—where the plaintiff could show that a defendant was part of a “cover-up” which was a cause of the plaintiff’s childhood sexual assault. §340.1(b)(1). AB218’s own sponsors acknowledged that the stated purpose of the treble damages provision was to “increase[] certain penalties” and “make people hurt.”<sup>2</sup> They also acknowledged that AB218 was designed to promote deterrence<sup>3</sup> and make proving childhood sexual assault easier.<sup>4</sup>

AB218 is both a prohibited ex post facto law under U.S. Const. Art. I, §10, cl.1, and violates Petitioners’ rights to due process of law guaranteed by the Fourteenth Amendment. U.S. Const., Am. XIV. Despite this, hundreds of cases have been filed across California under AB218. These gave rise to three joint coordinated proceedings, permitted by California Code of Civil Procedure §404, including, relevant here, ones for Northern California (“JCCP 5108”) and Southern California (“JCCP 5101”). These JCCP Courts were tasked with addressing threshold issues common to all coordinated cases, including threshold constitutional issues. Accordingly, Petitioners in JCCP 5108—as well as similarly-situated defendants in JCCP 5101 (“JCCP 5101”)—filed motions to dismiss those cases on the ground that AB218 is unconstitutional on its face. Petitioners argued that, as applied retroactively, AB218 is an ex post facto law because it: a) exposes defendants to

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<sup>2</sup> Assem. Judiciary Com. Analysis of Bill, as introduced January 16, 2019; Transcript of March 12, 2019 Assem. Hearing.

<sup>3</sup> Assem. Floor Analysis of Bill, as amended March 25, 2019.

<sup>4</sup> Sen. Judiciary Com. Analysis of Bill, as amended March 25, 2019.

increased damages; b) lowers plaintiffs' burdens of proof; and c) creates new bases for liability. Defendants also argued that AB218 violated Due Process because: a) it is unconstitutionally vague, including because what it means to engage in a "concerted effort to hide evidence"—the predicate for treble damages—can mean that joint conduct both is or is not required; b) by allowing defendants to face penalties and claims which did not exist when challenged conduct occurred, AB218 deprives them of rightful notice; c) AB218 denies defendants' substantive due process rights because California precedent creates a vested right in the expiration of a statute of limitation.<sup>5</sup>

Despite its nominally civil character, the California Courts of Appeal have held that AB218's treble damages provision make it penal in nature. It is thus an ex post facto law when applied retroactively. An ex post facto law cannot be tolerated, especially one that exposes hundreds if not thousands of defendants to prohibitive new damages or allows claims on previously lawful conduct. This Court already has held that "even the extension of an unexpired *civil* limitations period can unconstitutionally infringe upon a 'vested right.'" *Stogner v. California*, 539 U.S. 607, 632 (2003)(emphasis original; citations omitted). Nor can a statute which is unconstitutionally vague be allowed to stand and be the basis for hundreds of suits. Further, California courts are applying the United States constitution inconsistently, where the trial court in JCCP 5108 has ruled treble damages under AB218 are constitutional and the trial court in JCCP 5101 has ruled they are not, and neither the California Court of Appeal nor the California Supreme Court granted review of

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<sup>5</sup> Liaison counsel appointed by the Court acted for plaintiffs in these proceedings.

either ruling. This means that defendants in actions in the northern part of the state may be subject to treble damages, while defendants in actions in the southern part of the state may not.

This application is timely, being filed more than 10 days prior to the February 15, 2022 Petition due date, and good cause exists for such an extension where Petitioners are in the process of onboarding additional, expert counsel to assist with their Petition and, if accepted, any appeal to this Court. In doing so, the seven Petitioners in this matter have coordinated efforts with the two petitioners in the Southern California Cases, who also plan to petition this Court, and will submit a single, joint petition. Therefore, a 60-day extension would give additional counsel the opportunity to familiarize themselves with the record and legal issues and be of great value.

Wherefore, Petitioners respectfully request that they be granted an extension of 60 days—until April 16, 2022—to file their Petition for Certiorari.

February 3, 2022

Respectfully submitted,

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JEFFREY R. BLEASE  
LISA GLAHN  
DAVID GOROFF\*  
FOLEY & LARDNER LLP  
321 North Clark Street, Suite 3000  
Chicago, IL 60654-4762  
Telephone: (312) 832-4500  
E-mail: dgoroff@foley.com

Attorneys for Applicant and Petitioner  
The Roman Catholic Bishop of Oakland

\*Counsel of Record

**GREENE & ROBERTS**

Stephen Greene, Jr.

Attorneys for Applicant and Petitioner

The Roman Catholic Bishop of Sacramento

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Paul Gaspari

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Attorneys for Applicants and Petitioners

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**SHAPIRO, GALVIN, SHAPIRO & MORAN**

Adrienne Moran

Attorneys for Applicant and Petitioner

The Roman Catholic Bishop of Santa Rosa

**MCCORMICK BARSTOW LLP**

Mart Oller, IV

Attorneys for Applicant and Petitioner

The Roman Catholic Bishop of Fresno



# **EXHIBIT A**

SUPREME COURT  
FILED

NOV 17 2021

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

Jorge Navarrete Clerk

S271532

Deputy

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**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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

v.

SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;

JOHN DOE et al., Real Parties in Interest.

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The petition for review and application for stay are denied.

**CANTIL-SAKAUYE**

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*Chief Justice*

# **EXHIBIT B**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL – SECOND DIST.

FILED

Oct 20, 2021

DANIEL P. POTTER, Clerk

mfigueroa Deputy Clerk

THE ROMAN CATHOLIC BISHOP  
OF OAKLAND, et al.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE  
OF CALIFORNIA FOR THE  
COUNTY OF LOS ANGELES,

Respondent;

MULTIPLE PLAINTIFFS,

Real Parties in Interest.

B313278

(Alameda County Super. Ct. No. JCCP  
5108)

(Winifred Y. Smith, Judge)

**ORDER**

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

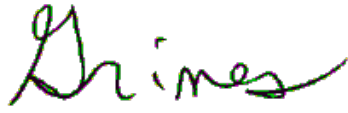
The motion for judicial notice filed on June 28, 2021 is granted as to all exhibits (Exhibits A through H). The motion for judicial notice filed on July 19, 2021 is denied as to Exhibit A and granted as to Exhibits B and C.

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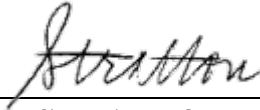
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Petitioners do not establish entitlement to writ relief. Accordingly, the petition and request for immediate relief are denied.



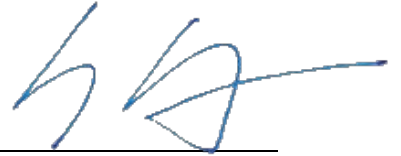
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GRIMES, Acting P.J.



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STRATTON, J.



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OHTA, J.\*

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

# **EXHIBIT C**



FILED  
ALAMEDA COUNTY

APR 29 2021

CLERK OF THE SUPERIOR COURT

By [Signature]  
Deputy

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

IN RE BAY AREA CLERGY CASES

No. JCCP 5108

ORDER DENYING MOTION OF  
DEFENDANTS ON  
CONSTITUTIONALITY OF CCP 340.1  
AMENDMENTS

DATE 4/28/21  
TIME 10:00  
DEPT 21

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

1 (r) are constitutional prospectively, and holds that CCP 340.1(b) is constitutional as applied to  
2 revived cases and to actions before the enactment of the statute.

3  
4  
5 OVERVIEW AND PROCEDURE

6 In 2019 the legislature approved and the Governor signed AB 218, which amended CCP  
7 340.1. AB 218:

- 8  
9 1. Extends the statute of limitations for non-perpetrators to the later of age 40 or five years  
10 after the date the plaintiff discovers or reasonably should have discovered that  
11 psychological injury or illness occurring after the age of majority was caused by the  
12 sexual assault (CCP 340.1(a)),  
13  
14 2. Opens a three-year window for filing lapsed claims (CCP 340.1(q)),  
15  
16 3. Applies the new statutes of limitations to cases that would previously have been time  
17 barred (CCP 340.1(r), and  
18  
19 4. Provides for treble damages against a person who is found to have covered up the sexual  
20 assault of a minor (CCP 340.1(b)).

21 *Northern California Clergy Cases*, JCCP 5108, was created to manage the various  
22 Northern California cases that have been or will be filed in the three-year window. *Southern*  
23 *California Clergy Cases*, JCCP 5101, is managing cases in Southern California. *Diocese of San*  
24 *Diego Cases*, JCCP 5105, is managing cases in the San Diego area.

25 The parties, through court appointed liaison counsel, agreed to address the facial  
26 constitutional challenges to the statute in this motion. (Joint CMC Stmt 12/1/20 p6-7; CMO 1  
dated 12/22/20 at p3.) The court as coordination trial judge presiding over complex cases finds



1 this to be an appropriate procedure. (CCP 128(a)(8); CRC 3.400 and 3.541; Std Jud Admin 3.10;  
2 *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 704-705.)

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

11  
12 The court will decide the motion despite the decisions of the current plaintiffs to  
13 withdraw their claims for treble damages. A coordination trial judge is authorized and  
14 encouraged to “Provide a method and schedule for the submission of preliminary legal questions  
15 that might serve to expedite the disposition of the coordinated actions.” (CRC 3.541(a)(4).) This  
16 is such a motion. The current plaintiffs withdrew their claims only after seeing the court’s  
17 tentative decision. “Allowing a moving party to withdraw a motion after receiving an adverse  
18 tentative ruling, only to refile a different version of the same motion later, would lead to  
19 excessive litigation and waste of judicial resources.” (*Cowan v. Krayzman* (2011) 196  
20 Cal.App.4th 907, 917.)

