No. S250734

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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Deputy

B.B., a Minor, etc., et al., *Plaintiffs, Respondents, and Petitioners,*
v.
COUNTY OF LOS ANGELES et al., *Defendants and Appellants.*

T.E., a Minor, etc., et al., *Plaintiffs, Respondents, and Petitioners,*
v.
COUNTY OF LOS ANGELES et al., *Defendants and Appellants.*

D.B., a Minor, etc., et al., *Plaintiffs, Respondents, and Petitioners,*
v.
COUNTY OF LOS ANGELES et al., *Defendants and Appellants.*

AFTER DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B264946

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES
THE HONORABLE ROSS M. KLEIN
CIVIL CASE NO. TC027341, COMBINED WITH BC505918 & TC027438

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TABLE OF CONTENTS

Page

ISSUE PRESENTED 10

INTRODUCTION 10

STATEMENT OF THE CASE 11

I. FACTUAL BACKGROUND 11

II. PROCEDURAL BACKGROUND 13

SUMMARY OF THE ARGUMENT 14

ARGUMENT 17

I. THE TEXT OF SECTION 1431.2 APPLIES APPORTIONMENT TO EVERY DEFENDANT WITHOUT EXCEPTION. 17

a. The Statutory Text Is Unambiguous and Exception-Free. 17

1. Section 1431.2, Subdivision (a) Explicitly Applies to *All* Defendants. 17

2. Section 1431.1, Which Declares the Purpose of Proposition 51, Supports a Plain Reading. 19

b. The Court and Lower Courts Have Recognized That Section 1431.2 Is Unambiguous and Exception-Free. 21

c. The Ballot Materials for Proposition 51 Also Establish That Intentional Tortfeasors Are Covered by Section 1431.2. 24

II. THE "COMPARATIVE FAULT" CLAUSE SUPPLIES ONLY THE MANNER FOR CALCULATING LIABILITY PERCENTAGES. 26

a. The Nearest-Reasonable-Referent Canon Applies to Section 1431.2, Subdivision (a). 26

b. Plaintiffs' Proposed Interpretation of the "Comparative Fault" Clause Is Unreasonable. 29

III. THE COMPARATIVE FAULT DOCTRINE DOES NOT EXCLUDE INTENTIONAL TORTFEASORS, AND SECTION 1431.2 DEMONSTRATES NO INTENT TO DO SO. 31

TABLE OF CONTENTS
(continued)

Page

a. The Comparative Fault Doctrine Never Excluded Intentional Tortfeasors. 32

b. The Court Cannot Incorporate into Section 1431.2 a Common-Law Meaning for "Comparative Fault" That Did Not Exist in 1986. 34

c. Plaintiffs Overstate the Development of Comparative Fault and Rely on Inapplicable Doctrines. 36

1. None of Plaintiffs' Cited Authority Establishes That Intentional Tortfeasors Were Excluded From Comparative Fault. 36

2. Contribution and Indemnity Doctrines Cannot Alter the Plain Text of Section 1431.2. 38

IV. PUBLIC POLICY AND FAIRNESS DICTATE THAT SECTION 1431.2 APPLY TO INTENTIONAL TORTFEASORS IN WRONGFUL DEATH ACTIONS. 41

a. Applying Section 1431.2 to Intentional Tortfeasors in Wrongful Death Actions is Sound Public Policy. 42

b. Holding Deputy Aviles Responsible for Only His Proportionate Share of the Fault Fulfills Section 1431.2's Purpose of Fairness. 43

V. SECTION 1431.2 APPLIES TO A WRONGFUL DEATH ACTION BASED ON POLICE BATTERY. 46

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

Cases

Action NC v. Strach
(M.D.N.C. 2016) 216 F.Supp.3d 597 18

Alan v. American Honda Motor Co.
(2007) 40 Cal.4th 894 27

Allen v. Sundean
(1982) 137 Cal.App.3d 216 33

American Motorcycle Association v. Superior Court
(1978) 20 Cal.3d 578 .... 32, 40, 41

Arena v. Owens-Corning Fiberglas Corp.
(1998) 63 Cal.App.4th 1178 23

Atkins v. Strayhorn
(1990) 223 Cal.App.3d 1380 44

Aydin Corp. v. First State Insurance Co.
(1998) 18 Cal.4th 1183 27

B.B. v. County of Los Angeles
(2018) 25 Cal.App.5th 115 .... *passim*

Baird v. Jones
(1993) 21 Cal.App.4th 684 .... 37, 39

Bourhis v. Lord
(2013) 56 Cal.4th 320 .... 21, 22

Buckley v. Chadwick
(1955) 45 Cal.2d 183 45

In re C.B.
(2018) 6 Cal.5th 118 17

California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.
(1997) 14 Cal.4th 627 .... 31, 43

TABLE OF AUTHORITIES
(continued)

Page(s)

Carter v. United States
(2000) 530 U.S. 255 .... 34, 35

Cassel v. Superior Court
(2011) 51 Cal.4th 113 42

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone. Co.
(1999) 20 Cal.4th 163 42

City & County of San Francisco v. Farrell
(1982) 32 Cal.3d 47 30

Community for Creative Non-Violence v. Reid
(1989) 490 U.S. 730 34

DaFonte v. Up-Right, Inc.
(1992) 2 Cal.4th 593 .... *passim*

Daly v. General Motors Corp.
(1978) 20 Cal.3d 725 33

Davis v. Fresno Unified School Dist.
(2015) 237 Cal.App.4th 261 27

Dickenson-Russell Coal Co., LLC v. Sect. of Labor
(4th Cir. 2014) 747 F.3d 251 18

Evangelatos v. Superior Court
(1988) 44 Cal.3d 1188 .... *passim*

Godfrey v. Steinpress
(1982) 128 Cal.App.3d 154 37

People ex rel. Grijalva v. Superior Court
(2008) 159 Cal.App.4th 1072 29

Estate of Griswold
(2001) 25 Cal.4th 904 19

Heiner v. Kmart Corp.
(2000) 84 Cal.App.4th 335 38

TABLE OF AUTHORITIES
(continued)

Page(s)

Horwich v. Superior Court
(1999) 21 Cal.4th 272 .... 44, 46

Hutnick v. U.S. Fidelity & Guaranty Co.
(1988) 47 Cal.3d 456 .... 24, 25

Knight v. Jewett
(1992) 3 Cal.4th 296 .... 28, 29

Larcher v. Wanless
(1976) 18 Cal.3d 646 29

Li v. Yellow Cab Co.
(1975) 13 Cal.3d 804 .... 32, 40

Lockhart v. United States
(2016) 136 S.Ct. 958 27

Lopez v. Sony Electronics, Inc.
(2018) 5 Cal.5th 627 17

Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC (2011)
52 Cal.4th 1100 .... 42, 43

Martin v. United States
(9th Cir. 1993) 984 F.2d 1033 .... 28, 29

In re Melchor P.
(1992) 10 Cal.App.4th 788 26

Metropolitan Water Dist. v. Superior Court
(2004) 32 Cal.4th 491 34

Milligan v. City of Laguna Beach
(1983) 34 Cal.3d 829 20

Myers v. Phillip Morris Cos.
(2002) 28 Cal.4th 828 23

Pacific Gas & Electric Co. v. County of Stanislaus
(1997) 16 Cal.4th 1143 31

TABLE OF AUTHORITIES
(continued)

Page(s)

PacifiCare Life & Health Insurance Co. v. Jones
(2018) 27 Cal.App.5th 391 27

People v. Brunette
(2011) 194 Cal.App.4th 268 38

People v. Floyd
(2003) 31 Cal.4th 179 26

People v. Lopez
(2003) 31 Cal.4th 1051 34

People v. Millard
(2009) 175 Cal.App.4th 7 38

People v. Park
(2013) 56 Cal.4th 782 35

Prospect Medical Group, Inc. v. Northridge Emergency Medical Group
(2009) 45 Cal.4th 497 41

Prudential Reinsurance Co. v. Superior Court
(1992) 3 Cal.4th 1118 .... 19, 21

Rashidi v. Moser
(2014) 60 Cal.4th 718 23

Renee J. v. Superior Court
(2001) 26 Cal.4th 735 30

Richards v. Owens-Illinois, Inc.
(1997) 14 Cal.4th 985 22

Safeway Stores, Inc. v. Nest-Kart
(1978) 21 Cal.3d 322 33

Sierra Club v. Environmental Protection Agency
(D.C. Cir. 2008) 536 F.3d 673 18

Sierra Club v. Superior Court
(2013) 57 Cal.4th 157 .... 18, 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Sorensen v. Allred
(1980) 112 Cal.App.3d 717 33

Southern Pacific Transportation Co. v. California
(1981) 115 Cal.App.3d 116 32

Stockton Theatres, Inc. v. Palermo
(1956) 47 Cal.2d 469 19

Thomas v. Duggins Construction Co.
(2006) 139 Cal.App.4th 1105 38

Torres v. Xomox Corp.
(1996) 49 Cal.App.4th 1 23

Union Asphalt, Inc. v. Planet Insurance Co.
(1994) 21 Cal.App.4th 1762 26

United States v. Everett
(3d Cir. 1983) 700 F.2d 900 35

United States v. Turley
(1957) 352 U.S. 407 .... 34, 35

Weidenfeller v. Star & Garter
(1991) 1 Cal.App.4th 1 .... 37, 45

Willis v. California
(1994) 22 Cal.App.4th 287 42

Statutes

Civ. Code § 1431 *et seq.* 10

Civ. Code § 1431.1 .... 20, 43, 45

Civ. Code § 1431.1, subd. (c) 10

Civ. Code §1431.2 .... 10, 23

Civ. Code § 1431.2, subd. (a) .... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Civil Proc. Code § 377.60 46

Code Civ. Proc. § 875 39

Code Civ. Proc. § 875, subd. (a) 39

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Code Civ. Proc. § 876, subds. (a) & (c) 39

Elec. Code § 9064 25

Fla. Stat. § 768.81, subd. (4) 18

Other Authorities

11 Cyc. of Fed. Proc. (3d ed. 2018) § 39:23 35

American Heritage Dictionary 18

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ISSUE PRESENTED

The Court granted review of the following issue, as framed in Plaintiffs B.B. and B.B.'s petition for review: "May a defendant who commits an intentional tort invoke Civil Code section 1431.2, which limits a defendant's liability for non-economic damages 'in direct proportion to that defendant's percentage of fault,' to have his liability for damages reduced based on principles of comparative fault?"

