S234269

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LATRICE RUBENSTEIN,
Plaintiff and Appellant,

vs.

DOE NO. 1,
Defendant and Respondent;

After a Decision From the Court of Appeal of California,
Fourth Appellate District, Division One,
Case No. D066722

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, AND SCHOOL ASSOCIATION FOR EXCESS RISK IN SUPPORT OF DEFENDANT/RESPONDENT DOE NO. 1

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases **Page(s)**

Statutes **Page(s)**

Other

APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f),[1] Northern California Regional Liability Excess Fund ("Nor Cal ReLiEF"), Southern California Regional Liability Excess Fund ("So Cal ReLiEF"), Statewide Association of Community Colleges ("SWACC"), and the School Association for Excess Risk ("SAFER") hereby request leave to file the attached amicus curiae brief in support of Defendant/Petitioner Doe No. 1 (hereinafter "Petitioner"). Amici Curiae are familiar with the issues and scope of their presentation, and believe the attached brief will aid the Court in its consideration of the issues presented in this case.

Identity and Interest of Amici Curiae

The Regional Liability Excess Fund ("ReLiEF") is a non-profit member-owned and operated Joint Powers Authority ("JPA") organized pursuant to the California Joint Exercise of Powers Act (Gov't Code, § 6500.1 et seq.) that provides liability coverage and risk management services to public schools in the state of California. ReLiEF is comprised of two independent regionally-based risk sharing programs, Southern California ReLiEF ("SoCal ReLiEF") and Northern California ReLiEF ("NorCal ReLiEF"). Together, these two entities currently serve more than 400 educational agencies in California—representing in excess of two

[1] Pursuant to California Rule of Court 8.520, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

million students across the state. ReLiEF is the largest property and casualty program for public schools in the country.

The Statewide Association of Community Colleges ("SWACC") also is a non-profit member-owned and operated Joint Powers Authority ("JPA") organized pursuant to the California Joint Exercise of Powers Act (Gov't Code, § 6500.1 et seq.) that provides liability coverage and risk management services to more than 45 public Community Colleges in the state of California-representing over 590,000 daily Full Time Equilavents (students). SWACC is the largest Community College property & casualty program in California.

The Schools Association for Excess Risk ("SAFER") is a non-profit member-owned and operated Excess Property & Liability Joint Powers Authority ("JPA") organized pursuant to the California Joint Exercise of Powers Act (Gov't Code, § 6500.1 et seq.) that provides liability coverage and risk management services. SAFER membership is comprised of ReLiEF and SWACC and provides excess property & casualty protection for over 2.5 Million students above the self funded Member Retained liability limits of One Million per occurrence protection for each of its members. All three members of SAFER are joint and severably liable for all unfunded liabilities.

ReLiEF and SWACC were formed in 1986 in response to skyrocketing premiums and decreasing availability of liability insurance for California schools. In the mid-1980's, the situation reached the point where many school districts within the state were unable to secure *any* commercial insurance coverage. Recognizing this problem, a steering committee was formed in 1985 consisting of representatives of northern and southern California school districts and statewide representatives for community colleges to address the issue. Due to the diversity of need and

location of the representatives, the committee split into three groups, which ultimately became SoCal ReLiEF, NorCal ReLiEF, and SWACC.

The need for these entities was driven by the prohibitively high cost and unavailability of traditional insurance. By pooling tax revenues from multiple school districts, the existence of SoCal ReLiEF, NorCal ReLiEF, and SWACC provide public school districts in California the ability to self-insure. Moreover, because each of these entities acts through a Board of Directors comprised of representatives from member school districts, the school districts' themselves are able to dictate the terms of the coverage offered. It is the express mission of these entities to provide public schools in California with broad (yet cost-effective) liability and property coverage, stable rates, and quality, specialized risk management services. In furtherance of this mission, in 2002, SoCal ReLiEF, NorCal ReLiEF, and SWACC formed an additional JPA known as SAFER, which is a governmental, not-for-profit, risk sharing pool designed to provide California K-12 and Community College Districts with excess property and liability coverage and to eliminate all gaps in coverage. Together, SoCal ReliEF, NorCal ReLiEF, SWACC, and SAFER (collectively "Amici Curiae") provide liability coverage and risk management services to approximately half of the public school districts within the state.