21  
22  
23 The motion presents a justiciable controversy because it concerns the interpretation and  
24 constitutionality of the statute that is at the center of this JCCP. The motion is addresses to  
25 issues of law and not to the application of law to fact. The legal issues are ripe for resolution.  
26 “[T]he requirement [of ripeness] should not prevent courts from resolving concrete disputes if

1 the consequence of a deferred decision will be lingering uncertainty in the law, especially when  
2 there is widespread public interest in the answer to a particular legal question.” (*Panoche*  
3 *Energy Center, LLC v. Pacific Gas & Electric Co.* (2016) 1 Cal.App.5th 68, 99.) The legal  
4 issues are not mooted by the decision by the current plaintiffs in this JCCP that they will not seek  
5 treble damages. (*Association of Irrigated Residents v. Department of Conservation* (2017) 11  
6 Cal.App.5th 1202, 1221-1222 [mootness].) That appears to be a tactical decision by plaintiffs  
7 and it is unclear whether defendants can enforce it by equitable estoppel or otherwise.  
8  
9

#### 10 STRUCTURE OF COURT’S ANALYSIS

11  
12 The court first interprets the statute. The court interprets the statute to give effect to the  
13 intent of the legislature. The court reads the various amendments both in isolation and in light of  
14 the amendments as a collective package. This approach is consistent with settled principles of  
15 statutory construction. (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4  
16 Cal.5th 1082, 1089-1090.) As a general principle, the court must not rewrite the statute in the  
17 guise of statutory construction. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63,  
18 73-74.) The courts have greater leeway when the constitutionality of a statute is at issue. “[A]  
19 court may reform—i.e., “rewrite”—a statute in order to preserve it against invalidation under the  
20 Constitution, when [the court] can say with confidence that (i) it is possible to reform the statute  
21 in a manner that closely effectuates policy judgments clearly articulated by the enacting body,  
22 and (ii) the enacting body would have preferred the reformed construction to invalidation of the  
23 statute.” (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 661.) (See also *Legislature*  
24 *v. Padilla* (2020) 9 Cal.5th 867, 875-876.)  
25  
26

1 Statutory interpretation is an issue of law for the court. The court gives no weight to the  
2 agreements or concessions of the parties. Parties cannot determine issues of statutory  
3 interpretation by agreement. A party's concession in litigation does not relieve the court of the  
4 obligation to interpret the statute. The dynamics of this motion are peculiar. The plaintiffs  
5 sought treble damages, then stated they would not seek treble damages, then argued that treble  
6 damages should be treble of all damages, then noted that if that might be unconstitutional then  
7 Civil Code 1431.2 can make it constitutional by providing a mechanism for allocating damages  
8 among parties and claims. The defendants argue that the statute must be interpreted to provide  
9 for punishment to themselves, presumably so they can then argue that with that interpretation the  
10 statute is unconstitutional.  
11

12 The court second determines whether a statutory provision is constitutional prospectively  
13 or retroactively. The court separately examines each of CCP 340.1(b), (q), and (r). This is  
14 primarily a due process analysis but also relies on concepts in the ex post facto analysis.  
15

16 The court third decides whether it is possible to sever constitutional and unconstitutional  
17 provisions. The court's consideration of the amendments as a collective package for purposes of  
18 statutory interpretation does not dictate that the court decide that the amendments are an  
19 indivisible whole for purposes of severability.  
20

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

1           There is tension because the court must both interpret each provision in isolation and  
2 must also interpret them so that, if possible, the treble damages provision in CCP 340.1(b) can be  
3 applied to claims that are revived under CCP 340.1(q) and (r). The court cannot rewrite the  
4 treble damages provision but it can reform the provision to make it constitutional as applied  
5 retroactively. Furthermore, the interpretation of the treble damages provision must be consistent  
6 – the court cannot interpret a section one way retroactively so that it is constitutional  
7 retroactively and then interpret it a different way prospectively when the constitutional concerns  
8 of retroactivity do not apply.  
9

10  
11 EVIDENCE  
12

13           The court GRANTS all requests for judicial notice. At the court’s direction, Defendants  
14 filed the entire legislative history. (Filing on 3/16/21.) The court gives substantial weight to  
15 documents reflecting the intent and understandings of the legislature. (*Kaufman & Broad*  
16 *Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26.) The court gives  
17 less weight to documents reflecting the intent of the executive branch, such as signing statements  
18 or enrolled bill reports. (*People v. Tarkington* (2020) 49 Cal.App.5th 892, 904-906.) The court  
19 does not give any weight to the intent of third parties that were commenting on proposed  
20 legislation. (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward*  
21 (2020) 9 Cal.5th 488, 505.)  
22

23 ///

24 ///

1 CONCERNS WITH RETROACTIVITY OF LEGISLATION

2 Whether new statutes and case law can have retroactive effect depends on the nature of  
3 the prior law, the nature of new law, and other factors. The initial round of briefing at times  
4 conflated the various factual situations and constitutional concerns. The general categories for  
5 analysis are:  
6

- 7 1. Civil statutes that retroactively revive previously existing but currently time barred civil  
8 liabilities. These implicate due process concerns. (E.g., *Quarry v. Doe I* (2012) 53  
9 Cal.4th 945, 955-960 [revival of claims]; *20th Century Ins. Co. v. Superior Court* (2001)  
10 90 Cal.App.4th 1247 [revival of claims].) These concerns apply to the revival of lapsed  
11 claims through the CCP 340.1(q) and (r) three-year window and the revival of lapsed  
12 claims.  
13
- 14 2. Civil statutes that retroactively revive previously existing but currently time barred civil  
15 remedies. These implicate due process concerns. (E.g., *Roman Catholic Bishop of*  
16 *Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155 [revival of punitive damages];  
17 *21st Century Ins. Co. v. Superior Court* (2005) 127 Cal.App.4th 1351 [revival of punitive  
18 damages].) These concerns apply to the revival of punitive damages through the CCP  
19 340.1(q) and (r) three-year window and the revival of lapsed claims.  
20
- 21 3. Civil statutes that retroactively create civil liabilities that did not exist when the  
22 defendants did the relevant actions. These implicate due process concerns. (*Myers v.*  
23 *Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828.) These concerns apply to the  
24 creation of CCP 340.1(b) liability for treble damages.  
25  
26

1 4. Civil statutes that retroactively alter civil procedures or remedies that did not exist when  
2 the defendants did the relevant actions. These implicate due process concerns. (*ARA*  
3 *Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1564  
4 [retroactive change in remedy].) These concerns apply to the creation of CCP 340.1(b)  
5 treble damages and the burden of proof for treble damages.

6  
7 5. Civil statutes that retroactively create duties or penalties that are so punitive in nature  
8 they are effectively criminal. These implicate ex post facto concerns. (*Hipsher v. Los*  
9 *Angeles County Employees Retirement Association* (2020) 58 Cal.App.5th 671, 681.)  
10 CCP 340.1 is punitive in nature. These concerns apply to CCP 340.1(b) liability for  
11 cover up treble damages.

12  
13 6. Criminal statutes that retroactively create crimes or criminal penalties. These implicate  
14 ex post facto concerns. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th  
15 428, 472 [“the ex post facto prohibition applies only to criminal statutes”].) CCP 340.1 is  
16 not a criminal statute.

17  
18 7. Criminal statutes that retroactively alter criminal procedures. These implicate ex post  
19 facto concerns. CCP 340.1 is not a criminal statute.

20  
21 8. Case law that retroactively interprets existing law. (E.g., *Peterson v. Superior Court*  
22 (1982) 31 Cal.3d 147, 151-152.) CCP 340.1 is a statute, so the retroactivity of judicial  
23 decisions is not at issue.

24  
25 CCP 340.1 is a statute. As a general principle, “No part of [a statute] is retroactive,  
26 unless expressly so declared.” (CCP 3; Civil Code 3.) (See also *Quarry v. Doe I* (2012) 53

1 Cal.4th 945, 955.) As a general principle, “the presumption against retrospective construction  
2 does not apply to statutes relating merely to remedies and modes of procedure.” (*ARA Living*  
3 *Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1561.) (See also *Sierra*  
4 *Pacific Industries v. Workers’ Comp. Appeals Bd.* (2006) 140 Cal.App.4th 1498, 1506.) A  
5 change in a remedy or procedure can, however, have substantive effect and trigger constitutional  
6 concerns about retroactive application. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936-937 [“We  
7 consider the effect of a law on a party’s rights and liabilities, not whether a procedural or  
8 substantive label best applies”].)

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

18 The constitutional issues in this case are based on due process concerns. “Retroactive  
19 civil laws are analyzed not under the ex post facto clause, but the due process clause, and the  
20 question is whether they deprive a party of vested rights.” (*21st Century Ins. Co. v. Superior*  
21 *Court* (2005) 127 Cal.App.4th 1351, 1358 fn 3.) The due process concerns parallel the ex post  
22 facto concerns, but the due process analysis gives deference to the policy decisions of the  
23 legislature.  
24  
25  
26

1 In *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155,  
2 1161, citing *Calder v. Bull* (1798) 3 U.S. 386, 390, stated that there are four different types of ex  
3 post facto laws:

4 1st. Every law that makes an action, done before the passing of the law, and  
5 which was innocent when done, criminal; and punishes such action. 2nd. Every  
6 law that aggravates a crime, or makes it greater than it was, when committed. 3rd.  
7 Every law that changes the punishment, and inflicts a greater punishment, than the  
8 law annexed to the crime, when committed. 4th. Every law that alters the legal  
9 rules of evidence, and receives less, or different, testimony, than the law required  
10 at the time of the commission of the offence in order to convict the offender.  
11

12 The court uses the four different concerns as a framework for its analysis of the due process  
13 concerns with retroactivity. The creation of additional liability for a “cover-up” implicates the  
14 1<sup>st</sup> concern of retroactively punishing actions that were lawful when done. The creation of treble  
15 damage liability implicates the 3<sup>rd</sup> concern of inflicting greater punishment than when the action  
16 was taken. The burden of proof for “cover-up” and the amount of “up to treble damages”  
17 implicates the 4<sup>th</sup> concern of altering the legal rules of evidence to permit proof by a lesser  
18 standard than applied when the action was taken.  
19

20  
21  
22 NEW STATUTE OF LIMITATIONS – CCP 340.1(a)

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

24  
25 The amendment to CCP 340.1(a) sets the statute of limitations for three categories of  
26 cases related to “childhood sexual assault.”



1 The amendment to CCP 340.1(a) does not create a new cause of action for “childhood  
2 sexual assault.” CCP 340.1(c) states: “Nothing in this subdivision shall be construed to  
3 constitute a substantive change in negligence law.” The definition of “childhood sexual assault”  
4 in CCP 340.1(d) is for the purpose of identifying when the statute of limitations in CCP 340.1(a)  
5 applies to the claims in an action. The underlying civil claims would presumably be in the nature  
6 of common law tort claims for torts that are statutory violations defined as “childhood sexual  
7 assault” and thus failure to exercise due care under Evid Code 669 (CCP 340.1(a)(1)), or torts of  
8 a breach of a duty of care (aka negligence) (CCP 340.1(a)(2)), or intentional torts (CCP  
9 340.1(a)(3)).  
10

11  
12 THREE YEAR WINDOW - CCP 340.1(q).  
13

14 The amendment to CCP 340.1(q) states: “(q) Notwithstanding any other provision of law,  
15 any claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a) that  
16 has not been litigated to finality and that would otherwise be barred as of January 1, 2020,  
17 because the applicable statute of limitations, claim presentation deadline, or any other time limit  
18 had expired, is revived, and these claims may be commenced within three years of January 1,  
19 2020. A plaintiff shall have the later of the three-year time period under this subdivision or the  
20 time period under subdivision (a) as amended by the act that added this subdivision.”  
21

22 The effect of this is that claims that would otherwise be time-barred are revived during  
23 the three-year window. This is a retroactive change in the statute of limitations. This is  
24 permitted by California statute and is constitutional.  
25  
26

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

5  
6 The CCP 340.1(q) reopening of the statute of limitation is not a violation of constitutional  
7 due process. *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th  
8 1155, 1161-1162, sets out the relevant law:

9 [L]egislation reviving the statute of limitations on civil law claims does not  
10 violate constitutional principles. In *Chase Securities Corp. v. Donaldson* (1945)  
11 325 U.S. 304, ..., the court held that due process notions were not affected by the  
12 revival of a civil law claim because civil limitations periods “find their  
13 justification in necessity and convenience rather than in logic. ... Their shelter has  
14 never been regarded as ... a ‘fundamental’ right ... the history of pleas of  
15 limitation shows them to be good only by legislative grace and to be subject to a  
16 relatively large degree of legislative control.” ... In *Liebig v. Superior Court*  
17 (1989) 209 Cal.App.3d 828, 831–834, ..., the court held that the Legislature had  
18 the power to revive lapsed common law claims based on childhood sexual abuse  
19 under an earlier version of section 340.1.