INTRODUCTION

California voters endorsed a principle of basic fairness when they passed Proposition 51 by an overwhelming margin in 1986: Defendants in tort actions should be held financially liable in proportion to their degree of fault. To force a party to pay for the wrongs of others—merely because the former has deeper pockets than the latter—is, they proclaimed, to perpetuate "a system of inequity and injustice."

In approving Proposition 51, Californians voted to amend Civil Code section 1431 *et seq.* and set new boundaries for liability for noneconomic damages. The amendment squarely eliminated joint liability for noneconomic damages in personal injury, property damage, and wrongful death actions. The new statutory scheme mandated fairness for all defendants, no matter the nature of fault assigned, providing that "each defendant" in "any" such suit is entitled to apportionment of noneconomic damages based on his or her percentage of the fault. "To treat them differently is unfair and inequitable." (Civ. Code, § 1431.1, subd. (c).) Proposition 51, and the resulting statutory language, allows no exceptions.

Three decades later, Plaintiffs now seek to rewrite both electoral history and statutory text. In this wrongful death case, Plaintiffs claim that Civil Code section 1431.2, despite its clear and unambiguous application to "each defendant" in "any" wrongful death action, excludes intentional tortfeasors. Plaintiffs are wrong. Neither the plain text of section 1431.2

nor the voters' declared intent in section 1431.1 contains any exceptions, much less one for intentional tortfeasors. The entirety of the statutory text demonstrates that every defendant, regardless of how the jury classifies a tortfeasor's fault, is entitled to section 1431.2's apportionment. This statutory interpretation is confirmed by voter materials from the June 1986 election and extensive California precedent construing the provision.

Defendants and Appellants County of Los Angeles (the "County") and Deputy David Aviles (collectively, "Defendants") therefore respectfully request that the Court affirm the opinion issued below by the Second Appellate District.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On the evening of August 3, 2012, residents of Compton, California, heard frantic screams for help—"Somebody help me. He's trying to kill me."—and saw Mr. Burley straddling a pregnant woman in the middle of the street. (*B.B. v. County of Los Angeles* (2018) 25 Cal.App.5th 115, 121 (*B.B.*); 12.RT.3426:19–3430:13.)[1] Two residents intervened by pushing Mr. Burley off the victim, allowing the woman to flee, while others called 911. (*B.B.*, at p. 121.)

Deputy Aviles and his partner were the first law enforcement officials to arrive at the scene, where they found Mr. Burley lying on his back in the street. (*B.B.*, *supra*, 25 Cal.App.5th at p. 121; 7.RT.1850:8–10.) As the deputies approached, Mr. Burley stood up and faced them. (7.RT.1850:8–20.) Ignoring Deputy Aviles's commands to get on his knees, Mr. Burley slowly approached the deputies while making grunting sounds, leading the deputies to believe that Mr. Burley was under the influence of PCP. (*B.B.*, *supra*, at p. 121.) Toxicology tests would later

[1] Defendants cite the Reporter's Transcript as [Vol.].RT.[Page]:[Line] and the Appellant's Appendix as [Vol.].AA.[Page].

confirm their suspicions: Mr. Burley had both PCP and cocaine in his system. (11.RT.3044:6–15.)

The pregnant victim then reappeared, pointed at Mr. Burley, and yelled, "He tried to kill me!" (*B.B.*, *supra*, 25 Cal.App.5th at p. 121.) When Mr. Burley turned to pursue her, Deputy Aviles "hockey checked" Mr. Burley to the ground, and a struggle ensued. (*Ibid.*) Mr. Burley repeatedly punched and attempted to bite Deputy Aviles while resisting arrest. (7.RT.1854:26–1857:17.) Multiple deputies were required to restrain Mr. Burley. (*B.B.*, at p. 121.)

After several minutes of violent confrontation, Mr. Burley was handcuffed and placed in a prone position with Deputy Aviles applying pressure to his back and head. (*B.B.*, *supra*, 25 Cal.App.5th at p. 121.) When the other deputies disengaged, Deputy Paul Beserra remained with Mr. Burley, who was still in a prone position. (*Ibid.*) After several minutes, Mr. Burley's breathing became labored and his body went limp. (*Ibid.*) Paramedics then arrived and administered CPR, restoring Mr. Burley's pulse before transporting him to a hospital. (*Id.* at p. 122.) Mr. Burley died 10 days later. (*Ibid.*)

The autopsy listed Mr. Burley's cause of death as "sequelae of anoxic encephalopathy/cerebral edema with cardiopulmonary arrest (clinical)." (1.AA.179.) The autopsy added: "The decedent is status-post restraint maneuvers for behavior associated with cocaine, phencyclidine [PCP], and cannabinoids intake (clinical). Other conditions include superficial blunt head trauma, a reported history of asthma, and hypertrophic heart disease with mild interstitial fibrosis." (*Ibid.*) "The manner of death is opined to be undetermined." (*Ibid.*) The deputy medical examiner who performed the autopsy found no evidence of trauma to Mr. Burley's chest or abdomen, and CT scans of Mr. Burley's head, neck, chest, abdomen, and spine revealed no fractures or internal injuries.

(12.RT.3353:19–3358:3.)

II. PROCEDURAL BACKGROUND

Three sets of plaintiffs filed lawsuits against the County and the deputies involved in Mr. Burley's arrest: (1) Mr. Burley's estranged wife, Rhandi Thomas, and their two children, D.B. and D.B.; (2) Mr. Burley's two children with Shanell Scott, B.B. and B.B.; and (3) Mr. Burley's child with Akira Earl, T.E. (*B.B.*, *supra*, 25 Cal.App.5th at p. 122.) The consolidated cases proceeded to trial in November 2014 on wrongful death claims of police battery and negligence against the County, Deputy Aviles, Deputy Beserra, and five other deputies. (*Ibid.*)

At trial, Defendants presented extensive evidence that a volatile cocktail of PCP and cocaine caused Mr. Burley's kidneys to fail, prompting his heart to stop. (See, e.g., 1.AA.255–259; 11.RT.3022:28–3023:13; 11.RT.3045:8–3046:16; 14.RT.3929:26–3930:17; 15.RT.4332:11–21.) Plaintiffs' own expert admitted that cocaine "played some role" in stopping Mr. Burley's heart. (11.RT.3018:15–25.)

The jury returned a special verdict finding Deputy Aviles liable for the intentional tort of battery and Deputy Beserra for negligence. (*B.B.*, *supra*, 25 Cal.App.5th at p. 122.) The jury attributed 40% of the fault for Mr. Burley's death to Mr. Burley himself. (*Ibid.*) The jury then spread the remainder among five deputies: 20% to Deputy Aviles, 20% to Deputy Beserra, and 20% to the other deputies. (*Ibid.*) After hearing evidence on damages, the jury awarded Plaintiffs $8 million in noneconomic damages. (*Ibid.*) Plaintiffs did not request economic damages.

Despite the jury's allocation of only 20% fault to Deputy Aviles, the trial court, over Defendants' objection,[2] entered a judgment against Deputy

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[2] Defendants' counsel clearly objected to any verdict that failed to apportion damages as to Deputy Aviles. (21.RT.8402:27–8403:2 ["Our position is that 1431.2 applied not only to the negligence allocation of the

Aviles (and his employer, the County) for 100% of the $8 million in noneconomic damages, because Deputy Aviles was found liable for an intentional tort. (*B.B.*, *supra*, 25 Cal.App.5th at p. 122.) Defendants moved to set aside the judgment on grounds that the trial court failed to apportion damages as required by section 1431.2, among other errors. (2.AA.456–460.) The trial court denied all of Defendants' post-trial motions. (3.AA.695–700.) Defendants timely appealed. (3.AA.701–705.)

The Court of Appeal held that the trial court erred by not apportioning damages in proportion to Deputy Aviles's percentage of fault, as required under section 1431.2. (*B.B.*, *supra*, 25 Cal.App.5th at pp. 123–128.) As a result, the Court of Appeal vacated the judgment below and ordered the trial court to enter a new judgment "in direct proportion to each individual defendant['s] percentage of fault, as found in the jury's comparative fault determinations." (*Id.* at p. 128.)