Amici Curiae are not insurance companies. (Gov't Code, § 990.8, subd. (c) ["The pooling of self-insured claims or losses among entities ... shall not be considered insurance nor be subject to regulation under the Insurance Code"].) Indeed, the majority of services that Amici Curiae provide to school districts falls under the category of risk management services. This includes identifying and assessing risks and taking actions to protect school districts against those risks. Amici Curiae operate from the standpoint that the best way to manage risk is to prevent it. This is a

proactive endeavor and preventative measures include ongoing safety inspections, building evaluations, and online and in-house training and workshops. The online and in-house training provided by Amici Curiae ranges from courses on the evaluation of sports-related concussions to the prevention of cyberbullying. As of 2012, NorCal ReLiEF alone had provided more than 38,000 on-line safety and risk management training courses to more than 7,680 school district employees. With regard to teacher-student sexual abuse, Amici Curiae have instituted training programs to insure that school district employees know their responsibilities under California's Child Abuse and Neglect Reporting Law (Pen. Code, §§ 11164-11174.3) as well as training for school administrators to assist them with profiling problematic employees and identifying the signs that sexual abuse is occurring.[2] As of the time of filing this brief, this number has grown in excess of 500,000 on-line course completions for the three JPA's combined.

The continued viability of these risk-sharing pools depends largely on two factors: (i) the ability to identify and predict risks; and (ii) the ability of public school districts to provide funds sufficient to cover those risks. As to the first factor, exposure to known risks can be mitigated through the preventative measures discussed above. These measures, however, do not affect latent claims—claims arising from events that have already occurred. The cost of such claims is borne by the school districts themselves and is a factor Amici Curiae must take into consideration when setting rates for their school district members. As to the second factor—the ability of school districts to contribute funds sufficient to cover potential liabilities—the question has always been a close one and now more so than ever. Amici

[2] During the 2013/2014 school year, "Child Abuse: Identification & Intervention" was one of the top three courses taken by members of SoCal ReLiEF with nearly 55,000 trainings completed.

Curiae are non-profit governmental entities created pursuant to the California Government Code. Between 1994 and 2003, NorCal ReLiEF provided return of equity to its members of approximately $22 million at an average of $2.5 million per annum. These rebates constituted funds of member schools that exceeded liabilities and the costs of operating the JPA. NorCal ReLiEF has not issued a rebate since 2003. Similarly, SoCal ReLiEF and SWACC have return of equity in the amount of $25 million and $23 million respectively over roughly the same time frame. Put simply, the gap between member contributions and liabilities has closed over the last decade.

For the reasons set forth directly below and more fully in the accompanying brief, the Fourth District Court of Appeal's decision in *Rubenstein v. Doe No. 1* (2016) 245 Cal.App.4th 1037, if it is allowed to stand, will have a catastrophic impact on the continued viability of risk-sharing pools in California. This is not hyperbole. By enacting Government Code section 905, subdivision (m), the California Legislature made clear that school districts cannot be held liable for childhood sexual abuse that occurred prior to January 1, 2009, unless the victim complied with the claims presentation requirements of the Government Claims Act. In other words, if the victim did not present the school district with a claim within six months of the alleged abuse, then the claim is barred. The claims presentation requirement is grounded in public policy considerations of "confin[ing] potential governmental liability to rigidly delineated circumstances," [3] affording public entities the opportunity to promptly investigate and remedy the condition giving rise to the injury thereby minimizing risk to others,[4] and "enable[ing] the public entity to engage in

[3] *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 991.

[4] *Shirk v. Vista Unified Sch. Dist.* (2007) 42 Cal.4th 201, 2013.

fiscal planning for potential liabilities."[5] Balancing these policies with the heinous nature of childhood sexual abuse and the effect it has on its victims, the Legislature eliminated the claims presentation requirement for childhood sexual abuse claims against public entities arising from conduct occurring *after* January 1, 2009. (Gov't Code, § 905, subd. (m).)