20  
21 (See also *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1181.) The legislative history demonstrates  
22 that the legislature considered this issue. The Assembly Committee on the Judiciary’s report on  
23 AB 218 expressly cites to *Chase Securities* for the federal law and to *Liebig* for the California  
24 law. (LIS-3, page 6.) The Senate Committee on the Judiciary’s report on AB 218 expressly cites  
25 to *Chase Securities* for the federal law and to *Liebig* for the California law. (LIS-6, page 8.)  
26

1 The CCP 340.1(q) reopening of the statute of limitation for the three year window is not a  
2 violation of the constitutional prohibition against ex post facto legislation. The Court of Appeal  
3 resolved this issue in *Coats v. New Haven Unified School District* (2020) 46 Cal.App.5th 415,  
4 424-428.)

5  
6 Significantly, however, the constitutional ability of the legislature to change a statute of  
7 limitations is limited to the revival “of a traditional common law cause of action” and the pursuit  
8 of the damages that were permitted at common law. That limiting framework is in *Bishop of*  
9 *Oakland*, 128 Cal.App.4th at 1165, where the court states, “we hold that a statute reviving the  
10 limitations period for *a common law tort cause of action*, thereby allowing the plaintiff to seek  
11 punitive damages, does not implicate the ex post facto doctrine and therefore does not trigger the  
12 intent-effects test at all.” (Italics added.) Similarly, *Lent v. Doe* (1995) 40 Cal.App.4th 1177,  
13 1181, states that there is “no constitutional impediment to revival in the case of *a traditional*  
14 *common law cause of action* where, as here, the Legislature makes express its intent the law be  
15 given retrospective application.” (Italics added.)  
16

17 The limiting framework also applies to the recovery of compensatory and punitive  
18 damages. In *Bishop of Oakland*, 128 Cal.App.4th at 1165, and *21st Century Ins. Co. v. Superior*  
19 *Court* (2005) 127 Cal.App.4th 135, the court held that the legislature could revive claims that  
20 permitted punitive damages because punitive damages are not criminal in nature. The  
21 legislature was, however, reviving the remedy of punitive damages that existed when the  
22 underlying torts occurred and was not creating a new remedy that did not exist when the tort  
23 occurred.  
24  
25  
26

1 REVIVING TIME BARRED CASES WITH THE NEW STATUTE OF LIMITATION - CCP  
2 340.1(r).

3  
4 The amendment to CCP 340.1(r) states: “The changes made to the time period under  
5 subdivision (a) as amended by the act that amended this subdivision in 2019 apply to and revive  
6 any action commenced on or after the date of enactment of that act, and to any action filed before  
7 the date of enactment, and still pending on that date, including any action or causes of action that  
8 would have been barred by the laws in effect before the date of enactment.”

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

12  
13 The CCP 340.1(r) revival of claims is permitted by statute. CCP 3 states, “No part of it is  
14 retroactive, unless expressly so declared.” (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 955.) The  
15 text of the CCP 340.1(r) expressly declares that the amendment revives claims that would  
16 otherwise be time-barred.

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

20  
21 [T]he Supreme Court has determined that “in a civil case, there is no  
22 constitutional right of repose. ... Thus, appellant has no constitutional right to be  
23 free of the obligation to defend stale claims. Because section 340.1(c) [which  
24 permitted revival of lapsed claims] does not deprive a defendant of a protected  
25  
26

1 liberty or property interest encompassed by the Fourteenth Amendment, it is not  
2 unconstitutional under the due process clause.

3 Even if defendants had a vested interest in a statute of limitation or a statute of repose, “Vested  
4 rights may be impaired with due process of law . . . , and a statute's retroactive application does  
5 not offend due process if the change reasonably could be believed to be sufficiently necessary to  
6 the public welfare as to justify the impairment.” (*Calleros v. Rural Metro of San Diego, Inc.*  
7 (2020) 58 Cal.App.5th 660, 773.) The legislative history of AB 218 demonstrates that the  
8 legislature considered the constitutional issue and expressly decided that the retroactive effect of  
9 CCP 340.1’s amendments were sufficiently necessary to the public welfare as to justify the  
10 impairment of due process.  
11

12 The CCP 340.1(r) revival of claims is not a violation of the constitutional prohibition  
13 against ex post facto legislation. The Court of Appeal resolved this issue in *Coats v. New Haven*  
14 *Unified School District* (2020) 46 Cal.App.5th 415, 424-428.)  
15

16 Again, the ability of the legislature to change a statute of limitations is limited to the  
17 revival “of a traditional common law cause of action” and the pursuit of the damages that were  
18 permitted at common law. (*Bishop of Oakland*, 128 Cal.App.4th at 1165; *Lent v. Doe* (1995) 40  
19 Cal.App.4th 1177, 1181.) Whether the legislature can retroactively create a new duty,  
20 obligation, cause of action, remedy, or evidentiary standard is a different issue.  
21

22 ///

23 ///

24 ///

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

2 The amendment to CCP 340.1(b) states:

3  
4 (b)(1) In an action described in subdivision (a), a person who is sexually assaulted  
5 and proves it was as the result of a cover up may recover up to treble damages  
6 against a defendant who is found to have covered up the sexual assault of a minor,  
7 unless prohibited by another law.

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

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

15 Defendant argue that CCP 340.1(b) is unconstitutionally vague. (Def Supp Brief at 10-  
16 11.) The statute is not unconstitutionally vague. The court can give the statute “a reasonable and  
17 practical construction in accordance with the probable intent of the Legislature.” This order  
18 makes the statute “more precise by judicial construction and application of the statute in  
19 conformity with the legislative objective.” (*Schweitzer v. Westminster Investments, Inc.* (2007)  
20 157 Cal.App.4th 1195, 1206.)

21 COVER-UP - THE STATUTE.

22 The statute permits an award of treble damages injuries for caused by a prior “cover up”,  
23 which is defined as “a concerted effort to hide evidence relating to childhood sexual assault.”

24 This is the total definition.  
25  
26

1 As introduced on 2/16/18, the predecessor bill, AB 3120, included the proposed text of:  
2 “(2) For purposes of this subdivision, a “cover up” is a concerted effort to hide evidence relating  
3 to childhood sexual assault, which includes moving a perpetrator to another location without  
4 notifying authorities and adults at the new location, giving an accused perpetrator a positive  
5 recommendation for further employment without disclosing the accusations of childhood sex  
6 assault, or destroying documents to conceal childhood sex assault.” (LH 586.) (See also LH  
7 586, 593 [4/19/18].) The Assembly Judiciary Committee Report on AB 3120 dated 4/24/18 at p9  
8 suggested that the text add the phrase “but is not limited to” to clarify that the examples of what  
9 might amount to a cover-up was not meant to be exhaustive. (LH at 658.) The text of AB 3120  
10 then eliminated the examples. (LH at 585, 599 [5/21/18].) When AB 218 was enacted it has no  
11 examples.  
12

13 The legislative history provided by the parties provides no further indication about what  
14 the legislature intended by the phrase “cover up.”  
15

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

19 The phrase “cover-up” is used elsewhere in unrelated California statutes, so the court can  
20 consider those other uses for context. The court does so with caution because the same word or  
21 phrase can have a different meaning depending on context. (*Russ-Field Corp. v. Underwriters at*  
22 *Lloyd's, London, England* (1958) 164 Cal.App.2d 83, 96.) The phrase “cover up” is used  
23 repeatedly in the context of statutes that state, “It is unlawful for any person to knowingly alter,  
24 destroy, mutilate, conceal, *cover up*, falsify, or make a false entry in any record, document, or  
25 tangible object with the intent to impede, obstruct, or influence the administration or  
26

1 enforcement of this division.” (Corp Code 28716(a); Corp Code 29105(a); Corp Code 31204(a);  
2 Fin Code 12332(a), Fin Code 30218(a); Fin Code 50512(a).) The inclusion of “cover up” in the  
3 string of words suggests that the CCP 340.1(b) definition of “a concerted effort to hide evidence”  
4 has a meaning similar to or has a purpose similar to the other words in those other statutes.  
5 (*MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration* (2018) 28  
6 Cal.App.5th 635, 645-646.)

7  
8 The court has reviewed case law. The court has found no definition of “cover-up.”

9 The court has considered the dictionary definition of “cover-up.” Black's Law Dictionary  
10 defines “concealment” as “The act of refraining from disclosure; esp. an act by which one  
11 prevents or hinders the discovery of something; a cover-up.” (Black's Law Dictionary (8th  
12 ed.2004) p. 306.) This suggests that there is some equivalency between an effort to hide  
13 evidence and an effort to refrain from disclosure.  
14

15 Looking within the statutory definition of “cover-up” in CCP 340.1(b)(2), the court has  
16 considered the phrase “a concerted effort.” It is unclear whether “a concerted effort” is defined as  
17 collective effort, an effort on behalf of a group or entity, or a strenuous effort.  
18

19 Dictionaries mostly define “concerted” as collective, but also define it as “strenuous.”  
20 (Merriam-Webster.com/dictionary [“mutually contrived or agreed on”]; Dictionary.com  
21 [contrived or arranged by agreement; planned or devised together: a concerted effort.].) (See  
22 also <https://www.lexico.com/en/definition/concerted> [“(1) Jointly arranged, planned or carried  
23 out; coordinated, (1.1) Strenuously carried out; done with great effort.”].)