The Court granted Plaintiffs' petitions for review on October 10, 2018. Plaintiffs then filed two opening briefs on the merits: the first by Plaintiffs B.B. and B.B. (the "B.B. Br.") and the second by Plaintiffs T.E., D.B., and D.B. (the "T.E. Br.").

SUMMARY OF THE ARGUMENT

The Court need not look any further than the text of section 1431.2 to resolve the Issue Presented. Section 1431.2, subdivision (a) unambiguously guarantees "each defendant" in "any" wrongful death action the right to several liability for their share of the plaintiffs' noneconomic damages, as determined by principles of comparative fault: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of *each defendant*

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jury as to Deputy Beserra, but also to the battery cause of action as to Deputy Aviles."].) Plaintiffs' suggestion that Defendants waived this issue is meritless. (T.E. Br. at 20.)

for non-economic damages shall be several only and shall not be joint." (Civ. Code, § 1431.2, subd. (a), italics added.) The "each defendant" language encompasses all defendants and provides no exceptions. And the "comparative fault" language instructs courts how to determine each defendant's percentage of several liability. This reading flows not only from the plain text, but it is also dictated by a canon of statutory construction and decisions from the Court, the courts of appeal, and the U.S. Court of Appeals for the Ninth Circuit.

This plain reading of the statute is also supported by the text of a companion statutory provision. Section 1431.1 expresses the voters' intent and purpose in enacting section 1431.2, explaining that all defendants are entitled to a fair and equitable distribution of noneconomic damages based on their proportionate share of fault. And, once again, there is no expressed intent to exclude *any* category of defendant from the statutory framework.

Given the bare statutory text, the Court need not resort to any extrinsic source to conclude that intentional tortfeasors are entitled to the apportionment guaranteed to "each defendant." But extrinsic sources similarly confirm that all defendants, without exception, are entitled to apportionment under section 1431.2, subdivision (a). The ballot materials provided to voters in June 1986 made no suggestion that Proposition 51 would exclude categories of defendants from apportionment for noneconomic damages.

To avoid the unambiguous text, Plaintiffs propose a textual statutory reading that has no basis in any canon of statutory interpretation. They claim that the participial phrase "based on principles of comparative fault" in section 1431.2, subdivision (a) creates a limitation on the types of actions in which apportionment applies and argue that the language somehow requires that intentional tortfeasors be excluded. This reading is wrong. The participial phrase that Plaintiffs rely on does not act as a limitation, but

instead as an instruction, expressing how the liability of each defendant is to be determined—*i.e.*, by principles of comparative fault. Any other interpretation is unreasonable and would render the "any" language in section 1431.2, subdivision (a) surplusage.

Even under Plaintiffs' erroneous statutory interpretation, their reading requires a second inquiry: whether the comparative fault doctrine at the time the voters passed Proposition 51 excluded intentional tortfeasors. And, under this second inquiry, Plaintiffs would still be wrong. No rule in California excludes intentional tortfeasors from a comparative fault analysis, and that was true at the time Proposition 51 passed. Neither the Court nor any lower court had held that intentional tortfeasors were excluded from the comparative fault doctrine adopted in 1975. Voters, therefore, could not have incorporated a rule that did not exist. Because the common-law meaning of "comparative fault" did not exclude intentional tortfeasors at the time voters employed that term in Proposition 51, the language referencing comparative fault principles in section 1431.2, subdivision (a) cannot be read to exclude intentional tortfeasors from its scope. The Court should reject Plaintiffs' attempt to create a new common-law doctrine for purposes of defining a statutory term approved by voters three decades ago.

Not only are Plaintiffs wrong about their statutory construction and understanding of the comparative fault doctrine, but they also misstate the pertinent California "public policy." Unrelated principles of contribution or indemnity did not establish a statewide policy that prohibited voters from passing initiatives like Proposition 51, which treat all defendants the same for purposes of apportioning noneconomic damages in certain actions. The result directed by the Court of Appeal below not only adheres to the plain language of the statute, it also is unquestionably fair and best comports to California's public policy. It should be affirmed.

ARGUMENT

I. THE TEXT OF SECTION 1431.2 APPLIES APPORTIONMENT TO EVERY DEFENDANT WITHOUT EXCEPTION.

Section 1431.2 clearly and unambiguously applies to all defendants regardless of how a fact-finder characterizes a defendant's fault. This conclusion is compelled by the statute's text and purpose, prior judicial interpretations, and the ballot materials provided to the voters.

a. The Statutory Text Is Unambiguous and Exception-Free.

Statutory interpretation must begin and end with a statute's text if it is "clear and unambiguous." (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 633–634.) This interpretive principle applies equally to statutes passed by voter initiative, as the text is "the best guide to voter intent." (*In re C.B.* (2018) 6 Cal.5th 118, 125.)

1. Section 1431.2, Subdivision (a) Explicitly Applies to *All* Defendants.

The Court need look no further than text of section 1431.2, subdivision (a), which clearly and unambiguously limits the liability of all defendants in a wrongful death action for noneconomic damages to their proportionate share of the total fault. Section 1431.2, subdivision (a) reads in full:

> In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of *each defendant* for non-economic damages shall be several only and shall not be joint. *Each defendant* shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(Civ. Code, § 1431.2, subd. (a), italics added.)

The statutory text mandates its application to "each defendant" without exception. The phrase "each defendant," which is repeated in consecutive sentences, means what it says; no commonsense reading of

those two words limits their meaning to a subclass of defendants. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165 (*Sierra Club*) ["We first examine the statutory language, giving it a plain and commonsense meaning."].) Courts have long recognized that the plain and commonsense meaning of "each" is expansive and synonymous with "every." (See, e.g., *Dickenson-Russell Coal Co., LLC v. Sect. of Labor* (4th Cir. 2014) 747 F.3d 251, 258 ["The ordinary meaning of the word 'each' is 'every one of two or more people or things considered separately.' "], quoting Merriam-Webster Dictionary; *Sierra Club v. Environmental Protection Agency* (D.C. Cir. 2008) 536 F.3d 673, 678 [" 'Each' means '[e]very one of a group considered individually.' "], quoting American Heritage Dictionary; *Action NC v. Strach* (M.D.N.C. 2016) 216 F.Supp.3d 597, 634 ["The ordinary meaning of the word 'each' is 'every (individual of a number) regarded or treated separately.' "], quoting Oxford English Dictionary.)

Nothing in the text of section 1431.2, subdivision (a) qualifies or modifies the phrase "each defendant" in a manner that excludes defendants found liable for an intentional tort. Indeed, the terms "intent" or "intentional" are nowhere to be found.

If the voters had meant to create exceptions for intentional tortfeasors, they could have done so. They did not. This point is crystallized by recognizing that Assembly Bill 4271, which was introduced four months before the voters passed Proposition 51, similarly sought to introduce apportionment for noneconomic damages. But that bill included an exception for intentional tortfeasors: "The allocation provided for by this section shall not apply to any person who intentionally injures another." (Defs.' Mot. for Jud. Notice, Ex. A at p. 4, filed concurrently herewith.) And other jurisdictions that have chosen to exclude intentional tortfeasors from their apportionment statutes have done so in the statutory text. (See, e.g., Fla. Stat., § 768.81, subd. (4) ["This section does not apply . . . to any

action based upon an intentional tort."].) The drafters of Proposition 51, by contrast, included no exceptions. The voters approved no such exception, and the Court "cannot create exceptions . . . in the absence of an explicit legislative intention to do so." (*Prudential Reinsurance Co. v. Superior Court* (1992) 3 Cal.4th 1118, 1149 (*Prudential*); see also *Estate of Griswold* (2001) 25 Cal.4th 904, 917 ["We may not, under the guise of interpretation, insert qualifying provisions not included in the statute."]; *Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 476 ["If the statute announces a general rule and makes no exception thereto, the courts can make none."].) Such explicit voter intent does not exist.

Accordingly, the plain text of Section 1431.2, subdivision (a) dictates that it unambiguously applies to every defendant regardless of the nature of fault assigned. Here, a unanimous panel at the Court of Appeal agreed: "[W]e conclude the unambiguous reference to '[e]ach defendant' in section 1431.2, subdivision (a) mandates allocation of noneconomic damages in direct proportion to a defendant's percentage of fault, regardless of whether the defendant's misconduct is found to be intentional." (*B.B.*, *supra*, 25 Cal.App.5th at p. 128.)

Plaintiffs have no response to the "each defendant" language in section 1431.2, subdivision (a). They suggest that the phrase is "ambiguous," (B.B. Br. at p. 19), yet they fail to explain how the two words could be susceptible to more than one reasonable interpretation. They also fail to cite any opinion where a court found that such language was anything less than clear and unambiguous. Plaintiffs cannot manufacture legal ambiguity through a subjective assessment of the text.

2. <u>Section 1431.1, Which Declares the Purpose of Proposition 51, Supports a Plain Reading</u>.

Aside from the clear text of Section 1431.2, subdivision (a), the stated purpose of Proposition 51 also supports the plain reading of the

statute and confirms its application to all defendants no matter the nature of their fault. (See *Sierra Club, supra*, 57 Cal.4th at p. 165 ["We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment."].) In passing Proposition 51, the voters approved a "Findings and Declaration of Purpose," as reflected in Section 1431.1. It too makes no exception for any category of defendants, declaring in relevant part: "The legal doctrine of joint and several liability . . . has resulted in a system of inequity and injustice"; it further states that "to remedy these inequities, *defendants in tort actions* shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable." (Civ. Code, § 1431.1, italics added.) The voters clearly and unambiguously declared that all "defendants" shall be financially liable for noneconomic damages in proportion with their own degree of fault, and makes no exception for intentional tortfeasors.