Amici Curiae have operated in reliance on Government Code section 905, subdivision (m). Indeed, following the enactment of the statute in 2008, NorCal ReLiEF was required to raise the rates of member school districts to account for the fact that prospective plaintiffs no longer have to comply with the claims presentation requirements of the Government Claims Act for claims arising from conduct occurring after January 2009. The statute had the effect of expanding school districts' potential liability by twenty one years. Under the statute, every five-year-old starting kindergarten has until age 26 to file a lawsuit for sexual abuse occurring after January 2009. Amici Curiae were therefore required to appropriately manage their reserves for an exposure that runs twenty one years for each fiscal year. Obtaining and maintaining funds sufficient to cover this potential liability has proven to be a daunting task.

Rubenstein unequivocally nullifies Government Code section 905, subdivision (m), treating pre-2009 abuse claims the same as post-2009 abuse claims, eliminating the well-settled six month claims presentation requirement, and holding that pre-2009 abuse claims may be brought any time within three years of the victim's realization that adult-onset psychological injury was caused by childhood sexual abuse. Thus, while Government Code section 905, subdivision (m) required public school districts to contribute funds sufficient to cover twenty-one years of potential

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[5] *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738.

liability for every school year since 2009, *Rubenstein* has the effect of creating exposure to an additional twenty-two years of liability. In other words, because the court in *Rubenstein* held that there is essentially no difference between pre- and post-2009 claims, if the ruling is allowed to stand, Amici Curiae will be required to cover potential liability not only for the post-2009 claims contemplated by Government Code section 905, subdivision (m), but also for claims arising from conduct that occurred any time from 1986—when ReLiEF was formed—in perpetuity. This result was neither anticipated by Amici Curiae nor contemplated by the Legislature. If Amici Curiae are required to maintain funds sufficient to cover potential liability for childhood sexual abuse that occurred as early as 1986, the risk-sharing pools will no longer be sustainable. Put simply, the holding in *Rubenstein* will likely put an end to risk-sharing pools for public school districts in California. Without the benefits of risk-sharing pools, public school districts will either have to obtain commercial insurance (which many will not be able to procure) or directly pay for these liabilities out of their own coffers.

In addition, any claims prior to 1986 would be the responsibility of each individual entity district within the Amici Curiae which could in essence bankrupt a school district leaving them in State receivership.

Summary of Position

Under the California Government Claims Act, before suing a public entity, the plaintiff must present a timely written claim for damages to the entity. (Gov't Code, § 945.4.) The claim must be presented "not later than six months after the accrual of the cause of action." (Gov't Code, § 911.2.) The court in *Rubenstein* held that Code of Civil Procedure section 340.1, which sets forth the statute of limitations for claims of childhood sexual abuse, "governs the *accrual date* for claim filing purposes." (*Rubenstein*,

supra, 245 Cal.App.4th at p. 1045, italics added.) Amici Curiae agree with Petitioner that this statement directly conflicts with the holding in *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201. There, a 41-year-old plaintiff presented a tort claim and then sued a public school district for sexual abuse by a teacher that allegedly occurred twenty years earlier. (*Id.*, at p. 205.) The trial court sustained the school district's demurrer without leave to amend on the ground that the plaintiff had failed to timely comply with the Government Claims Act. (*Id.*, at p. 206.) The plaintiff appealed, the Fourth District Court of Appeal reversed the trial court's decision, and the case made its way to the California Supreme Court.

The Court of Appeal in *Shirk* held that the plaintiff's government tort claim was timely presented under Code of Civil Procedure section 340.1 ("Section 340.1"). That statute sets the statute of limitations for childhood sexual abuse and provides that such claims must be commenced "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness ... was caused by the sexual abuse ...." (Code Civ. Proc., § 340.1, subd. (a).) Based on that statute, the plaintiff in *Shirk* argued "that her duty to present her claim to the School District, as required under the government claims statute, *first arose* on September 12, 2003, when she discovered that her psychological injury was caused by the teacher's sexual abuse." (*Shirk*, *supra*, 42 Cal.4th at pp. 210-211, italics added.) The California Supreme Court expressly rejected this argument, reiterating the well-settled principle that "a cause of action for childhood sexual abuse accrues at the time of molestation," and stating that the plaintiff's argument concerning Section 340.1 was not supported by the language or legislative history of the statute. (*Id.*, at pp. 210-211.)