24 Other California statutes are inconsistent. The vast majority of statutes use the word  
25 “concerted” to mean “collective.” (E.g. CCP 527.3; Fin Code 5100.7; Ins Code 1853.5, 12401.6;  
26



1 Govt Code 11410.30(c); Labor Code 1118, 1132.6, 1152; Penal Code 213(a)(1)(A), 264.1(a),  
2 287(d), 490.4(a)(1) and (2), and 538c(a.) A few statutes use the word “concerted” to mean  
3 “strenuous.” (E.g., Govt Code 16279.1, H&S 104875 and W&I 15400.) A few statutes are  
4 ambiguous and “concerted” could arguably mean either “collective” or “strenuous.” (Ed Code  
5 67433, H&S 104875 and Govt Code 1027.5, Govt Code 14998.1.) Looking to federal statutes,  
6 22 USCA 7101(b)(21) refers to “concerted and vigorous action”, suggesting that concerted  
7 action and vigorous action are distinct concepts.  
8

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

21 The court holds as a matter of statutory interpretation that in the context of CCP  
22 340.1(b)(2) the word “concerted” means “strenuous.” The text of CCP 340.1(b)(1) uses the  
23 phrase “a defendant,” suggesting that a single person can conduct a “cover up.” The text of the  
24 statute is the most persuasive tool of statutory construction. A few other statutes use the word  
25 “concerted” to mean “strenuous.” A dictionary definition of “concerted” is “strenuous.”  
26

1 Looking at the possibility that “concerted” might mean “collective,” the legislative history  
2 contains no mention or suggestion that collective action is required for a “cover up.” A  
3 requirement that a plaintiff prove collective action for a “cover up” would be significant  
4 requirement in the statute. The court will not infer the requirement of collective action without  
5 clearer legislature direction.  
6

7 Looking within the statutory definition of “cover-up” in CCP 340.1(b)(2), the court has  
8 considered the word “hide.” The common meaning of the word “hide” strongly suggests that the  
9 conduct be intentional. There is a distinction between losing or forgetting something and hiding  
10 that same thing. *People v. Irvin* (1968) 264 Cal.App.2d 747, 754-755, states “A search implies a  
11 prying into hidden places for that which is concealed and that the object searched for has been  
12 hidden or intentionally put out of the way; the mere looking at that which is open to view is not a  
13 search.” The definition of “hide” can also plausibly draw on the definition of “accessories” in  
14 Penal Code 32. “[T]he gist of the [section 32] offense is that the accused harbors, conceals or  
15 aids the principal with the requisite knowledge and intent.” (*People v. Partee* (2020) 8 Cal.5th  
16 860, 869.) Knowledge requires “Knowledge that the principal committed a felony or has been  
17 charged with the commission of one is an essential element of accessory liability.” (*People v.*  
18 *Moomey* (2011) 194 Cal.App.4<sup>th</sup> 850, 858.) Intent requires “intent that the principal avoid or  
19 escape from arrest, trial, conviction, or punishment.” (*People v. Partee* (2020) 8 Cal.5th 860,  
20 873.) Knowledge and intent are “separate and distinct from the requirement of overt or  
21 affirmative assistance.” (*Id.*) These collectively suggest that “hide evidence relating to  
22 childhood sexual assault” means “intentionally conceal, suppress, or destroy evidence relating to  
23 childhood sexual assault with knowledge of childhood sexual assault or of a credible accusation  
24 of childhood sexual assault.”  
25  
26

1 The result is the statutory definition of a “cover up” as “a concerted effort to hide  
2 evidence relating to childhood sexual assault” with “concerted effort” meaning “strenuous  
3 effort” and “hide evidence relating to childhood sexual assault” meaning “intentionally conceal,  
4 suppress, or destroy evidence relating to childhood sexual assault with knowledge of childhood  
5 sexual assault or of a credible accusation of childhood sexual assault.”  
6

7 In the Order of 2/24/21, the court asked the parties to address several issues regarding the  
8 further interpretation of CCP 340.1. The court tracks the issues in that order.  
9

10 ISSUE #1 - COVER-UP –DAMAGES ENHANCEMENT OR SEPARATE CLAIM?  
11

12 The court holds as a matter of statutory construction that under CCP 340.1(b) a “cover-  
13 up” is a prerequisite for an enhancement to the damages that can be awarded on an underlying  
14 claim. A “cover-up” is not a separate claim. The parties agree on this. (Pltf Supp Brief at 7;  
15 Def Supp Brief at 1; Pltf Supp Reply at 4.)  
16

17 Reading CCP 340.1(b) as an enhanced damages provision gives effect to the plain  
18 language of the statute. CCP 340.1(b)(1) starts with the phrase “In an action described in  
19 subdivision (a), ...” The plain language of the statute is that CCP 340.1(b) applies only if the  
20 case is already “action described in subdivision (a).” CCP 340.1(b)(1) then states that a plaintiff  
21 may recover up to treble damages against “a defendant.” The context of the sentence suggests  
22 that “a defendant” means a defendant in an “action described in subdivision (a).” Furthermore,  
23 the context suggests that “a defendant” must be a defendant who has been found to be liable on a  
24 CCP 340.1(a) claim for breach of “childhood sexual assault” statute, negligence, or an  
25 intentional tort. (CCP 340.1(a)(1), (2), or (3).) The plain language of the statute indicates that  
26

1 CCP 340.1(b) enhances or augments the damages that are awarded on a CCP 340.1(a) claim are  
2 that CCP 340.1(b) does not establish a separate and free-standing statutory claim for  
3 participating in a “cover-up.”

4 The concept of civil enhanced damages is well established in other California statutes.  
5 As relevant to the question of whether CCP 340.1(b) is a claim or enhanced damages, the statutes  
6 fall into two categories – those that enhance damages based on proof of some additional facts or  
7 elements and those that enhance damages based on nothing more than proof of the underlying  
8 liability. CCP 340.1(b) is in the first category and other statutes in the first category include:  
9

- 10 • Civil Code 3345. Act against senior citizens or disabled persons. Permits the award of  
11 up to treble damages if “the trier of fact makes an affirmative finding in regard to one or  
12 more of the following factors ...”
- 13 • Civil Code 3345.1. Commercial sexual exploitation of minor. Permits the award of up to  
14 treble damages if “the trier of fact makes an affirmative finding in regard to one or more  
15 of the following factors ...”
- 16 • Civil Code 3346. Injuries to timber. Permits treble damages for “wrongful injuries to  
17 timber, trees, or underwood upon the land of another, or removal thereof,” double  
18 damages “where the trespass was casual or involuntary,” and actual detriment damages  
19 “where the wood was taken by the authority of highway officers for the purpose of  
20 repairing a public highway.” (CCP 733 [also timber]; *Scholes v. Lambirth Trucking Co.*  
21 (2020) 8 Cal.5th 1094.)  
22  
23  
24  
25  
26

- 1 • Probate Code 859. Transfer of property belonging to conservatee, minor, or elder.  
2 Provides for double damages if court “finds that a person has in bad faith wrongfully  
3 taken, concealed, or disposed of property.”
- 4 • Welfare and Institutions Code 15657. Elder abuse. Lifts the MICRA cap on damages if  
5 there is clear and convincing evidence of recklessness, oppression, fraud, or malice in the  
6 commission of the abuse.  
7

8 Statutes in the second category that enhance damages based on nothing more than proof of the  
9 underlying liability include Bus & Prof 16750(a) [Combinations in Restraint of Trade]; Bus &  
10 Prof 17082 [Unfair Trade Practices]; Civil Code 1812.94 [contracts for health studio services];  
11 Civil Code 1812.123 [Contracts for Discount Buying Services]; Labor Code Section 970, 972  
12 [False representations that induce people to relocate for work].)

13  
14 Reading CCP 340.1(b) as an enhanced damages provision minimizes the retroactivity  
15 concern that the amendment “makes an action, done before the passing of the law, and which  
16 was innocent when done, [actionable] and punishes such action.” (*Roman Catholic Bishop of*  
17 *Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161.) If CCP 340.1(b) is enhanced  
18 damages, then proof of a previously existing common law claim is a precondition to potential  
19 eligibility for the treble damages. This avoids constitutional “difficulties” or “doubts.”  
20 (*Monster, LLC*, 12 Cal.App.5th at 1231.)  
21

## 22 23 ISSUE #2 - COVER-UP – BROADER THAN EXISTING COMMON LAW CLAIMS?

24  
25 The court holds as a matter of statutory construction that the definition of “cover-up” is in  
26 the nature of an intentional tort and is therefore within the scope of some common law claims

1 and is outside the scope of others. The parties disagree on this issue. Plaintiffs assert that  
2 “cover-up” is consistent with existing common law claims, including negligence. (Pltf Supp  
3 Brief at 8-9; Pltf Supp Reply at 5.) Defendants argues that “cover-up” creates new duties that  
4 did not exist at common law. (Def Supp Brief at 2.)

5  
6 CCP 340.1(b) permits a plaintiff to obtain enhanced damages based on proof of a “cover-  
7 up.” The court examines whether a “cover-up” is within the scope of any existing common law  
8 duty and, if so, which ones.

9 NEGLIGENCE - BREACH OF GENERAL DUTY. A “cover-up” is not within the  
10 scope of the common law general duty to not be negligent. The general duty to not be negligent  
11 does not impose a duty to report bad behavior or a suspected criminal activity to law  
12 enforcement, to an employer, or to any other organization. It is “well established that, as a  
13 general matter, there is no duty to act to protect others from the conduct of third parties.”  
14 (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) “[L]iability may not be imposed for  
15 mere nondisclosure or other failure to act, at least in the absence of some special relationship.”  
16 (*In Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1078.) (See also  
17 *Williams v. State of California* (1983) 34 Cal.3d 18, 23.) Nonfeasance generally does not give  
18 rise to a legal duty because "as a general matter, there is no duty to act to protect others from the  
19 conduct of third parties." (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531.) In addition, a  
20 “cover up” requires “a concerted effort to hide evidence,” which is the description of an  
21 intentional tort and not negligence. As plaintiff state, “The notion that one could engage in a  
22 ‘negligent’ cover up is simply unfounded and contrary to basic statutory construction.” (Pltf  
23 Supp Reply at 7:7-8.)  
24  
25  
26

1 NEGLIGENCE - BREACH OF DUTY TO PERSON WITH SPECIAL

2 RELATIONSHIP. A “cover-up” is not within the scope of any common law duty arising from a  
3 special relationship to care for another person. The existence of a special relationship can create  
4 a duty to act. Assuming such a duty, a “cover up” requires “a concerted effort to hide evidence,”  
5 which is the description of an intentional tort and not a mere failure to meet a duty arising from a  
6 special relationship.  
7

8 Mandated reporters have a statutory duty to report under the Child Abuse and Neglect  
9 Reporting Act (CANRA). (Pen. Code § 11164 et seq.) A person can have a duty to protect a  
10 specific individual when there is CANRA reporting obligation with that specific individual.  
11 Assuming such a duty, a “cover up” requires “a concerted effort to hide evidence,” which is the  
12 description of an intentional tort and not a mere failure to meet a reporting responsibility under  
13 CANRA.  
14

15 Assuming such a duty, a “cover-up” is not within the scope of any common law or  
16 statutory duty to protect every person who might be injured as a result of a failure to take  
17 reasonable action to prevent future sexual assaults. The duty arising from a special relationship  
18 extends only to the person in that special relationship. A special relationship does not extend to  
19 every person who might be injured as a result of a failure to report the sexual assault or take  
20 other action. In *P.S. v. San Bernardino City Unified School Dist.* (2009) 174 Cal.App.4th 953,  
21 965, the Court of Appeal interpreted CANRA and stated, “Necessarily, the child intended to be  
22 protected is the child about whom the reporting party is in a position to observe or to know  
23 anything regarding known or suspected abuse or neglect. For this reason, [*Randi W. v. Muroc*  
24 *Joint Unified School Dist.* (1997) 14 Cal.4th 1066] was not intended to extend an open-ended  
25 liability to all future children who might conceivably be harmed, even years later, for the failure  
26

1 to report suspected injury to one child within the knowledge and observation of the reporter.”  
2 *San Bernardino* concluded, “Quite simply, nothing in the amendment indicates any legislative  
3 intent whatsoever to extend a duty or to create liability to all future children who might be  
4 harmed by a suspected abuser.” (*San Bernardino*, 174 Cal.App.4th at 966.)