Plaintiffs disregard the statutory text of 1431.1, possibly because the plain language is at odds with their reading of section 1431.2, subdivision (a). Where, as here, the enacting body "has stated the purpose of its enactment in unmistakable terms, [the Court] must apply the enactment in accordance with the [enacting] direction, and all other rules of construction must fall by the wayside." (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 831.)

In *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188 (*Evangelatos*), the Court observed that "the language and purposes of [section 1431.2's] statutory schemes as a whole" would dictate whether section 1431.2 "applies to causes of action based on intentional tortious conduct." (*Id.* at p. 1202.) As explained above, the statutory language and purpose provide that answer—section 1431.2, subdivision (a) applies to all

defendants regardless of the nature of fault assigned by the fact-finder. Any other result would create an unstated exception, contradicting the voters' intent. (*Prudential*, *supra*, 3 Cal.4th at p. 1149.)

b. The Court and Lower Courts Have Recognized That Section 1431.2 Is Unambiguous and Exception-Free.

Plaintiffs not only ask the Court to ignore the plain reading of section 1431.2, they ask it to ignore its own rulings that found the text of 1431.2 clear and unambiguous. But the "doctrine of stare decisis teaches that a court usually should follow prior judicial precedent" and that the "doctrine is especially forceful when, as here, the issue is one of statutory construction, because the Legislature can always overturn a judicial interpretation of a statute." (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 327 (*Bourhis*).)

The Court's own rulings along with multiple opinions from the courts of appeal have already recognized that the text of section 1431.2 is clear and unambiguous and that it applies to "every" defendant. In *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593 (*DaFonte*), for example, the Court expressly found that "section 1431.2 itself contains no ambiguity." (*Id.* at p. 602.) The Court explained: "In every case, [section 1431.2, subdivision (a)] . . . shields *every* 'defendant' from any share of noneconomic damages beyond that attributable to his or her own comparative fault"—the "statute *plainly* attacks the issue of joint liability for noneconomic damages *root and branch*." (*Ibid.*, italics added.)

In *DaFonte*, the Court addressed a similar issue: whether an employer-defendant constitutes a "defendant" for purposes of section 1431.2 when that employer is statutorily immune from tort liability under workers' compensation laws. (*DaFonte*, *supra*, 2 Cal.4th at pp. 596, 600–601.) The inquiry began and ended with the statute's plain text. Focusing on the "each defendant" language in the statute, the Court explained that

"section 1431.2 expressly affords relief to *every* tortfeasor who is a liable 'defendant,' and who formerly would have had full joint liability." (*Id.* at p. 601, italics added.) The Court, therefore, had no need to "resort to [any] extrinsic constructional aids" to interpret the statute. (*Id.* at p. 602.) The Court held that an unstated exception could not be read into section 1431.2 for noneconomic damages attributable to a person statutorily immune from suit: "The statute neither states nor implies an exception for damages attributable to the fault of persons who are immune from liability or have no mutual joint obligation to pay missing shares." (*Id.* at p. 601.) In response to the plaintiff's claim that it was unfair and impractical to apportion noneconomic damages in this manner because he could not recover the portion attributed to his employer, the Court returned to the statutory text, explaining that it mandates that all defendants be entitled to apportionment of noneconomic damages based on their percentage of fault. (*Id.* at pp. 603–604 & fn. 6.)

Plaintiffs here similarly ask the Court to read into section 1431.2 an unstated exception that has no basis in the statutory text. This argument was rejected in *DaFonte*. It should be rejected in this case, again. Plaintiffs claim that because *DaFonte* addressed a different legal question (which Defendants do not dispute), the Court's interpretation of section 1431.2 there is irrelevant and should not be followed. (B.B. Br. at pp. 17–19; T.E. Br. at pp. 16–17.) But that argument ignores stare decisis principles. (*Bourhis*, *supra*, 56 Cal.4th at p. 327.) If the voters disagreed with the Court's conclusions in *DaFonte* that section 1431.2, subdivision (a) "shields *every* 'defendant' from any share of noneconomic damages beyond that attributable to his or her own comparative fault," (*DaFonte*, *supra*, 2 Cal.4th at p. 602), they could have amended section 1431.2. They did not.

In other cases, the Court has recognized that section 1431.2 is

unambiguous and extrinsic aids are, therefore, unnecessary. In *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, for example, the Court emphasized that section 1431.2's "statutory protection is constant and absolute; it does not permit a 'defendant's' share of 'non-economic' damages to vary depending upon which other tortfeasors happen to be before the court, or upon the reason why a full proportionate contribution from each such tortfeasor may not be forthcoming." (*Id.* at p. 997, *superseded by statute on other grounds as recognized in Myers v. Philip Morris Cos.* (2002) 28 Cal.4th 828.) And in *Rashidi v. Moser* (2014) 60 Cal.4th 718, the Court reiterated that "Civil Code section 1431.2 imposes 'a rule of strict proportionate liability' on noneconomic damages." (*Id.* at p. 722, citing *DaFonte*.)

The California courts of appeal have followed suit, finding the plain text of section 1431.2, subdivision (a) unambiguous and free of exceptions. (See, e.g., *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 24 ["Proposition 51 by its terms guarantees that *no* judgment will *ever* be entered against *any defendant* for the plaintiff's share of noneconomic damages"; instead, "defendants will pay no more than their 'direct proportion' of those damages based on their percentage of fault."], italics added.) As one court explained, "*DaFonte* . . . indicates the Supreme Court's unwillingness to base the application of [section 1431.2] on either the status of the defendant or the theory of the defendant's liability." (*Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1196.)

While these cases do not expressly address section 1431.2, subdivision (a)'s application to intentional tortfeasors, they do reveal that California courts—including this Court—have repeatedly found that the statute must be construed according to its unambiguous text, which guarantees apportionment to *every* defendant in a wrongful death case,

without exception. The Court should not here, for the first time, create an exception.

c. The Ballot Materials for Proposition 51 Also Establish That Intentional Tortfeasors Are Covered by Section 1431.2.

Even were the Court to consider extrinsic sources when interpreting section 1431.2, the result would be the same. The official Proposition 51 ballot materials confirm that the voters intended section 1431.2 to apply to all defendants, without exception.

Courts look principally to official ballot materials—those presented directly to voters by state officials, proponents, and opponents—to determine voter intent when a statutory text is ambiguous. They do so for good reason. It is "reasonable to infer that those who actually voted on the proposed measure read and considered the materials presented in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it." (*Hutnick v. U.S. Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7 (*Hutnick*).) While "ballot materials can help resolve ambiguities in an initiative measure . . . they cannot vary its plain import." (*DaFonte*, *supra*, 2 Cal.4th at p. 602.)

The official ballot materials for Proposition 51 offer no support for Plaintiffs' argument. The Attorney General's summary of Proposition 51 and an "Analysis by the Legislative Analyst" make no mention of any exceptions to Proposition 51's applicability, much less an exception based on the nature of the defendant's wrongdoing. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1243, appen.[3]) Indeed, the terms "intent" or "intentional" are not in either passage. Instead, the Legislative Analyst declared that

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[3] The voter pamphlet for the June 3, 1986 primary election was reproduced, in relevant part, in an "Appendix" to the Court's opinion in *Evangelatos*.

Proposition 51's rule would apply to all plaintiffs and defendants alike; it "limits the liability of *each responsible party* in a lawsuit to that portion of non-economic damages that is equal to the responsible party's share of fault." (*Ibid.*, italics added.)

Statements of both proponents and opponents of Proposition 51 similarly provide no support for Plaintiffs. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1243, appen.) The statements say nothing about any exceptions to the proposition's application. The proponents indicated that the statute would apply "[r]egardless of whether it is a city, county or private enterprise" that is sued. (*Id.* at p. 1245, appen.)

These ballot materials confirm the fair import of the statute's text: each defendant in a wrongful death lawsuit is entitled to apportionment of noneconomic damages. (*DaFonte*, *supra*, 2 Cal.4th at p. 602.) The voters—who approved Proposition 51 by a 62%-to-38% margin—had no reason to believe there would be any exceptions to that bright line rule. (See *Hutnick*, *supra*, 47 Cal.3d at p. 465, fn. 7.)

Plaintiffs claim that because the "Argument in Favor of Proposition 51" provided voters a hypothetical example of a negligent tortfeasor that was only 5% responsible for the plaintiff's total harm, Proposition 51 was intended only "to limit the liability of relatively blameless, negligent tortfeasors." (B.B. Br. at p. 30.) But this hypothetical never suggested, much less explained, to voters that Proposition 51 excluded intentional tortfeasors or contained a ceiling for the percentage of fault. It was simply one illustration, in an abbreviated context, of how Proposition 51 would operate. The proponents' statement did not, and could not, demonstrate every hypothetical application. (See, e.g., Elec. Code, § 9064 [establishing limit of 500 words for arguments for or against ballot initiatives].) Nor could the hypothetical establish by omission an exception not stated in the text. As noted above, ballot measures "cannot vary [a statute's] plain

import." (*DaFonte*, *supra*, 2 Cal.4th at p. 602.)