Here, Ms. Rubenstein asserts that *Shirk* did not address the question of whether Section 340.1 governs the time at which a claim for childhood sexual abuse accrues under Government Claims Act. (Answer Br., pp. 24, 29-31.) This is patently incorrect. The plaintiff in *Shirk* argued that "her *duty to present her claim* to the School District ... *first arose* ... when she discovered that her psychological injury was caused by the teacher's sexual abuse." (*Shirk, supra*, 42 Cal.4th at pp. 210-211, italics added.) This is clearly an accrual argument. Indeed, the dissenting opinion in *Shirk* made this point explicit. There, Justice Werdegar recognized that the plaintiff's claim "accrued sometime in 1979, when defendant's employee last molested her." (*Id.*, at p. 214 (dis. opn. of Werdegar, J.).) Notwithstanding this finding, Justice Werdegar opined that Section 340.1 "redefined accrual" and, under the delayed discovery provision in Section 340.1, the plaintiff's claim accrued *a second time* in 2003 "when she 'discover[ed] or reasonably should have discovered that psychological injury ... was caused by the [earlier] sexual abuse.'" (*Id.*, at pp. 215-215.)

Justice Werdegar's theory of two accrual dates was rejected by the majority in *Shirk*, which disagreed with the premise that Section 340.1 "redefined accrual" for claims against public entity defendants. (*Shirk, supra*, 42 Cal.4th at p. 215 (dis. opn. of Werdegar, J.) ["the majority [] reasons the Legislature's silence, when it drafted the revival statute, on the subject of claim presentation must mean the Legislature did not intend the revival statute [citation] to affect 'the accrual of the cause of action' [citation] for purposes of the claim presentation statute."") Indeed, as recently as October of this year, the Court of Appeal has recognized that, "[i]n *Shirk*, our Supreme Court concluded that the delayed discovery provisions in section 340.1 *did not toll* the period in which to present a claim under the Government Claims Act." (*A.M. v. Ventura Unified Sch.*

Dist. (2016) 3 Cal.App.5th 1252, 1258, italic added.) Consequently, Ms. Rubenstein's assertion that *Shirk* did not address the accrual issue is simply wrong.

One might reasonably ask, if the holding in *Shirk* is so clear on this issue, how did the Fourth District Court of Appeal get this case so wrong? The answer is twofold. First, the court of appeal completely ignored *Shirk*, failing to mention the case once in its decision. Regardless of the precise issues addressed in *Shirk*, the fact that the decision dealt with the interplay between Section 340.1 and the Government Claims Act renders the Court of Appeal's failure to cite the decision problematic in the extreme. Second, the Court of Appeal failed to recognize the well-settled distinction between limitations periods and accrual dates. Section 340.1 is a statute of limitations. "[W]hile section 340.1 extends the time during which an individual may commence a cause of action alleging childhood sexual abuse, it does not extend the time for *accrual* of that cause of action." (*V.C. v. Los Angeles Unified Sch. Dist.* (2006) 139 Cal.App.4th 499, 509, italics added.) "Rather, as cases decided both before and after the enactment of section 340.1 have confirmed, '[a] civil cause of action for child molestation generally accrues at the time of the molestation.'" (*Id.*, at p. 510.)

The confusion in this case stems from Government Code section 901, which provides that "the date of accrual of a cause of action [for purposes of the Government Claims Act] ... is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented ...." (Gov't Code, § 901.) The Court of Appeal in *Rubenstein* reasoned that, since the accrual date under the Government Claims Act is the same as the accrual date for a corresponding

civil cause of action under Government Code section 901, and because Section 340.1 sets forth the limitations period for filing an action for childhood sexual abuse, Section 340.1 necessarily "governs the accrual date for claim filing purposes." (*Rubenstein, supra*, 245 Cal.App.4th at p. 1045.) This reasoning is flawed. It presupposes that Section 340.1 speaks to the issue of accrual. However, as noted above, the Court of Appeal in *V.C.* and this Court in *Shirk* both rejected this proposition and made clear that Section 340.1 says nothing about accrual.