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

13  
14 FRAUDULENT MISREPRESENTATION. A “cover-up” is within the scope of the  
15 duty to not make intentional fraudulent misrepresentation. There is an existing common law  
16 duty to not make intentional fraudulent misrepresentations. (Civil Code 1709, 1710; *Borman v.*  
17 *Brown* (2021) 59 Cal.App.5th 1048, 1060-1061.) In *Randi W. v. Muroc Joint Unified School*  
18 *Dist.* (1997) 14 Cal.4th 1066, 1076-1077, the California Supreme Court addressed the potential  
19 liability of an employer for misrepresentations in the form of providing a letter of  
20 recommendation that failed to disclose information regarding charges or complaints of sexual  
21 misconduct. The court concluded, “the writer of a letter of recommendation owes to third  
22 persons a duty not to misrepresent the facts in describing the qualifications and character of a  
23 former employee, if making these misrepresentations would present a substantial, foreseeable  
24 risk of physical injury to the third persons.” (*Randi W.*, 14 Cal.4th at 1081.)  
25  
26



1           FRAUDULENT CONCEALMENT. A “cover-up” is within the scope of the duty to not  
2 make intentional fraudulent concealment. There is an existing common law duty to not engage  
3 in fraudulent concealment. That noted, “[a] fraud claim based upon the suppression or  
4 concealment of a material fact must involve a defendant who had a legal duty to disclose the  
5 fact.” (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1185-1186.) (See also  
6 Civ. Code, 1710(3) [a deceit includes “[t]he suppression of a fact, by one who is bound to  
7 disclose it ...”].)  
8

9           Concealment or nondisclosure may constitute fraud when the defendant is in a fiduciary  
10 or other special relationship with the plaintiff. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th  
11 276, 311.) (*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1076-1077,  
12 1078 [“[L]iability may not be imposed for mere nondisclosure or other failure to act, at least in  
13 the absence of some special relationship.”].) A “cover up”, however, requires “a concerted effort  
14 to hide evidence,” which is the description of an intentional tort and not a mere failure to meet a  
15 duty to disclose.  
16

17           Nondisclosure or concealment may also constitute fraud when the defendant is in a  
18 transactional relationship with the plaintiff. (*Bigler-Engler*, 7 Cal.App.5th at 311.) The  
19 transaction must be in the course of a relationship that gives rise to the duty, such as “seller and  
20 buyer, employer and prospective employee, doctor and patient, or parties entering into any kind  
21 of contractual arrangement.” (*Bigler-Engler*, 7 Cal.App.5th at 311-312.) (See also *Los Angeles*  
22 *Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 749-751 [non-fiduciary  
23 has duty to disclose when it is in transactional relationship]; (*Hoffman v. 162 North Wolfe LLC*  
24 (2014) 228 Cal.App.4th 1178, 1186-1193 [need for transactional relationship]; *Shin v. Kong*  
25 (2000) 80 Cal.App.4th 498, 509 [same].) A transaction that supports a duty to disclose “must  
26

1 necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise  
2 between the defendant and the public at large.” (*Bigler-Engler*, 7 Cal.App.5th at 311-312.)  
3 Assuming such a duty, a “cover up” requires “a concerted effort to hide evidence,” which is the  
4 description of an intentional tort and not a mere failure to meet a duty to disclose.

5  
6 SPOLIATION OF EVIDENCE. A “cover up” is not within the scope of a common law  
7 claim for spoliation because there is no common law claim for spoliation. “[T]he [California]  
8 Supreme Court declined to recognize intentional spoliation as a tort because it found the societal  
9 burdens associated with permitting tort remedies for intentional spoliation outweighed the  
10 benefits.” (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 459.)  
11 (See also *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464.) Similarly,  
12 “there is no tort remedy for first party or third-party negligent spoliation of evidence.” (*Coprich*  
13 *v. Superior Court* (2000) 80 Cal.App.4th 1081, 1089.) It is, however, a misdemeanor to  
14 willfully destroy, erase, or conceal evidence owned by another person if a person knows that the  
15 evidence is about to be produced in evidence for a trial, inquiry, or investigation authorized by  
16 law. (Penal Code 135.)  
17

#### 18 BROADER THAN EXISTING COMMON LAW CLAIMS - SUMMARY.

19 For purposes of CCP 340.1(b), a “cover up” is a concerted effort to hide evidence relating  
20 to childhood sexual assault. For the treble damages provision to apply in revived cases,  
21 however, a “cover-up” must be limited to preexisting common law claims. The court reads the  
22 statute to avoid constitutional “difficulties” or “doubts.” (*Monster, LLC*, 12 Cal.App.5th at  
23 1231.)  
24

25 The court holds as a matter of statutory interpretation that a “cover up” describes an  
26 intentional tort. A plaintiff must prove an intentional tort in the nature of intentional fraudulent

1 misrepresentation (to anyone) or intentional fraudulent concealment (where there is a duty to  
2 disclose, report, preserve, etc.) as a precondition to seeking cover up treble damages. A plaintiff  
3 that proves a CCP 340.1(a)(3) common law claim for an intentional tort that was the legal cause  
4 of the childhood sexual assault can also pursue “cover up” treble damages for that same  
5 intentional act. A plaintiff cannot prove a CCP 340.1(a)(3) common law claim for one  
6 intentional act and then pursue “cover up” treble damages for a different intentional act.  
7

8 A CCP 340.1(a)(1) common law claim against a perpetrator for childhood sexual assault  
9 would not be a “cover up” of that same sexual assault and thus could not support treble damages.  
10 (LH at 137; Def Supp Oppo at 3:19-24 [legislative history].) A CCP 340.1(a)(2) common law  
11 claim for a breach of a duty of care would not be a “cover up” because a negligent breach of duty  
12 or an unintentionally wrongful act is not “a concerted effort to hide evidence relating to  
13 childhood sexual assault.”  
14

15 This is relevant to the constitutional due process issue because the legislature can only  
16 revive claims that existed at common law. Claims for intentional fraudulent misrepresentation or  
17 intentional fraudulent concealment existed at common law. The legislature can plausibly create  
18 retroactive cover up enhanced damages if those damages are based on conduct that would have  
19 supported common law tort claims.  
20

21 Reading the CCP 340.1(b) definition of “cover up” as an intentional tort and requiring  
22 proof of an intentional tort as a precondition to seeking cover up treble damages based on that  
23 same tort minimizes the retroactivity concern that the amendment “makes an action, done before  
24 the passing of the law, and which was innocent when done, [actionable] and punishes such  
25 action.” (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155,  
26 1161.) If “cover up” is within the scope of existing intentional torts, then the “cover up”

1 enhancement is not making a defendant newly liable for actions that would not have subjected  
2 the defendant to liability when the defendant took the action. This avoids constitutional  
3 “difficulties” or “doubts.” (*Monster, LLC*, 12 Cal.App.5th at 1231.)

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

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

12  
13 Plaintiffs reasonably focused on interpreting CCP 340.1(b) to avoid concerns with  
14 retroactive application. Plaintiffs argued that CCP 340.1(b) permits a plaintiff to seek treble  
15 damages based on any violation of CCP 340.1(a)(1), (2), or (3), that would have supported  
16 punitive damages, which would permit the retroactive imposition of treble damages for acts that  
17 were done with “conscious disregard for the rights or safety of others” (Civil Code 3294(c)(1)),  
18 which would arguably be constitutional because a plaintiff could recover treble damages on the  
19 same fact patterns under which a plaintiff would previously have been able to recover punitive  
20 damages.

21  
22 The court sticks with its interpretation. The plain language of CCP 340.1(b)(1) is that  
23 liability under CCP 340.1(a) is a precondition for treble damages and the plain language of CCP  
24 340.1(b)(2) is that a “cover up” is an intentional tort. The combination of CCP 340.1(b)(1) and  
25 (b)(2) compels the conclusion that a plaintiff can recover treble damages only if the plaintiff can  
26 prove both an intentional tort generally and a “cover up” specifically. The overlap between

1 existing common law intentional torts and “cover up” are facts that support intentional fraudulent  
2 misrepresentation or intentional fraudulent concealment. If a plaintiff cannot prove one of those  
3 common law intentional torts, then the plaintiff by definition cannot prove a “cover up.” As  
4 noted above, a plaintiff cannot prove a CCP 340.1(a)(3) common law claim for one intentional  
5 act and then pursue “cover up” treble damages for a different intentional act. It would be absurd  
6 to permit a plaintiff to seek enhanced “cover up” treble damages based on a set of facts if the  
7 plaintiff could not prove an existing common law intentional tort based on the same set of facts.  
8 (*Taylor v. Department of Industrial Relations* (2016) 4 Cal.App.5<sup>th</sup> 801, 810 [“absurd results  
9 should be rejected” as they “are not supposed to have been contemplated by the legislature”].)  
10

11  
12 ISSUE #3 - COVER-UP - BURDEN OF PROOF  
13

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

17 CCP 340.1(b) does not address the burden of proof on the cover-up claim. CCP 340.1(e)  
18 states “This section shall not be construed to alter the otherwise applicable burden of proof, as  
19 defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this  
20 section.” Evidence Code section 115 states: “Except as otherwise provided by law, the burden of  
21 proof requires proof by a preponderance of the evidence.” Preponderance of the evidence is the  
22 standard “unless a heavier or lesser burden of proof is specifically required in a particular case by  
23 constitutional, statutory, or decisional law.” (*Masellis v. Law Office of Leslie F. Jensen* (2020) 50  
24 Cal.App.5<sup>th</sup> 1077, 1085-1086.) (See also *Baxter Healthcare Corp. v. Denton* (2004) 120  
25 Cal.App.4<sup>th</sup> 333, 368.)  
26

1           There is no Constitutional requirement that a plaintiff prove punitive or other non-  
2 compensatory damage by more than a preponderance of the evidence. (*Colombo v. BRP US Inc.*  
3 (2014) 230 Cal.App.4th 1442, 1456 [“punitive damages are allowable under federal maritime  
4 law and are awarded under a preponderance of the evidence standard of proof”].)

5  
6           The enhancement of damages does not convert the damages into punitive damages and  
7 trigger the use of the “clear and convincing evidence” standard of proof. A statute that provides  
8 for enhanced damages can use the preponderance of the evidence standard. A finding by a  
9 preponderance of the evidence can support an award of treble damages. (*Brocke v. Naseath*  
10 (1955) 134 Cal.App.2d 23, 25-26.) The Unfair Practices Act requires proof by a preponderance  
11 of the evidence but the plaintiff recovers treble damages. (*Bay Guardian Co. v. New Times*  
12 *Media LLC* (2010)187 Cal.App.4th 438, 466-467; Bus & Prof 17082.) The Cartwright Act  
13 requires proof by a preponderance of the evidence, but the plaintiff recovers treble damages.  
14 (*Quidel Corporation v. Superior Court of San Diego County* (2020) 57 Cal.App.5th 155.)