II. THE "COMPARATIVE FAULT" CLAUSE SUPPLIES ONLY THE MANNER FOR CALCULATING LIABILITY PERCENTAGES.

Plaintiffs' primary argument before the Court rests on a misreading of a single participial phrase in the first sentence of section 1431.2, subdivision (a): "based upon principles of comparative fault." A canon of statutory interpretation dictates that the participial phrase "based upon" modifies the *subject* of the sentence—"the liability of each defendant"—and not a term "action" in the preceding clause, which is already modified by "any." Thus, the "comparative fault" participial phrase instructs courts *how* the percentage of fault should be calculated—*i.e.*, according to the proportion of fault determined by the fact-finder. It does not limit *to whom* the statute applies.

a. The Nearest-Reasonable-Referent Canon Applies to Section 1431.2, Subdivision (a).

The relevant sentence in section 1431.2, subdivision (a) contains three distinct parts: "[1] In any action for personal injury, property damage, or wrongful death, [2] based upon principles of comparative fault, [3] the liability of each defendant for non-economic damages shall be several only and shall not be joint." (Civ. Code, § 1431.2, subd. (a), brackets added.)

Part 1 is an introductory or prefatory clause that defines the statute's "purview" and "circumstances." (*In re Melchor P.* (1992) 10 Cal.App.4th 788, 792–793; see also *People v. Floyd* (2003) 31 Cal.4th 179, 185 (*Floyd*) [identifying statutory phrase "Except as otherwise provided" as an "introductory clause"]; *Union Asphalt, Inc. v. Planet Insurance Co.* (1994) 21 Cal.App.4th 1762, 1766 [explaining that an "introductory clause . . . is meant to clarify a point rather than to create substantive law"].)

Part 3 is the main or operative clause, as it contains both the subject ("liability") and verb ("shall be") for the sentence and, unlike other parts,

can stand grammatically by itself. (See *Floyd*, *supra*, 31 Cal.4th at pp. 185–186 [identifying the main clause of a statute]; *PacifiCare Life & Health Insurance Co. v. Jones* (2018) 27 Cal.App.5th 391, 406 [same]; see also *Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1198 [explaining that the main clause in an insurance policy "is syntactically 'independent' and hence can stand without the subordinate clause"].)

Part 2 is a participial phrase, framed by the third and fourth commas in the sentence, that turns the verb "base" into the modifier "based." "A participial phrase is made up of a participle plus any closely associated word or words, such as modifiers or complements. It can be used . . . as an adjective to modify a noun or pronoun {**nailed to the roof**, the slate stopped the leaks}." (Chicago Manual of Style (17th ed. 2017) § 5.111, bold in original; see *Alan v. American Honda Motor Co.* (2007) 40 Cal.4th 894, 900 [interpreting the participial phrase "showing the date either was mailed"].)

Under the nearest-reasonable-referent canon, the participial phrase most reasonably modifies the sentence's subject: "liability." This canon provides that "[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the *nearest reasonable referent*." (*Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 288, italics added, quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012); see also *Lockhart v. United States* (2016) 136 S.Ct. 958, 970 [acknowledging canon] (dis. opn. of Kagan, J.).)

The nearest reasonable referent for the participial phrase is the sentence's subject. The subject is "the liability of each defendant," and the participial phrase, which *immediately* precedes the subject, relates to the doctrine that distributes liability "proportionately among all who caused the harm." (*DaFonte*, *supra*, 2 Cal.4th at 595 [explaining comparative fault

doctrine].) Indeed, the Court has observed that "comparative fault *principles* call for a sharing of the burden of *liability*." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 311, italics added (*Knight*).) Given (1) the proximity of the participial phrase and the subject, which has no other modifier, and (2) the connection between comparative fault principles and liability, the sentence's subject is the nearest reasonable referent for the participial phrase. As a result, the participial phrase instructs how a defendant's liability should be calculated under the statute—*i.e.*, "based on principles of comparative fault."

Numerous courts that have considered the question have adopted this same statutory interpretation. The U.S. Court of Appeals for the Ninth Circuit held: "The clause 'based upon principles of comparative fault,' instructs how 'the liability of each defendant' is to be determined." (*Martin v. United States* (9th Cir. 1993) 984 F.2d 1033, 1039 (*Martin*).) The Court of Appeal in this case agreed. (*B.B.*, *supra*, 25 Cal.App.5th at p. 126, fn. 10 [approving *Martin*].) This interpretation is also consistent with the second sentence in section 1431.2, subdivision (a), which explains that damages must be allocated "in direct proportion to [a] defendant's percentage of fault." (Civ. Code, § 1431.2, subd. (a).)

And the extrinsic evidence—which the Court need not consider given the statute's clear and unambiguous text—further confirms this interpretation. The ballot measures for Proposition 51 repeatedly informed voters that the statute entitled all defendants to apportionment of noneconomic damages based on their percentage of fault. For example, the Legislative Analyst informed the voters that Proposition 51 "limits the liability of *each responsible party* in a lawsuit to that portion of non-economic damages that is equal to *the responsible party's share of fault*." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1243, appen., italics added.) Nothing in the ballot materials informed voters that the actions subject to

Proposition 51 were limited to only those "based upon" principles of comparative fault. Instead, the ballot materials align with the statute's plain import: the participial phrase instructs how the liability of each defendant is to be determined. (See *Martin*, *supra*, 984 F.2d at p. 1039.)

b. Plaintiffs' Proposed Interpretation of the "Comparative Fault" Clause Is Unreasonable.

Without citing any canon of interpretation, Plaintiffs argue that the "based upon principles of comparative fault" participial phrase refers to the term "action" in the preceding introductory clause. (B.B. Br. at pp. 22–23, T.E. Br. at pp. 14–15.) That construction is not reasonable for at least two fundamental reasons.

First, it is unreasonable for an "action"—*i.e.*, a lawsuit—to be based upon "principles" of distributing fault. Actions are based upon the claims or facts asserted by the plaintiff in the litigation. (See, e.g., *Larcher v. Wanless* (1976) 18 Cal.3d 646, 656–657 ["[T]he cause of action for wrongful death . . . is an entirely new cause of action created in the heirs and *based on* the death of the decedent as that death inflicted injury upon them."], italics added.) This case is a prime example. Plaintiffs' pleadings did not cite comparative fault—nor should they since the doctrine is an affirmative defense (see *People ex rel. Grijalva v. Superior Court* (2008) 159 Cal.App.4th 1072, 1078)—and it took a jury seven days of deliberation to decide whether comparative fault should apply at all. Plaintiffs' action, at most, implicated principles of comparative fault once it was before the jury; it was not "based" on these principles.

In contrast, and as explained above, a defendant's "liability" under section 1431.2, subdivision (a)—*i.e.*, the subject in the main clause—*is based upon* a "principle" of distributing fault—*i.e.*, the participial phrase. This is confirmed by both the second sentence in section 1431.2, subdivision (a) and prior opinions from the Court. (See *Knight*, *supra*, 3

Cal.4th at p. 311 ["[C]omparative fault *principles* call for a sharing of the burden of *liability*."], italics added.)

Second, it is unreasonable for "action" to have two separate modifiers. The term "action" is undeniably modified by the word it directly follows, "any." If it were also modified by the subsequent participial phrase, the modifier "any" would become surplusage. (See *City & County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["[A]n interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning."].) Plaintiffs even admit in their opening briefing that their interpretation would eliminate "any" from the statute. Plaintiffs B.B. and B.B. concede that their statutory interpretation "requires several liability for non-economic damages *only* in an 'action . . . based upon principles of comparative fault.' " (B.B. Br. at p. 22, italics and alterations in original.) And Plaintiffs T.E., D.B., and D.B. concede that their statutory interpretation would mean that section 1431.2 "applies *only* to actions '*based upon principles of comparative fault.*' " (T.E. Br. at p. 6, italics in original.) But by its plain terms, section 1431.2 must apply in "*any* action" of personal injury, property damage, and wrongful death, and not, as Plaintiffs argue, "only in" certain categories of those actions.

If the voters intended the participial phrase to modify "action," the modifier "any" would not exist and the participial phrase would not be offset by commas in a later clause, but instead included in the introductory clause. (See *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 747 [explaining that "the presence or absence of commas is a factor to be considered in interpreting a statute"].) Plaintiffs are essentially asking the Court to rewrite section 1431.2, subdivision (a) as follows:

> In an~~y~~ action based upon principles of comparative fault for personal injury, property damage, or wrongful death, ~~based upon principles of comparative fault,~~ the liability of each defendant for non-economic damages shall be several only and shall not be joint.

But the Court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, citation omitted (*Cal. Teachers*).)

Defendants' interpretation requires no rewriting and best "ascertain[s] and effectuate[s] the intent" of the voters, which is always the goal of statutory interpretation. (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.) The voters used an introductory clause to define the statute's scope and a participial phrase to define the manner in which liability would be apportioned. Section 1431.2, subdivision (a) applies to "every defendant," regardless of the nature of the defendant's wrongdoing, and, when applied, all defendants' liability shall be "based upon" the comparative fault doctrine, which distributes tort damages proportionately.

Because all of Plaintiffs' remaining arguments are dependent on an incorrect statutory construction, their arguments are moot, and the Court ought to reject them on that ground alone.