The reason why Section 340.1 does not speak to the issue of accrual is straight forward. A cause of action accrues "when, under the substantive law, the wrongful act is done ... and the consequent liability arises." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397, internal quotation marks omitted.) In other words, a cause of action accrues when it "is complete with all of its elements." (*Ibid.*) Put simply, a cause of action accrues "when the plaintiff is first entitled to sue." (*Buttram v. Owens-Corning Fiberglas Corp.* (1987) 16 Cal.4th 520, 531, fn. 4.) This Court has repeatedly stated that "a cause of action for childhood sexual molestation accrues at the time of molestation." (*Shirk, supra*, 42 Cal.4th at p. 210; *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 443.) Where the molestation takes place over a period of time, accrual is measured from the date of the last molestation. (*V.C., supra*, 139 Cal.App.4th at p. 510.) These rules are based on the fact that a child suffers an appreciable injury at the time of molestation and all of the elements of a civil cause of action are present at that time. (See *Marsh V. v. Gardner* (1991) 231 Cal.App.3d 265, 272-273, cited with approval in *S.M. v. Los Angeles Unified Sch. Dist.* (2010) 184 Cal.App.4th 712, 720.)

What the courts in *V.C.* and *Shirk* recognized, and what the Court of Appeal in this case failed to appreciate, is that Section 340.1 does not alter

the elements of a cause of action for childhood sexual abuse. (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 982 [stating that Section 340.1 did not "giv[e] rise to a new cause of action with its own accrual and limitations period"].) As Ms. Rubenstein herself points out in her brief, the question of accrual boils down to "a determination about whether the action at law for damages may proceed." (Answer Br., p. 22, quoting *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 615.) There can be no dispute in this case that all of the elements of Ms. Rubenstein's cause of action were present at the time she was allegedly molested. In other words, she could have maintained an action at that time. Section 340.1 does not alter this result. The statute simply operates as a tolling mechanism and provides that, notwithstanding the accrual date, the statute of limitations for claims of childhood sexual abuse is extended—based on policy considerations—to three years after a victim realizes a certain species of injury related to such claims, i.e., adult-onset psychological injury. Because Section 340.1 does not alter the accrual date for childhood sexual abuse claims, as recognized by *V.C.* and *Shirk*, the statute has no impact on when a claim accrues for purposes of when a government tort claim must be presented to a public entity.

It should be stressed that this case is not about whether *Shirk* was correctly decided. In other words, even if this Court now believes that Justice Werdegar's dissent was correct in *Shirk*, this Court is no longer operating on a clean slate. *Shirk* was decided in 2007. A year later, the California Legislature enacted Government Code section 905, subdivision (m). The statute partially overrules the holding in *Shirk*, exempting childhood sexual abuse claims from the requirements of the Government Claims Act, but only for those claims arising from abuse that occurred after January 1, 2009. (Gov't Code, § 905, subd. (m).) The legislative history of the statute makes clear that the Legislature interpreted *Shirk* the same way

that Petitioner and Amici Curiae have in this case, i.e., the Legislature understood *Shirk* to hold that Section 340.1 did not alter the accrual date for the purposes of the claims presentation statute.[6] In other words, if the statutory delayed discovery provision contained in Section 340.1 did in fact alter the accrual date for claims against public entities (as Ms. Rubenstein and the Court of Appeal suggest), the enactment of Government Code section 905, subdivision (m) would have been entirely unnecessary. More importantly, by enacting Government Code section 905, subdivision (m), the Legislature chose, for policy reasons, to legislatively overrule *Shirk*, but *only* for claims based on post-2009 conduct. According to the Senate Rules Committee, the limitation on the exemption to claims arising from post-2009 conduct was designed to "reduce the bill's financial impact on local public entities." (Sen. Rules Com., Analysis of Sen. Bill No. 640 (2007-2008 Reg. Sess.), as amended July 14, 2008.)[7]

The Court of Appeal unequivocally stated in *Rubenstein* that "section 340.1 governs the accrual date for claim filing purposes." (*Rubenstein*, *supra*, 245 Cal.App.4th at p. 1045.) That statement directly conflicts with the Legislature's understanding of *Shirk*. More importantly, the holding in *Rubenstein* nullifies Government Code section 905, subdivision (m), where the Legislature chose, for policy reasons, to treat claims arising from conduct occurring prior to January 2009 differently than claims arising from post-2009 conduct. If the holding in *Rubenstein* is

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[6] The legislative history of Government Code section 905, subdivision (m) is explored in detail in the proposed brief of Amici Curiae.

[7] Because the legislative history cited in this brief is publically available (www.leginfo.ca.gov), no motion for judicial notice is necessary. (*Wittenburg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654, 665, fn.4.)

allowed to stand, Government Code section 905, subdivision (m) will be rendered superfluous.