15  
16           Some case law, however, suggests that when a cause of action can lead to the imposition  
17 of treble damages then the claim requires proof by clear and convincing evidence. In *Siry*  
18 *Investment, L.P. v. Farkhondehpour* (2020) 45 Cal.App.5th 1098, 1136, recently held that a  
19 plaintiff in a civil suit could not leverage Penal Code 496 to get treble damages. The court  
20 stated, “Until now, a plaintiff seeking greater than compensatory damages had to prove, by clear  
21 and convincing evidence, that the defendant was “guilty of oppression, fraud, or malice.” (Civ.  
22 Code, § 3294, subd. (a).) If Penal Code section 496 applied to these torts, a plaintiff could obtain  
23 treble damages merely by proving the tort itself by a preponderance of the evidence.” (See also  
24 *Lacagnina v. Comprehend Systems, Inc.* (2018) 25 Cal.App.5th 955, fn 8 [Penal Code 496 did  
25 not apply to wage theft, and if it did, then plaintiffs arguably would need to prove the claim by  
26

1 more than a preponderance of the evidence].) The case law on Penal Code 496 and applicable  
2 burden of proof is distinguishable because it concerns the incorporation of a Penal Code penalty  
3 into civil law.

4  
5 The court holds as a matter of statutory construction that the preponderance of the  
6 evidence standard applies to proof of a CCP 340.1(b) cover-up. This is consistent with the  
7 Evidence Code 115 presumption regarding the burden of proof. The text of CCP 340.1(b) makes  
8 no mention of the clear and convincing standard, and the legislature knows how to specify the  
9 use of the standard for enhanced damages. (Welfare and Institutions Code 15657 [Elder abuse].)  
10 The legislative history of the amendments never mentions either the word “preponderance” or  
11 the phrase “clear and convincing.”

12  
13 Reading the CCP 340.1(b) as permitting a plaintiff to prove a cover-up and the up to  
14 treble damages by a preponderance of the evidence implicates the due process concern with a  
15 “law that alters the legal rules of evidence, and receives less, or different, testimony, than the law  
16 required at the time of the commission of the offence in order to convict the offender.” (*Roman*  
17 *Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1161.) The court  
18 has identified several non-California cases addressing retroactive changes in the burden of proof.  
19 (*Woodward v. Department of Justice* (Fed Cir., 2010) 598 F.3d 1311, 1315; *Streicher v. Prescott*  
20 (DC Cir., 1987) 663 F.Supp. 335, 340 fn 11; *People v. McRunels* (Ct App Mich, 1999) 237  
21 Mich.App. 168, 603 N.W.2d 95.) These cases also suggest that a retroactive change in the  
22 burden of proof raises constitutional due process questions.

23  
24 Consistent with the due process concerns, recent California case law holds that changes  
25 in the rules of evidence may trigger ex post facto concerns. (*John L. v. Superior Court* (2004) 33  
26 Cal.4th 158, 179; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936-937; *Strong v. Superior Court*

1 (2011) 198 Cal.App.4th 1076, 1083-1084; *People v. Treadway* (2008) 163 Cal.App.4th 689,  
2 698.) These California cases refer to and are consistent with United States Supreme Court case  
3 law. (*Stogner v. California* (2003) 539 U.S. 607, 612.) A single older California case states  
4 “changes in a statute regulating the burden of proof are to be applied as changes in procedure  
5 only.” (*Estate of Giordano* (1948) 85 Cal.App.2d 588, 592.)  
6

7 The court considered whether to interpret CCP 340.1(b) as requiring proof under the clear  
8 and convincing standard. This would minimize the constitutional concern because pre-  
9 enactment a defendant was liable for punitive damages under the clear and convincing. That  
10 would, however, require the court to ignore CCP 340.1(e) and case law that preponderance of the  
11 evidence is the standard “unless a heavier or lesser burden of proof is specifically required in a  
12 particular case by constitutional, statutory, or decisional law.” (*Masellis v. Law Office of Leslie*  
13 *F. Jensen* (2020) 50 Cal.App.5th 1077, 1085-1086.) The court will not rewrite the statute.  
14 (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73-74.) The court cannot  
15 interpret CCP 340.1(b) cover-up as having the clear and convincing standard for pre-enactment  
16 conduct and the preponderance of evidence standard for post-enactment conduct.  
17  
18

19 ISSUE #4 - COVER-UP – UP TO TREBLE DAMAGES  
20

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

24 CCP 340.1(b) creates the new remedy of treble damages. The legislature has the ability  
25 to enact legislation that includes up to treble damages.  
26



1            *ARA Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1564,  
2 sets out the methodology for evaluating retroactivity when the legislature has created a new  
3 remedy for a previously existing claim. ARA Living Centers states that the court should  
4 “consider whether the Legislature (1) has merely affected a change in the conduct of trials ... or  
5 (2) has changed the legal consequences of past conduct by imposing new or different liabilities  
6 based upon such conduct. ... If the latter is the case, [the court] must consider also whether the  
7 Legislature intended retroactive application and, if so, whether it could properly make it  
8 retroactive.”  
9

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

12            The court finds that the Legislature intended retroactive application. The structure of AB  
13 218 and the legislative history indicate that the legislature intended the amendments to be a  
14 package. The legislative history indicates that the legislature intended that when the three-year  
15 window for reviving lapsed claims opened up that the treble damages provision would apply to  
16 those claims. Legislative documents state “The bill also exposes those who cover up the sexual  
17 abuse of children to additional punishment” (LH p 57, 657.) A statement by the bill sponsor  
18 states “AB 218 will [expand the statute of limitation] while increasing the amount of damages.”  
19 (LH 111.) A legislative bill analysis states AB218 “Subjects all [employers] to potentially  
20 decades-old claims, and authorizes a court to award treble damages. (LH 112.) (See also 117  
21 [cover up damages needed “both to compensate victims” and as “an effective deterrent]; 122  
22 [similar].)  
23  
24

25            Legislative documents show that the legislature knew that others understood the treble  
26 damages provision applied retroactively. (LH at 56-57 [noting “particular objection to the

1 application of treble damages retroactively”]; 138-139 [“the coalition specifically urges the  
2 removal of the treble damages provisions” that concern “claims that are decades old”].) Letters  
3 by opponents of the bill state the concerns that were transmitted to the legislature. (LH 70-71;  
4 99; 106; Pltf filing on 4/5/21, Exhs 20, 21, 22.) Letters by supporters of the bill suggest that they  
5 also understood the treble damages provision would applied retroactively. Those letters state  
6 that current law did not “provide an effective deterrent or enough remedy and that AB 218 would  
7 “increase[e] the amount of damages a victim may recover” (LH 80). (See also LH 83 [current  
8 law did not “provide an effective deterrent or sufficient remedy”].)  
9

10 The legislative history contrasts this case with *ARA Living Centers*, 18 Cal.App.4th at  
11 1564, where the Court of Appeal stated:

12 We strongly suspect that, if asked a question about retroactive application, the  
13 Legislature would have said the change should apply to past abuse. However, we  
14 also suspect the Legislature never considered whether to make the amendment  
15 retroactive. We find no clear indication of retroactive intent. The Legislature  
16 pointed out that few civil actions were being brought in connection with elder  
17 abuse due in part to lack of incentives. It then provided some incentives.  
18 However, it said nothing to indicate an intent both to improve incentives for  
19 bringing actions based on future abuse and to vindicate past abuse. In light of this  
20 silence, the presumption of prospective intent prevails.  
21

22  
23 Whereas in *ARA Living Centers*, 18 Cal.App.4th at 1564-1565, the legislature “said nothing to  
24 indicate an intent ... to improve incentives for bringing actions ... to vindicate past abuse,” the  
25 legislative history of CP 340.1 strongly suggests legislative intent to encourage actions to  
26 vindicate past abuse.

1           The legislative intent is very significant. (Compare *Sanders v. Allison Engine Co., Inc.*  
2 (6<sup>th</sup> Cir. 2012) 703 F.3d 930, 949 [retroactive application of treble damages constitutional where  
3 clear legislative intent] with *Resolution Trust Corp. v. S & K Chevrolet* (C.D. IL., 1994) 868  
4 F.Supp. 1047, 1063-1064 [retroactive application of treble damages not constitutional where no  
5 clear legislative intent].)

6  
7           The legislative intent is a fact question and record could support different inferences.  
8 The text of CCP 340.1 does not expressly state that the treble damages provision has retroactive  
9 application. The AB 218 amendments are part of a package but exist independent of each other.  
10 The legislative history consistently lists the three topics in separate bullet points or paragraphs.  
11 The court has considered the text of the statute and the legislative history. The court concludes  
12 that the legislature intended to have CCP 340.1 apply to revived cases and to actions before  
13 enactment. The legislative history compensates for the lack of an express statement in in the  
14 statute itself.

15  
16           The legislature “could properly make [cover up treble damages] retroactive.” The  
17 application of treble damages to revived cases implicates the due process concern with “Every  
18 law that changes the punishment, and inflicts a greater punishment, than the law annexed to the  
19 crime, when committed.” (*Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128  
20 Cal.App.4th 1155, 1161.) Viewed in isolation, the retroactive creation of a new treble damages  
21 remedy is problematic, but arguably permissible given the legislative intent. Viewed in the  
22 context of CCP 340.1(b) as interpreted by the court, the new treble damages remedy is consistent  
23 with due process and ex post facto analysis because it is in the alternative to the existing  
24 common law punitive damages remedy.  
25  
26

1 ISSUE #5 - COVER-UP – WHAT IS TREBLED

2 The court holds as a matter of statutory construction that under CCP 340.1(b) that the  
3 trebling is based on the damages suffered as a result of the “cover-up.” Both parties disagree  
4 with the court on this. (Pltf Supp Brief at 16-17; Def Supp Brief at 4-6; Pltf Supp Reply Brief at  
5 6-7.) As noted above, the court is responsible for statutory construction without regard to the  
6 agreement of the parties.  
7

8 CCP 340.1(b) does not address whether the CCP 340.1(b) “up to treble damages” is  
9 treble the damages on the underlying claim or is treble the damages suffered as a result of the  
10 “cover-up.” The statute could be read either way.  
11

12 CCP 340.1(b) could permit treble damages based on the damages on the underlying  
13 claim. Subsection (b) starts with the phrase “In an action described in subdivision (a)” and then  
14 states that a plaintiff may recover up to treble damages against “a defendant.” The context  
15 suggests that “a defendant” means a defendant who has been found to be liable on a claim  
16 described in a CCP 340.1(a) claim. This in turn suggest that the damages that can be trebled is  
17 the damages awarded on any underlying claim.  
18

19 CCP 340.1(b) could alternatively permit treble damages based solely on the damages  
20 suffered as a result of the “cover-up.” Subdivision (b) states that plaintiff must prove that they  
21 were sexually assaulted “as the result of a cover up” before they can “recover up to treble  
22 damages.” The “as a result of” language suggests that the legislature intended a causal  
23 relationship between the cover-up and the treble damages. This suggests that the damages that  
24 can be trebled is only the damages suffered as a result of the “cover-up.”  
25  
26