III. THE COMPARATIVE FAULT DOCTRINE DOES NOT EXCLUDE INTENTIONAL TORTFEASORS, AND SECTION 1431.2 DEMONSTRATES NO INTENT TO DO SO.

Even considering Defendants' unreasonable statutory construction, the results in this case would not change. According to Plaintiffs, intentional tortfeasors are not entitled to apportionment under section 1431.2 because the statute applies only to "actions based upon comparative fault" and the comparative fault doctrine excludes intentional tortfeasors.

(B.B. Br. at pp. 22–28; T.E. Br. at pp. 18–26.)

Plaintiffs are wrong; the doctrine of comparative fault has never excluded intentional tortfeasors from its application. To be sure, the Legislature and voters pass laws against the background of established common-law rules. But the voters could not have incorporated a rule excluding intentional tortfeasors from comparative fault, because no such rule existed. Therefore, section 1431.2's "incorporation" of the comparative fault doctrine would similarly not exclude intentional tortfeasors from the statute's application.

a. The Comparative Fault Doctrine Never Excluded Intentional Tortfeasors.

At the introduction of comparative fault to California, the Court declined to determine its application to intentional tortfeasors. The Court first adopted comparative fault in 1975. (See *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 811 (*Li*).) When it did, the Court reserved, among other issues, the question of how an intentional tortfeasor would fare under the new comparative fault principles. (*Id.* at pp. 825–826[4]; see *Southern Pacific Transportation Co. v. California* (1981) 115 Cal.App.3d 116, 120 ["In adopting the new rule the court reserved two related issues for future resolution—contribution or indemnity among joint tortfeasors, and the role of willful misconduct under comparative negligence."].)

In subsequent cases, the Court expanded coverage of comparative fault; at no time (let alone before Proposition 51's passage in 1986) did the Court exclude intentional tortfeasors from comparative fault. In *American*

[4] Plaintiffs claim that *Li* "firmly established" that comparative fault applies in all cases "involving misconduct which falls short of being intentional." (T.E. Br. at p. 7, quoting *Li*, *supra*, 13 Cal.3d at pp. 825–826.) However, Plaintiffs omit the first part of that quote from *Li*: "It has been persuasively *argued* . . . ." (*Li*, *supra*, 13 Cal.3d at pp. 825–826, italics added.) The Court declined to decide the issue, describing it as an "area[] of difficulty and uncertainty." (*Id.* at p. 826.)

Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578 (*Am. Motorcycle*), this Court held that partial indemnity among multiple tortfeasors should be calculated on a comparative fault basis. (*Id.* at pp. 591–599.) In *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725 (*Daly*), the Court held that comparative fault applied to strict liability actions. (*Id.* at p. 742.) Recognizing that the "fundamental and underlying purpose of *Li* was to promote the equitable allocation of loss among *all parties*," (*id.* at p. 737, italics added), the Court explained in *Daly* that "apportioning tort liability is sound, logical and capable of *wider application than to negligence cases alone*," (*id.* at p. 742, italics added). And in *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, the Court held that comparative fault should be used to apportion damages between negligent and strictly liable tortfeasors. (*Id.* at pp. 324–325; see *Evangelatos, supra*, 44 Cal.3d at pp. 1197–98 [describing the doctrine's evolution].)

Courts of appeal noticed this development. As one court observed: "[W]e find a trend in [the California Supreme Court's] decisions which points toward an adoption of an apportionment of the fault doctrine, irrespective of the nature of the alleged operative negligence *or other basis for liability* in a particular case." (*Sorensen v. Allred* (1980) 112 Cal.App.3d 717, 723, italics added.) Several years later, another court noted that while there was as yet "no authority" addressing the extension of comparative fault principles to intentional tortfeasors, "there may be sound policy arguments" for such a development. (*Allen v. Sundean* (1982) 137 Cal.App.3d 216, 226–227 (*Allen*).) Outside observers agreed that California courts had not yet addressed this issue. (See, e.g., Tracy, *Comparative Fault & Intentional Torts* (1978) 12 Loy. L.A. L.Rev. 179, 180 ["However, the [California Supreme Court] has not yet determined whether comparative fault principles should be extended to actions involving intentional misconduct."]; Dear & Zipperstein, *Comparative*

Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations (1984) 24 Santa Clara L.Rev. 1, 1 ["No court, however, has explicitly applied comparative fault principles to intentional torts."].)

Thus, by June 1986, California case law had not expressly outlined the boundaries of comparative fault for intentional tortfeasors. And certainly no case excluded intentional tortfeasors from comparative fault principles.

b. The Court Cannot Incorporate into Section 1431.2 a Common-Law Meaning for "Comparative Fault" That Did Not Exist in 1986.

Because California courts had not yet determined how intentional conduct would impact the comparative fault analysis when voters incorporated the phrase "comparative fault" in Proposition 51, the Court must rely on context and purpose to discern the meaning of "comparative fault" in section 1431.2.

When statutes use "terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that [the enacting body] means to incorporate the established meaning of those terms." (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 500, quoting *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 739–740; see also *People v. Lopez* (2003) 31 Cal.4th 1051, 1060 ["[I]f a term known to the common law has not otherwise been defined by statute, it is assumed that the common law meaning was intended."].)

However, the "canon on imputing common-law meaning applies *only* when [the enacting body] makes use of a statutory term with established meaning at common law." (*Carter v. United States* (2000) 530 U.S. 255, 264, italics added (*Carter*).) When a statutory term does not have settled meaning or that meaning has changed, courts must turn to the

statutory context and purpose to discern the term's meaning. (See *United States v. Turley* (1957) 352 U.S. 407, 412–413 (*Turley*) ["Freed from a common-law meaning, we should give [a statutory term] the meaning consistent with the context in which it appears."]; *United States v. Everett* (3d Cir. 1983) 700 F.2d 900, 904 ["If Congress uses a term in a . . . statute which has no widely accepted common law meaning at the time of enactment, the term should be given the meaning consistent with the purpose of the enactment and its legislative history."]; 11 Cyc. of Fed. Proc. (3d ed. 2018) § 39:23 ["Where a . . . statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning, but a term which has no established or accepted common-law meaning . . . should be given a meaning consistent with the context in which it appears and in the light of the statute's purpose and legislative history, freed from any common-law limitations or restrictions."].)

Here, the voters could not have intended to exclude intentional tortfeasors from the reach of section 1431.2, subdivision (a) by using the term "comparative fault" because the comparative fault doctrine did not have a settled meaning excluding intentional tortfeasors. Yet, that is precisely what Plaintiffs are asking the Court to do: create a new meaning for comparative fault and then declare, retroactively, that the voters intended to incorporate that meaning three decades ago when it did not exist. Such a result would defy a fundamental tenet of statutory construction that "it is the voters' intent that controls." (*People v. Park* (2013) 56 Cal.4th 782, 796.) That is precisely why common-law meanings are incorporated only when well settled. (*Carter*, *supra*, 530 U.S. at p. 264.)

As explained in Parts I and II, *supra*, the text and context of section 1431.2 is unequivocal: all defendants shall be entitled to apportionment

based on their proportion of fault regardless of the nature of the defendant's fault. (See *Turley*, *supra*, 352 U.S. at p. 412.) This is clearly stated without exception in sections 1431.1 and 1431.2 and in opinions from the Court. (See, e.g., *DaFonte*, *supra*, 2 Cal.4th at p. 602.) No anachronistic or idiosyncratic redefining of "comparative fault" can defeat the voters' intent.

Moreover, California voters did not intend to adopt wholesale any common-law rules because, as the Court has recognized, Proposition 51 "unquestionably made a substantial change in this state's traditional tort doctrine." (*Evangelatos, supra*, 44 Cal.3d at pp. 1199–1200 [rejecting constitutional challenge].) California voters resolved ambiguities in the comparative fault regime by passing Proposition 51, which unequivocally established that all defendants, regardless of fault, were entitled to apportionment of noneconomic damages. (*DaFonte*, *supra*, 2 Cal.4th at p. 596, 603 [explaining that section 1431.2 "plainly attacks the issue of joint liability for noneconomic tort damages root and branch"].)

c. Plaintiffs Overstate the Development of Comparative Fault and Rely on Inapplicable Doctrines.

Attempting to rewrite history, Plaintiffs try to persuade the Court that the voters (a) assigned a meaning to comparative fault that did not exist, and (b) intended principles of contribution and indemnity to override section 1431.2's plain text. Both arguments are meritless and should be rejected.

1. <u>None of Plaintiffs' Cited Authority Establishes That Intentional Tortfeasors Were Excluded From Comparative Fault</u>.

Plaintiffs repeatedly make the erroneous claim that "[i]t is thus beyond dispute that, prior to the passage of Proposition 51, comparative fault did not apply to intentional torts." (T.E. Br. at p. 21; B.B. Br. at p. 23.) They are wrong. As explained above, before June 1986, no California court excluded intentional tortfeasors from the comparative fault doctrine.

(See, e.g., *Baird v. Jones* (1993) 21 Cal.App.4th 684, 691 (*Baird*) ["Numerous commentators have suggested the policies behind *Li* [citation] and *American Motorcycle* [citation] support application of comparative principles in some, if not all, cases involving intentional tortfeasors."].) And Plaintiffs' cited authority does nothing to support their claim. (See B.B. Br. at pp. 23–27; T.E. Br. at pp. 18–26.)