How This Brief Will Assist the Court

The legal issue in this case is straightforward: does the statutory delayed discovery provision contained in Section 340.1—which sets the statute of limitations for claims of childhood sexual abuse—govern the accrual date for purposes of when a claim must be presented to a public entity under the Government Claims Act? The Court of Appeal answered this question in the affirmative. Amici Curiae agree with Petitioner that the Court of Appeal was wrong in this regard. Amici Curiae further agree with Petitioner that this Court's holding in *Shirk* and the California Legislature's enactment of Government Code section 905, subdivision (m) are controlling on this issue and require a finding that Section 340.1 does not affect the accrual date for purposes of the Government Claims Act. The proposed brief will assist the Court in two ways. First, because this case involves the interplay between Section 340.1 and multiple provisions of the Government Code, the parties have necessarily devoted large portions of their briefs to unpacking these statutory provisions. The proposed brief focuses on nuances of the parties' arguments that may have been lost in this unpacking. Second, the Court of Appeal's decision in this case, if allowed to stand, will have a significant financial impact on every public school district within the state of California. The Legislature considered this financial impact to be significant when enacting Government Code section 905, subdivision (m). Because Amici Curiae were created to provide liability coverage and risk management services to the public school districts within this state, they have an informed and unique perspective on the potential impact of the *Rubenstein* decision.

Amici Curiae now respectfully request that this Court accept its application to submit this brief as amici curiae in order to call attention not only to the legal reasons why the holding in *Rubenstein* cannot stand, but also to demonstrate how *Rubenstein* poses a significant risk of exposure to public school districts in California that could sound the death knell for risk-sharing pools in this state.

Date: December 5, 2016

Respectfully submitted,

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ARGUMENT

The Court of Appeal's decision in this case stands or falls on the proposition that Code of Civil Procedure section 340.1 ("Section 340.1") governs the accrual date for purposes of determining when a claim of childhood sexual abuse must be presented to a public entity under the California Government Claims Act. This brief explains why that proposition is false. In a nutshell, the Court of Appeal's holding in this case represents a departure from pre-existing law, including this Court's ruling in *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, and the California Legislature's enactment of Government Code section 905, subdivision (m) (hereinafter "Government Code section 905(m)").

In *Shirk*, this Court expressly rejected the contention that Section 340.1 defines accrual for purposes of determining when a claim must be presented to a public entity under the Government Claims Act. (*Shirk*, *supra*, 42 Cal.4th at p. 210-211 & 214.) In response to that ruling, the California Legislature enacted Government Code section 905(m). The statute partially overrules the holding in *Shirk* by exempting claims for childhood sexual abuse from the claims presentation statute, but only for claims arising from abuse occurring after January 1, 2009. By making the statute prospective only, the Legislature codified its intent to retain its interpretation of *Shirk* for claims arising from abuse that occurred prior to 2009, which the Legislature believed would reduce the statute's financial impact on public entities. By failing to recognize the distinction between pre- and post-2009 claims, and by completely ignoring this Court's ruling in *Shirk*, the Court of Appeal's decision effectively nullifies Government Code section 905(m).

This brief concludes with an explanation of how the Court of Appeal's decision, if upheld, will have a catastrophic impact on risk-

sharing pools in California and will, in turn, have a significant impact on the public school system in this state. It is therefore requested that the Court grant the relief requested by Petitioner in this case and reverse the Court of Appeal's decision in *Rubenstein v. Doe No. 1* (2016) 245 Cal.App.4th 1037.

I. Overview of the Claims Presentation Requirements of the California Government Claims Act

The California Government Claims Act (Gov't Code, § 900 *et seq.*) "prescribes the manner in which public entities may be sued." (*V.C. v. Los Angeles Unified Sch. Dist.* (2006) 139 Cal.App.4th 499, 507.) "Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity." (*Shirk, supra*, 42 Cal.4th at p. 208.) "[N]o suit for money damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity." (Gov't Code, § 945.4.) The six-month period is not tolled for minority. (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 444 n.3; *V.C., supra*, 139 Cal.App.4th 499, 508; Code Civ. Proc., § 352, subd. (b); Gov't Code, § 911.4, subd. (c)(1).)