1 The court interprets CCP 340.1(b) as meaning that the treble damages are based solely on  
2 the damages suffered as a result of the “cover-up.” This is consistent with the statutory text and  
3 appears to reflect the intent of the legislature. It ensures that a defendant that engaged in a cover  
4 up is assessed treble damages related to the cover up and is not assessed treble damages related  
5 to the actions of the perpetrator, the actions of some other person or entity, or actions of the  
6 defendant unrelated to the cover up.  
7

8 This interpretation of CCP 340.1(b) will require that any verdict form require the jury to  
9 define what damages are the result of the intentional tort that is the precondition to the possibility  
10 of treble damages and also define the damages suffered as a result of the “cover-up.” Both  
11 plaintiffs and defendants argue in their supplemental opening briefs that this would be  
12 impossibly confusing for a jury. (Pltf Supp Brief at 17:20-24; Def Supp Brief at 5:24-28.)  
13

14 Plaintiffs’ supplemental reply brief then points out that Civil Code 1431.2 already  
15 requires a jury to apportion non-economic damages among joint tortfeasors based on principles  
16 of comparative fault for claims accruing after 6/6/86. Plaintiffs’ supplemental reply also points  
17 out that in *B.B. v. County of Los Angeles* (2020) 10 Cal.5<sup>th</sup> 1, 23, the California Supreme Court  
18 states “stated: “in *all* cases in which a negligent actor and one or more others jointly caused the  
19 plaintiff’s injury, the jury should be instructed that, assuming 100 percent represents the total  
20 causes of the plaintiff’s injury, liability must be apportioned to each actor who caused the harm in  
21 direct proportion to *such actor’s respective fault*, whether each acted intentionally or negligently  
22 or was strictly liable [citations], and whether or not each actor is a defendant in the lawsuit ....”  
23 *B.B.*, 10 Cal.5<sup>th</sup> at 24, 29, also holds that Civil Code 1431.2 does not authorize a reduction in  
24 liability of intentional tortfeasors for noneconomic damages based on the negligence of other  
25 actors. Existing California law already requires a jury to allocate liability to a defendant and to  
26

1 state what allocation is the result of an intentional tort. A jury can also be asked to state whether  
2 those intentional torts also meet the statutory definition of cover up and then to determine the  
3 amount of any up to treble damages based on those intentional torts.<sup>1</sup>

4  
5 At the hearing on 4/28/21, defendants expressed concern that even if Civil Code 1431.2  
6 does permit apportionment of damages a defendant might still have joint and several liability for  
7 treble damage based on participation in a civil conspiracy to commit an intentional tort.  
8 (*Kesmodal v. Rand* (2004) 119 Cal.App.4<sup>th</sup> 1128, 1142-1145.) The court is not troubled by that  
9 result. Under existing common law, all parties to a civil conspiracy to commit tortious acts must  
10 have a duty to the plaintiff. (*Chavers v. Gatke Corp.* (2003) 107 Cal.App.4<sup>th</sup> 606, 614.) Under  
11 existing common law, if a plaintiff proves a conspiracy to commit an intentional tort, then all  
12 defendants in a conspiracy are liable for all damages caused as a result of the conspiracy.  
13 (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4<sup>th</sup> 503, 511.) The  
14 interpretation of “concerted” to mean “strenuous” rather than “collective” does not preclude a  
15 plaintiff from asserting that several defendants participated in a conspiracy to engage in an  
16 intentional tort. The damages caused by the conspiracy and intentional tort can presumably be  
17 enhanced for all coconspirators if the plaintiff proves a conspiracy to “cover up.”

18  
19 This interpretation regarding what damages are trebled is not directly related to the  
20 constitutional issues of retroactive application of CCP 340.1(b), but it is a necessary step before  
21 addressing the relationship between CCP 340.1(b) treble damages and Civil Code 3294 punitive  
22 damages.

23  
24  
25 <sup>1</sup> The court does not decide how the limitation of Civil Code 1431.2 to claims accruing  
26 after 6/6/86 might affect the constitutionality of the retroactive application of CCP 340.1(b). A  
plaintiff could presumably stipulate to the application of Civil Code 1431.2 to claims accruing  
before 6/6/86 to avoid the constitutional issue.

1 ///

2 ///

3  
4 ISSUE #6 - COVER UP – ARE TREBLE DAMAGES MULTIPLICATIVE OF, IN ADDITION  
5 TO, IN THE ALTERNATIVE TO, OR INSTEAD OF PUNITIVE DAMAGES

6 The court holds as a matter of statutory construction that an award of treble damages  
7 under CCP 340.1(b) is in the alternative to punitive damages. Plaintiff agrees with this. (Pltf  
8 Supp Brief at 20:15-17.) Defendants argue that the legislature intended the treble damages to be  
9 in addition to punitive damages, and defendants then argue that this interpretation has the effect  
10 of making the statute unconstitutional. (Def Supp Brief at 8-10.)

11  
12 CCP 340.1(b) does not address whether the CCP 340.1(b) “up to treble damages” is  
13 multiplicative of, in addition to, in the alternative to, or instead of Civil Code 3294 punitive  
14 damages.

15 Cover-up treble damages are arguably multiplicative of punitive damages. The plain  
16 language of CCP 340.1(b) is that a plaintiff “may recover up to treble damages against a  
17 defendant who is found to have covered up the sexual assault of a minor.” The word “damages”  
18 includes both compensatory and punitive damages, so arguably the jury could award  
19 compensatory and punitive damages and then treble that combined damage award. The court  
20 found no California appellate law on that issue. A federal trial judge held that the trebling of  
21 punitive damages would be constitutional. (*Hood v. Hartford Life and Acc. Ins. Co.* (E.D. Cal.  
22 2008) 567 F.Supp.2d 1221, 1226-1227.) Under this scenario, a jury could award compensatory  
23 damages of \$300,000, punitive damages of \$200,000, and then CCP 340.1 could treble the total  
24 of \$500,000 to reach a judgment of \$1,500,000.  
25  
26

1 Cover-up treble damages are arguably in addition to punitive damages. A court can  
2 award both enhanced statutory damages and punitive damages if they serve different “social  
3 objectives. (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 418-419.) In *Greenberg v. Western*  
4 *Turf Assn.* (1903) 140 Cal. 357, 73 P. 1050, the Supreme Court authorized both punitive  
5 damages, under Civil Code section 3294, and a statutory penalty of \$100 in addition to actual  
6 damages. (See also *Hill v. Superior Court* (2016) 244 Cal.App.4th 1281 [double damages under  
7 Probate Code 858 are not punitive damages].) Under this scenario, a jury could award  
8 compensatory damages of \$300,000, punitive damages of \$200,000, and then CCP 340.1 could  
9 treble the compensatory damages of \$300,000 to reach a judgment of \$1,100,000.  
10

11 Cover-up treble damages are arguably in the alternative to punitive damages. “If the  
12 purpose of the [treble damages] is the same as that of punitive damages, ..., the plaintiff cannot  
13 obtain a double recovery and must elect to have judgment entered in an amount which reflects  
14 either the statutory trebling or the compensatory and punitive damages.” (*Turnbull & Turnbull v.*  
15 *ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826.) (See also *Marshall v. Brown* (1983)  
16 141 Cal.App.3d 408, 418-419.) The legislative history indicates that “cover-up” treble damages  
17 was designed to be “an effective deterrent against individuals and entities who have chosen to  
18 protect the perpetrators of sexual assault over the victims.” (DEF RJN, Assembly Report  
19 3/12/19, page 4.) This serves the same social purpose as a punitive damages award against a  
20 person who made material misstatements or who intentionally hid material information when  
21 they had a duty to disclose the information. Under this scenario, a jury could award  
22 compensatory damages of \$300,000, punitive damages of \$200,000, and then the plaintiff would  
23 elect between the treble damages total judgment of \$900,000 or the punitive damages total  
24 judgment of \$500,000.  
25  
26



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

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

19 The court discards “instead of” because the actions that comprise a cover up were an  
20 intentional tort at common law. This is not a situation where the legislature created a new cause  
21 of action with a new and adequate remedy. Assuming that cover-up were a new statutory claim  
22 with a new remedy, then treble damages would be an adequate remedy. Although punitive  
23 damages can be awarded at ratios greater than 2-1 (which is the same as treble damages),  
24 California law has noted Supreme Court authority that “ratios of 3 or 4 to 1 were ‘instructive’ as  
25  
26

1 to the due process norm.” (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159,  
2 1181-1182.)

3 The court holds that cover-up treble damages are in the alternative to punitive damages.  
4 This is consistent with the law that “where a statutory remedy is provided for a preexisting  
5 common law right, the newer remedy is generally considered to be cumulative, and the older  
6 remedy may be pursued at the plaintiff’s election.” (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 70.)

7 This is consistent with most of the case law on situations where a plaintiff can recover both  
8 punitive damages and some other statutory enhanced damages. (Def Supp Brief at 7; *Turnbull &*  
9 *Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826; *Marshall v. Brown*  
10 (1983) 141 Cal.App.3d 408, 418-419.) A jury can award both cover-up treble damages based on  
11 a preponderance of the evidence and punitive damages based on clear and convincing evidence  
12 and the plaintiff must then elect their remedy. This has the benefit of following an established  
13 procedural roadmap and being “workable and reasonable in practice.” (*Allende v. Department of*  
14 *Cal. Highway Patrol* (2011) 201 Cal.App.4th 1006, 1018.)

15  
16  
17 The interpretation of CCP 340.1(b) treble damages as being in the alternative to punitive  
18 damages avoids constitutional “difficulties” or “doubts.” (*Monster*, 12 Cal.App.5th at 1231.)  
19 Furthermore, it avoids those “difficulties” or “doubts” whether the statute is applied to revived  
20 cases or prospectively.

21  
22  
23 COVER UP – SUMMARY OF INTERPRETATION AND CONSTITUTIONALITY

24 The court interprets CCP 340.1(b) as follows: (1) a “cover-up” is a requirement for  
25 enhanced damages; (2) a plaintiff must prove an intentional tort in the nature of intentional  
26

1 fraudulent misrepresentation or intentional fraudulent concealment as a precondition to seeking  
2 “cover up” enhanced damages; (3) proof of a “cover-up” permits the award of “up to treble  
3 damages”; (4) a plaintiff must prove a “cover up” by a preponderance of the evidence; (5) the  
4 treble damages apply only to the damages that the plaintiff suffered as a result of the “cover-up”;  
5 and (6) the treble damages are in the alternative to the punitive damages based on the relevant  
6 intentional tort.

7  
8 This interpretation gives effect to the plain language of CCP 340.1(b) and is consistent  
9 with the legislative intent gleaned from the legislative history. The court can say with  
10 confidence that (i) this interpretation closely effectuates policy judgments clearly articulated by  
11 the legislature, and (ii) the legislature would have preferred this statutory construction to  
12 invalidation of the statute or limiting the statute to prospective operation. (*Legislature v. Padilla*  
13 (2020) 9 Cal.5<sup>th</sup> 867, 875-876; *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4<sup>th</sup> 607, 661.)