The *only* pre-Proposition 51 case cited by Plaintiffs is silent about whether intentional tortfeasors were excluded from comparative fault. In *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, the court of appeal held that, unlike personal-injury cases, it is not possible for a plaintiff's negligence to contribute to his own harm resulting from contractual fraud. (*Id.* at p. 176.) The court noted that the plaintiff's conduct would be evaluated in a manner similar to "comparative fault" when determining whether the plaintiffs "were aware" of the alleged fraud. (*Ibid.*) The court never held, nor was it asked to hold, that intentional tortfeasors were excluded from the comparative fault doctrine.

Contrary to Plaintiffs' assertions, *Weidenfeller v. Star & Garter*, (1991) 1 Cal.App.4th 1 (*Weidenfeller*), suggests that section 1431.2 should apply to intentional tortfeasors. In *Weidenfeller*, which was decided *post*-Proposition 51, the only issue before the court of appeal was whether a negligent defendant was entitled to apportionment under section 1431.2 when a plaintiff's harm was also caused by a non-party who acted intentionally. (*Id.* at pp. 4–5.) The court correctly concluded that the answer was "yes," and in doing so, acknowledged that no authority excluded intentional tortfeasors from the comparative fault doctrine. (*Id.* at p. 7 ["In context this statement [from *Allen*, *supra*, 137 Cal.App.3d at p. 226] does not mean that section 1431.2 never applies to both intentional and negligent tortfeasors."].) Because the third party was not named as a defendant, the court did not address whether a defendant found to be an

intentional tortfeasor is entitled to apportionment under section 1431.2.

And in *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335 (*Heiner*), which was also decided *post*-Proposition 51, the court of appeal noted in *dicta* that an intentional tortfeasor's damages cannot be apportioned. (*Id.* at pp. 348–350.) In that case, however, the verdict form did not distinguish between economic and noneconomic damages, and the defendants waived any claim for apportionment. (*Id.* at p. 343.) The decision never discusses noneconomic damages and does not consider the applicability of section 1431.2, which is *never cited.* While it may be true that an intentional tortfeasor is jointly and severally liable for all *economic* damages, that principle has no relevance to this case.[5]

2. Contribution and Indemnity Doctrines Cannot Alter the Plain Text of Section 1431.2.

In support of their claim that intentional tortfeasors are excluded from comparative fault, Plaintiffs also rely on case law regarding statutory contribution and common-law indemnity. (B.B. Br. at pp. 22–28; T.E. Br. at pp. 18–29.) But neither contribution nor indemnity principles have any applicability to section 1431.2's intent to eliminate several liability for noneconomic damages regardless of fault.

The case central to Plaintiffs' argument is a 2006 opinion—*Thomas v. Duggins Construction Co.* (2006) 139 Cal.App.4th 1105 (*Thomas*)—that relies on the law of contribution to undermine the statutory text of section 1431.2. While the court of appeal in *Thomas* held that section 1431.2 did

[5] Because *Heiner* has no applicability here, case law adopting *Heiner*'s *dicta* is irrelevant for the same reasons. This is especially true for the two *criminal cases* that Plaintiffs cite in support of their claim that there is "a long, well-established consensus among cases *after* the passage of Proposition 51" that comparative fault does not apply to intentional tortfeasors. (T.E. Br. at pp. 24–25, citing *People v. Brunette* (2011) 194 Cal.App.4th 268, 283, and *People v. Millard* (2009) 175 Cal.App.4th 7, 41.) Indeed, neither *Burnette* nor *Millard* cites section 1431.2.

not apply to an intentional tortfeasor in a personal-injury case (*id.* at p. 1113), the holding is wrong for a number of reasons. First, *Thomas* never addressed the "each defendant" language in the statute's text. Second, it never cited the Court's findings in *DaFonte*. And third, it never acknowledged that the voters' intent in passing Proposition 51 was to reform then-existing tort doctrine.

Rather than rely on principles of statutory interpretation, *Thomas* relied (as Plaintiffs do here) almost exclusively on California's contribution statute, Code of Civil Procedure section 875, which prohibits intentional tortfeasors from seeking a right of contribution from co-defendants.[6] But the law on statutory contribution is inapposite because it prescribes principles for loss allocation at odds with the comparative fault doctrine adopted by section 1431.2. (See *B.B.*, *supra*, 25 Cal.App.5th at p. 127 ["the right [of contribution] has no relevance to a proper construction of section 1431.2"].) Section 875, subdivision (a) provides a right of contribution only where defendants are jointly liable. (Code Civ. Proc., § 875, subd. (a).) But section 1431.2 eliminates joint liability for noneconomic damages in "any action for personal injury, property damage, or wrongful death." (Civ. Code, § 1431.2, subd. (a).) As *DaFonte* put it, section 1431.2 "plainly attacks the issue of joint liability for noneconomic tort damages root and branch." (*DaFonte*, *supra*, 2 Cal.4th at p. 602.)

Moreover, under contribution principles, a judgment is divided equally on a pro rata basis "without regard to the conduct of the parties." (See *Baird*, *supra*, 21 Cal.App.4th at p. 688, fn. 2; see also Code Civ. Proc.,

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[6] The relevant provisions read: "Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided. . . . There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person." (Code Civ. Proc., § 875, subds. (a) & (d).)

§ 876, subds. (a) & (c).) But section 1431.2 mandates the opposite result, ensuring that "[e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant *in direct proportion to that defendant's percentage of fault*, and a separate judgment shall be rendered against that defendant for that amount." (Civ. Code, § 1431.2, subd. (a), italics added.)

Thus, California law governing comparative fault and contribution are based on fundamentally divergent principles. When the Legislature passed the contribution statutes in 1957, it made no attempt to put any restraints on the type of wrongdoers entitled to apportionment of noneconomic damages. Indeed, comparative fault did not even become law in California for another 20 years. (*Li*, *supra*, 13 Cal.3d at p. 811.) As the Court concluded in *American Motorcycle*, the contribution statutes were not intended to "preempt the field" in terms of allocating loss among multiple tortfeasors. (*Am. Motorcycle*, *supra*, 20 Cal.3d at pp. 599–603.) Accordingly, section 875 cannot prohibit the voters from later determining that comparative fault decides the amount of an intentional tortfeasor's noneconomic damages, which is exactly what the voters did when passing Proposition 51.

Because the contribution statute has no relevance to the proper construction of section 1431.2, *Thomas* was wrongly decided. The plain text of section 1431.2, subdivision (a) resolves this case, and a unanimous Court of Appeal below agrees: "Because we conclude *Thomas* conflicts with the plain text of section 1431.2, we decline to follow its holding." (*B.B.*, *supra*, 25 Cal.App.5th at p. 124.)

Plaintiffs also cite the common law of indemnity as further "proof" that intentional tortfeasors were excluded from the comparative fault doctrine. (B.B. Br. at pp. 24–26.) But once again, this unrelated area of law has no bearing on the proper interpretation of section 1431.2 because

indemnity applies only *after* the parties' comparative fault is determined and a defendant that is joint and severally liable seeks to collect from concurrent tortfeasors their share of the judgment. (See *Am. Motorcycle*, *supra*, 20 Cal.3d at p. 604 ["[W]e hold that under the common law of this state a concurrent tortfeasor may seek partial indemnity from another concurrent tortfeasor on a comparative fault basis."].) The threshold determination of comparative fault among all entities that caused the plaintiff's harm is separate and distinct from a later determination of indemnity among defendants.

Thus, section 1431.2's application to intentional tortfeasors is irrelevant to the principles controlling that tortfeasor's later attempts to seek partial indemnity.

IV. PUBLIC POLICY AND FAIRNESS DICTATE THAT SECTION 1431.2 APPLY TO INTENTIONAL TORTFEASORS IN WRONGFUL DEATH ACTIONS.

Because Section 1431.2, subdivision (a) is not ambiguous, the Court should not consider any of Plaintiffs' "policy" or "fairness" arguments. It is well-settled that the Court may consider extrinsic aids, including "public policy," only if "statutory language permits more than one reasonable interpretation." (*Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 507.) Section 1431.2 is not susceptible to more than one reasonable interpretation because its text is clear and unambiguous.

But even if the Court were to consider public policy and fairness arguments, they only further demonstrate that Defendants' statutory construction is correct. The voters have already declared their preferred "public policy" by enacting section 1431.1, and the enforcement of that public policy produces a fair and equitable result in this case.

a. Applying Section 1431.2 to Intentional Tortfeasors in Wrongful Death Actions is Sound Public Policy.

It is well established that the Court's "role here is to interpret the statutes as they were written, not to establish policy. The latter role is for the Legislature." (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1112, citation and alterations omitted (*L.A. Cty. Metro.*).) Indeed, public policy is "a concept . . . notoriously resistant to precise definition, and courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, lest they mistake their own predilections for public policy which deserves recognition at law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone. Co.* (1999) 20 Cal.4th 163, 185, citations and alterations omitted; see *Willis v. California* (1994) 22 Cal.App.4th 287, 293 ["[I]t remains a legislative, and not a judicial, prerogative to assess the competing interests and to determine public policy."].) Therefore, "due respect for the power of the Legislature and for the separation of powers requires [the California Supreme Court] to follow the public policy choices actually discernible from the Legislature's statutory enactments." (*L.A. Cty. Metro.*, *supra*, 52 Cal.4th at p. 1114; see *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 124 ["Where competing policy concerns are present, it is for the Legislature to resolve them."].)