Timely claim presentation is not merely a procedural requirement, but rather, a condition precedent to the plaintiff's maintaining an action against a public entity. (*Shirk, supra*, 42 Cal.4th at p. 209.) Timely claim presentation is therefore an element of the plaintiff's cause of action and a complaint which fails to allege facts demonstrating that a claim was timely presented (or that compliance with the claims statute is excused) is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action. (*Ibid.*)

Government Code section 911.2 requires that claims against public entities be filed "not later than six months after the accrual of the cause of action." (Gov't Code, § 911.2.) Government Code section 901 provides that "the date of accrual of a cause of action [for purposes of the Government Claims Act] ... is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented ...." (Gov't Code, § 901.) As to when a cause of action for childhood sexual abuse accrues, this Court has repeatedly stated that "a cause of action for childhood sexual molestation accrues at the time of molestation." (*Shirk*, *supra*, 42 Cal.4th at 210; *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 443.) Where the molestation takes place over a period of time, accrual is measured from the date of the last molestation. (*V.C.*, *supra*, 139 Cal.App.4th at 510.) These rules are based on the fact that a child suffers an appreciable injury at the time of molestation and all of the elements of a civil cause of action are present at that time. (See *Marsha V. v. Gardner* (1991) 231 Cal.App.3d 265, 272-273, cited with approval in *S.M. v. Los Angeles Unified Sch. Dist.* (2010) 184 Cal.App.4th 712, 720.)

II. Prior to the Decision in this Case, the Courts Unanimously Held that the Statute of Limitations Set Forth in Section 340.1 Does Not Directly Apply to Public Entities and Three of the Four Published Decisions on this Issue Held that Section 340.1 Has No Bearing on When a Claim Accrues for Purposes of the Government Claims Act

Several decisions, including this Court's decision in *Shirk*, have addressed the interplay between Section 340.1 and the claims presentation provisions contained in the Government Claims Act. (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263; *V.C. v. Los Angeles Unified School District* (2006) 139 Cal.App.4th 499; *Shirk v. Vista*

Unified School District (2007) 42 Cal.4th 201; *K.J. v. Arcadia Unified School District* (2009) 172 Cal.App.4th 1229; *S.M. v. Los Angeles Unified School District* (2010) 184 Cal.App.4th 712.) Notwithstanding these authorities, the Court of Appeal in this case completely ignored all but one of these cases (the *K.J.* decision), which, as discussed below, does not represent the majority view on this issue. Ms. Rubenstein now claims that the reason the Court of Appeal failed to cite these decisions is because the decisions "are not relevant in an analysis as to when a claim accrues." (Answer Br. p. 24.) This proposition cannot be reconciled with the language of the decisions that Ms. Rubenstein claims to be irrelevant. This section sets forth the legal landscape in which the Court of Appeal issued its decision. A review of this landscape shows that the Court of Appeal's decision is not in accord with existing law.

The California Legislature began expanding the statute of limitations applicable to childhood sexual abuse in 1986 by enacting Section 340.1. The statute has since been amended no less than five times and an in-depth discussion of the history of the statute appears both in *Shirk*, *supra*, 42 Cal.4th at 207-208, and this Court's decision in *Quarry v. Doe I* (2012) 53 Cal.4th 945, 960-970. As a brief overview, in 1990, the statute was amended to make it applicable to any individual who sexually abused a child, not just household members. (*Shirk*, *supra*, 42 Cal.4th at 207.) The amendment also extended the statute of limitations to eight years from the date the victim attains the age of majority or three years from the date the victim "discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse." (*Ibid.*) In 1998, the statute was again amended and, for the first time, was expanded to apply to organizational defendants. (*Id.*, at p. 208.) Prior to 1998, Section 340.1 only applied to

individual abusers and had no application to actions against organizations. Finally, in 2002, the statute was amended to open a one-year window for previously time-barred claims. (*Ibid.*) Under the amendment, a victim of childhood sexual abuse had until January 1, 2004 to file a cause of action against the individual or organization that would otherwise have been time barred "solely because of the applicable statute of limitations has or had expired" as of 2003. (*Ibid.*)