14  
15 Addressing retroactivity specifically, the court tracks the due process and ex post facto  
16 concerns identified in *Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128  
17 Cal.App.4th 1155, 1161.

18 Retroactive application of CCP 340.1(b) does not “make[] an action, done before the  
19 passing of the law, and which was innocent when done, criminal; and punish[] such action.” The  
20 CCP 340.1(b) “cover up” is an intentional tort in the nature of intentional fraudulent  
21 misrepresentation or intentional fraudulent concealment and the defendant was liable for those  
22 intentional torts when it did the action. A “cover up” is within the scope of and encompassed by  
23 the existing intentional torts, but “cover up” has narrower and more clearly defined elements.  
24 The statute does not create the possibility of liability for actions that were previously blameless.  
25  
26

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

3 Retroactive application of CCP 340.1(b) is a “law that changes the punishment, and  
4 inflicts a greater punishment, than the law annexed to the crime, when committed.” This is the  
5 retroactive creation of treble damages and is a concern.  
6

7 Retroactive application of CCP 340.1(b) is a “law that alters the legal rules of evidence,  
8 and receives less, or different, testimony, than the law required at the time of the commission of  
9 the offence in order to convict the offender.” This is the retroactive application of the  
10 preponderance of evidence standard to enhanced damages that previously required proof by clear  
11 and convincing evidence and is a concern.  
12

13 The court concludes that CCP 340.1(b) can be applied retroactively despite the concerns  
14 about newly created and retroactive treble damages and the award of those damages based on  
15 proof by a preponderance of the evidence. Most importantly, the legislative history shows the  
16 legislature understood AB 218 would expand the statute of limitation “while increasing the  
17 amount of damages” (LH 111), that it would “Subject[] all [employers] to potentially decades-  
18 old claims, and authorize[] a court to award treble damages (LH 112), and that cover up  
19 damages served the dual purpose of compensating victims (retroactive) and as an effective  
20 deterrent (prospective) (LH 117, 122.) This legislative history strongly suggests that the  
21 legislature intended that the treble damage provision would be applied retroactively. The  
22 legislature was certainly informed that opponents understood that it would be applied  
23 retroactively. (LH at 56-57 and 138-139.)  
24

25 In addition, the legislature indicated that there were “important state interests” in  
26 compensating the victims of childhood sexual abuse, punishing persons and entities who has

1 covered up childhood sexual abuse, and deterring future cover ups of childhood sexual abuse.  
2 (*Calleros v. Rural Metro of San Diego, Inc.* (2020) 58 Cal.App.5th 660, 668; *Abernathy Valley,*  
3 *Inc. v. County of Solano* (2009) 173 Cal.App.4th 42, 55.)

4           The court has also considered, “the extent of reliance upon the former law, the legitimacy  
5 of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which  
6 the retroactive application of the new law would disrupt those actions.” (*Calleros*, 58  
7 Cal.App.5<sup>th</sup> at 668.) The legislative history’s statements that the prior law was not adequate to  
8 deter cover ups and that that the new law should change behavior suggest that some persons or  
9 entities (not necessarily defendants in this case) might have relied on the lack of a sufficient  
10 deterrent when in the past they decided to cover up childhood sexual abuse. There is, however,  
11 no legitimacy to any such reliance. The law would not give effect to an argument that a person  
12 or entity legitimately relied to their detriment on the lack of an adequate deterrent when they  
13 engaged in intentional torts.  
14

15  
16           Central to the finding of constitutional retroactivity is the interpretation that “cover up” is  
17 an intentional tort, that “cover up” is encompassed in existing intentional torts, that a plaintiff  
18 must prove a relevant common law intentional tort related to the cover up as a precondition to  
19 seeking cover up treble damages, that the treble damages are based solely on the damages  
20 suffered as a result of the “cover up”, and that the treble damages are in the alternative to  
21 punitive damages. If any of part of that interpretation changes, then retroactive application of  
22 CCP 340.1(b) starts looking unconstitutional because of the combination of the retroactive  
23 creation of new duties and liabilities, the retroactive change in the burden of proof, the  
24 retroactive creation of the treble enhanced damages, the trebling of damages based on underlying  
25  
26

1 damages that are unrelated to the cover up, and the cumulative imposition of treble and punitive  
2 damages for the same cover up actions.

3  
4  
5 SEVERABILITY OF PROVISIONS

6 The court does not need to reach the issue of severability because (as the court has  
7 interpreted the statute) CCP 340.1(b) can be constitutionally applied to revived cases and to  
8 claims arising before the enactment of the statute. The court sets out its severability analysis in  
9 the event plaintiffs or defendant seek appellate review and the Court of Appeal determines that it  
10 is unconstitutional to apply CCP 340.1(b) retroactively.

11  
12 The severability analysis concerns only whether the retroactive application of the CCP  
13 340.1(b) treble damages provision can be severed from the remainder of the amendments. The  
14 severability analysis does not concern the prospective application of the CCP 340.1(b) treble  
15 damages provision. The severability analysis is focused on the retroactive application of the  
16 treble damages provision in the context of the AB 218 amendments rather than in the context of  
17 CCP 340.1 as a whole or the CCP 312 et seq statutes of limitation as a whole.

18  
19 The severability analysis is well established. (*Borikas v. Alameda Unified School Dist.*  
20 (2013) 214 Cal.App.4th 135, 165-168.)

21 The court starts with express legislative intent. There is no severability clause in AB 218  
22 so there is no specific presumption that the AB 218 amendments are severable. (*Borikas*, 214  
23 Cal.App.4th at 165.) There is, however, an implicit presumption in favor of severability based  
24 on “the general presumption in favor of statutes’ constitutionality.” (*Lopez v. Sony Electronics,*  
25 *Inc.* (2018) 5 Cal.5th 627, 639 fn 7.)  
26

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

4 To be grammatically separable, the valid and invalid parts of the statute can be separated  
5 by paragraph, sentence, clause, phrase, or even single words. (*Abbott Laboratories v. Franchise*  
6 *Tax Bd.* (2009) 175 Cal.App.4th 1346, 1358.) CCP 340.1(b) is its own subsection and is  
7 “grammatically separable” from the remaining portions of the statute.  
8

9 To be functionally separable, the remainder after separation of the invalid part must be  
10 “complete in itself” and “capable of independent application.” (*Abbott*, 175 Cal.App.4<sup>th</sup> at 1358.)  
11 If retroactive application of CCP 340.1(b) were unconstitutional, then it would not affect the  
12 application of CCP 340.1(a), (q) and (r) and it would not affect the prospective application of  
13 CCP 340.1(b). A finding that CCP 340.1(b) was unconstitutional as applied retroactively would  
14 simply mean that a plaintiff seeking treble damages would need to prove that the defendant did  
15 the “cover up” after the effective date of the statute.  
16

17 To be volitionally separable, “[t]he final determination depends on whether ‘the  
18 remainder ... is complete in itself and would have been adopted by the legislative body had the  
19 latter foreseen the partial invalidation of the statute’ ... or ‘constitutes a completely operative  
20 expression of the legislative intent[.]’ ” (*Abbott*, 175 Cal.App.4<sup>th</sup> at 1358.) The legislative  
21 history of AB 218 consistently lists the three topics in separate, but sequential, bullet points or  
22 paragraphs. The legislature has repeatedly revised CCP 340.1 and reopened the statute of  
23 limitations to permit persons to bring previously time barred claims under CCP 340.1 without  
24 having a related integrated provision for increased damages. These strongly suggest that the  
25 legislature expected that the CCP 340.1(a), (q), and (r) provisions to revise and reopen the statute  
26

1 of limitations could operate separately from the 340.1(b) provision for treble damages. In  
2 addition, the legislature’s prior amendment of CCP 340.1(b) in 2002 (SB 1779 to re-open the  
3 statute of limitation suggest that the legislature thought that reopening the statute of limitations  
4 was a statutory change that can stand on its own.

5  
6 At the hearing on 4/28/21, defendants argued that the treble damages are inseparable  
7 because they are the “teeth” or “life force” of AB 218. Defendants argue that he legislature  
8 determined that simply amending and reopening the statute of limitations was insufficient to  
9 address the legislative concern. Defendants referred to the statements at a hearing by Senator  
10 Hananh-Beth Jackson where she described AB 218 as “pretty draconian” and stated “the  
11 egregiousness of these acts really, In think, does warrant special treatment under the law” and I  
12 think we need to make a statement here.” (Def RJN filed 1/8/21, Exh K at p 12, 14.)  
13 Defendants also cited to statements by Assemblywoman Lorena Gonzalez at a hearing that “But  
14 until you make people hurt, this behavior doesn’t stop and we’ve seen that” and “that’s why it’s  
15 appropriate to give treble damages to the coverup, and that’s why it’s important that we actually  
16 make institutions face the consequences of their past behavior so that we are never in this  
17 position again,” (Def RJN filed 1/8/21, Exh L at p 15, 16-17.) These are the statements of  
18 individual legislators rather than statements by legislative committees or by the legislature as a  
19 whole. They are of minimal relevance regarding legislative intent. (*People v. Uber*  
20 *Technologies, Inc.* (2020) 56 Cal.App.5<sup>th</sup> 266, 297 fn 18.)

21  
22 The court holds that any unconstitutional retroactive application of the CCP 340.1(b)  
23 treble damages provision would be severable from the constitutional prospective application of  
24 CCP 340.1(b) as well as from CCP 340.1(q) and (r).  
25  
26



1 SUITABILITY FOR REVIEW

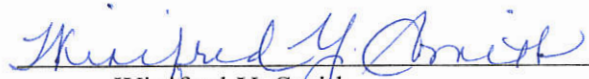
2 This order is suitable for interlocutory review regarding the interpretation of CCP 340(b)  
3 and whether as interpreted it can be applied retroactively consistent with constitutional due  
4 process. These are controlling questions of law as to which there are substantial grounds for  
5 difference of opinion, appellate resolution of which may materially advance the conclusion of all  
6 case in this coordinated proceeding as well as in both *Southern California Clergy Cases*, JCCP  
7 5101, and *Diocese of San Diego Cases*, JCCP 5105. (CCP 166.1; *Crestwood Behavioral Health,*  
8 *Inc. v. Superior Court* (2021) 60 Cal.App.5<sup>th</sup> 1069, 1074, fn 2.)

9 The interpretation and constitutionality of CCP 340(a), (q), and (r) do not raise issues as  
10 to which there is substantial grounds for difference of opinion.  
11

12  
13  
14 OTHER ISSUES

15 The Order of 2/24/21 identified several issues that the court looked at in the course of  
16 considering the interpretation of CCP 340.1(b), (q), and (r). The issues were not directly relevant  
17 to the issues presented on this motion. The court issues no orders on those other issues.  
18

19  
20 Dated: April 29, 2021

21   
22 Winfred Y. Smith  
23 Judge of the Superior Court  
24  
25  
26