California voters express the only public policy underlying Proposition 51: supplying fairness and equality to all defendants by apportioning noneconomic damages. The Court should implement *that* purpose, and not craft a new one from whole cloth.

Plaintiffs attempt to undermine the voters' declared policy preferences by, once again, relying on the law of contribution and indemnity. (B.B. Br. at pp. 31–33; T.E. Br. at pp. 23–24.) But as explained in Part III.c, *supra*, apportionment of liability for noneconomic damages

under section 1431.2 is independent from both statutory and common-law doctrines related to post-judgment collection from co-defendants. The fact that California law treats intentional tortfeasors differently in other contexts does not mean that the "public policy" of California is to always treat intentional tortfeasors differently. Yet, that is what Plaintiffs are asking the Court to do—*i.e.*, ignore the policy choices made by voters and declare a new statewide "public policy" binding in all cases regardless of the statutory text. The Court must instead respect the policy choices made by the voters. (*L.A. Cty. Metro.*, *supra*, 52 Cal.4th at p. 1114.)

Not only do Plaintiffs want the Court to declare this new public policy, but they also want the Court to incorporate this new policy into a statutory text that was passed nearly three decades ago. The voters did not intend to incorporate a policy that did not (and still does not) exist when they passed Proposition 51. The Court should reject Plaintiffs' invitation to rewrite section 1431.2 to conform with their incorrect interpretation of California law. (See *Cal. Teachers*, *supra*, 14 Cal.4th at p. 633 ["This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed."], citation omitted.)

b. Holding Deputy Aviles Responsible for Only His Proportionate Share of the Fault Fulfills Section 1431.2's Purpose of Fairness.

Plaintiffs further argue that Proposition 51 intended to relieve "less" or "minimally" culpable defendants from bearing all of a plaintiff's noneconomic damages, and, therefore, it is "fair" that intentional tortfeasors, such as Deputy Aviles, always be denied the benefits of section 1431.2 because they are never "less" or "minimally" culpable. (B.B. Br. at pp. 28–30.) This argument is wrong for a number of reasons.

As an initial matter, this argument has no basis in the statutory text, as the voters unequivocally declared that "defendants in tort actions shall be

held financially liable in closer proportion to their degree of fault" without mention of whether such defendants must meet an undefined standard of "less" or "minimal." (Civ. Code, § 1431.1.) The text of section 1431.2 is similarly not restrained by the quantitative nature of the fault—*i.e.*, "each defendant" is entitled to apportionment. (Civ. Code, § 1431.2, subd. (a).) Thus, this argument must fail because it would "vary [the statute's] plain import." (*DaFonte*, *supra*, 2 Cal.4th at p. 602.)

Not only is Plaintiffs' argument unsupported by the statutory text, but it is also based on the flawed premise that an intentional tortfeasor can *never* be "less" or "minimally" culpable. The facts of this case demonstrate why this premise is wrong.

Here, the jury concluded Mr. Burley's fault in his own death was *twice* that of Deputy Aviles. Indeed, Mr. Burley is an intentional wrongdoer himself, as he intentionally ingested PCP and cocaine, assaulted a pregnant woman, and repeatedly struck a sheriff's deputy who was making a lawful arrest. (See, e.g., *B.B.*, *supra*, 25 Cal.App.5th at p. 121 ["He tried to kill me!"].) Had Mr. Burley altered his conduct at any stage—by not ingesting dangerous, behavior altering drugs, by not committing assault, or by submitting peacefully to a lawful arrest—there may have been no damages to apportion. And as Plaintiffs concede, Deputy Aviles had disengaged from Mr. Burley when his heart first stopped. (B.B. Br. at pp. 11–12.) It is, therefore, unsurprising that when asked to assign fault between two intentional wrongdoers, the jury named Mr. Burley the more culpable wrongdoer in his own death.[7]

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[7] It is true that Deputy Aviles is more culpable than Plaintiffs—who were not present when Mr. Burley assaulted a pregnant woman—but "in wrongful death actions, the fault of the decedent is attributable to the surviving heirs whose recovery *must* be offset by the same percentage." (*Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1395, italics added.) The Court has recognized a version of this rule for as long as California has

Given the facts of this case, the fair and equitable result is one in which Deputy Aviles pays for his one-fifth proportional fault of Plaintiffs' noneconomic damages, which still amounts to $1.6 million. This is hardly a "free ride at the expense of the plaintiff," as Plaintiffs argue. (B.B. Br. at p. 30.) Instead, this result fulfills the voters' defined policy and intent that defendants be liable for noneconomic damages "in closer proportion to their degree of fault." (Civ. Code, § 1431.1.) Fulfillment of public policy can never be an "absurd result[]." (B.B. Br. at p. 28.)

Plaintiffs also argue that the application of section 1431.2 to intentional tortfeasors is unfair because "responsibility for intentional wrongdoing is diluted by transferring it to one with no bad intent." (B.B. Br. at pp. 30–31, citing *Weidenfeller*, *supra*, 1 Cal.App.4th at pp. 6–7.) This argument is wrong for several reasons.

First, Plaintiffs rely on an out-of-context statement from *Weidenfeller*. There, the "injured party [was] attempting to transfer the intentional actor's responsibility to the negligent tortfeasor." (*Weidenfeller*, *supra*, 1 Cal.App.4th at p. 7.) Relying on the fairness principles mandated by section 1431.2, the court of appeal rejected this attempted transfer, concluding that there was "no principled basis" to assign all of the fault to the intentional tortfeasor. (*Ibid.*) Contrary to Plaintiffs' assertions, *Weidenfeller* does not stand for the proposition that it is "unfair" for an intentional tortfeasor to pay only his equitable share of noneconomic damages.

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had a wrongful death statute. (See, e.g., *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 285 (*Horwich*) ["More modernly, principles of comparative fault and equitable indemnification support an apportionment of liability among those responsible for the loss, including the decedent, whether it be for personal injury or wrongful death."]; *Buckley v. Chadwick* (1955) 45 Cal.2d 183, 193 ["In respect to contributory negligence of the decedent as a defense in such actions there can be no doubt that the rule is as old as the act."].)

Second, section 1431.2 has nothing to do with "transferring" fault. The opposite is true, as section 1431.2 ensures that each wrongdoer is responsible only for his or her own share of the fault for noneconomic damages. (Civ. Code, § 1431.1 ["To treat them differently is unfair and inequitable."].) Deputy Aviles is not transferring (nor has he attempted to transfer) his 20% share of fault for the noneconomic damages in this case. Nor is Deputy Aviles attempting to "escape" liability for his proportionate share of fault, as Plaintiffs repeatedly suggest. (T.E. Br. at pp. 21, 28–29.) Deputy Aviles concedes that he and the County are responsible for his share of noneconomic damages as determined by the jury—$1.6 million.

V. SECTION 1431.2 APPLIES TO A WRONGFUL DEATH ACTION BASED ON POLICE BATTERY.

Plaintiffs contend that comparative fault can never apply to a jury's finding of police battery (B.B. Br. at p. 36, T.E. Br. at pp. 30–34), but this argument is based on a fundamental misunderstanding of the lone cause of action that went to trial: wrongful death.

Civil Procedure Code section 377.60 establishes a cause of action in favor of specified heirs of a person whose death is "caused by the wrongful act or neglect of another." As noted in Part IV.b, *supra*, California law has always imputed the decedent's fault in his own death to the wrongful death plaintiffs. (See, e.g., *Horwich*, *supra*, 21 Cal.4th at p. 285.)

Here, the only cause of action that went to the jury was wrongful death. Accordingly, the jury was asked to apportion fault for Mr. Burley's death. (See 3.AA.346 ["Assuming that 100% represents the total combined fault or negligence which was the legal cause of Darren Burley's death, what percentage of such combined fault is attributable to each person below?"].) The jury concluded that Mr. Burley was the most culpable person in his own death (*i.e.*, 40%), which is supported by extensive evidence, including a near-unanimous agreement among experts that the

volatile cocktail of PCP and cocaine that Mr. Burley intentionally ingested before assaulting a pregnant woman played a role in stopping his heart. (See, e.g., 11.RT.3018:15–25; 11.RT.3022:28–3023:13; 11.RT.3045:8–3046:16; 14.RT.3929:26–3930:17; 15.RT.4332:11–21.)

The jury was not asked, however, to apportion fault for Deputy Aviles's use of force. Nor did Defendants argue that such apportionment would be proper here. Thus, whether comparative fault applies to a police battery action is irrelevant to this case. The Court should reject Plaintiffs' meritless and inapposite argument.

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court affirm the opinion below.

Dated: February 7, 2019

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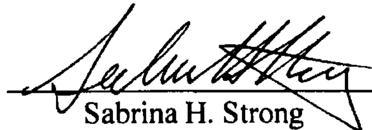
By: 
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Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed brief was produced using 13-point Times New Roman type and contains approximately 11,354 words (including footnotes) as counted by the Microsoft Word 2016 word processing program.

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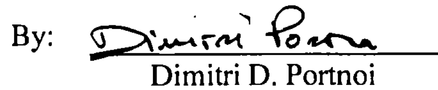
By: 
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I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 400 South Hope Street, 18th Floor, Los Angeles, California 90071-2899. On February 7, 2019, I served the following document on the persons listed in the attached service list and in the manner indicated below:

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Cynthia Evangelista

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