The courts began confronting the interplay between Section 340.1 and the Government Claims Act in 2005. In *County of Los Angeles* the plaintiff, who had attained the age of majority, alleged that she had been sexually abused as a minor in a county facility. (*County of Los Angeles*, *supra*, 127 Cal.App.4th at p. 1266.) A little more than a year after she turned 18, the plaintiff filed suit. (*Id.*, at 1266-1267.) The county moved for summary judgment on the ground that the plaintiff had not timely complied with the Claims Act and the plaintiff argued that her claim was timely under Section 340.1. More specifically, the plaintiff argued that, under Section 340.1 which requires claims for childhood sexual abuse to be filed within eight years of the victim reaching the age of majority, her claim did not accrue until she turned eighteen. (See *id.*, at p. 1272.) She therefore argued that she had eight years from that date to file suit. (*Id.*, at 1266.)

The court in *County of Los Angeles* rejected the plaintiff's argument. The court first noted that the Government Claims Act contains its own statute of limitations (Gov't Code, § 945.6), which provides that a lawsuit must be commenced six months after a timely claim is rejected by the public entity. (*County of Los Angeles*, *supra*, 127 Cal.App.4th at pp. 1267-1268.) Because the plaintiff was suing a public entity, the court held that the statute of limitations in the Claims Act applied and that Section

340.1 did not trump the Claims Act. (*Id.*, at p. 1268.) Finally, because the plaintiff had not filed suit until after she turned nineteen, the court held that, regardless of whether the plaintiff's claim accrued when she turned eighteen under Section 340.1—as she argued—or whether her claim accrued at the time of molestation, her claim was time barred because she had not filed suit within six months of either of those events. (*Id.*, at p. 1272.) Although the court ultimately punted on the accrual issue, it did make clear that "[t]o the extent that section 340.1 now authorizes suits against a person or entity other than the actual perpetrator, nothing in that statute or the legislative history of the 1998 amendment ... reflects an intent on the part of the Legislature to excuse victims of childhood sexual abuse from complying with the Act when the defendant is a public entity." (*Id.*, at 1268-69.)

In 2006, in *V.C. v. Los Angeles Unified School District* (2006) 139 Cal.App.4th 499, the Court of Appeal picked up where the court in *County of Los Angeles* had left off and directly addressed the accrual issue. The case involved allegations that the plaintiff was molested by her middle school teacher between 2001 and 2003. (*V.C.*, *supra*, 139 Cal.App.4th at 504.) Because she did not present a claim to the district within six months of the last act of molestation, the district demurred to the complaint based on the Claims Act. The trial court sustained the demurrer and the student appealed. On appeal, the student argued that section 340.1 "sets the date of accrual of her cause of action at or beyond the age of majority, thereby rendering her claim timely." (*Id.*, at 509.) According to the plaintiff, because Section 340.1 permits an individual to commence a cause of action up to eight years after attaining the age of majority, the statute "must be construed to provide that her cause of action would accrue—at the earliest—when [she] reached the age of majority." (*Id.*, at p. 505.)

Contrary to Ms. Rubenstein's assertion in this case, the Court of Appeal in *V.C.*, took the accrual issue head-on, stating that, "while section 340.1 extends the time during which an individual may commence a cause of action alleging childhood sexual abuse, *it does not extend the time for accrual of that cause of action.*" (*Id.*, at 510, italics added.) The court continued: "Rather, as cases decided both before and after the enactment of section 340.1 have confirmed, '[a] civil cause of action or child molestation generally accrues at the time of the molestation." (*Ibid.*) The court concluded that it could find "nothing in the language or legislative history of section 340.1 that establishes the Legislature intended to modify either the date of accrual or the claim requirements of Government Code sections 911.2 and 911.4 when there is an allegation of sexual abuse against a public entity." (*Id.*, at 514.)

In 2007, a year after the Court of Appeal's decision in *V.C.*, the issue reached the California Supreme Court in *Shirk.* There, a 41-year-old plaintiff sued a school district for sexual abuse by a teacher that occurred between 1978 and 1979. (*Shirk, supra*, 42 Cal.4th at p. 205.) More than twenty years later, the plaintiff encountered the teacher when attending a high school band tournament with her 15-year-old daughter. (*Ibid.*) The plaintiff became "very upset" and consulted a mental health professional, who told her that she was suffering psychological injuries due to the long-ago abuse. (*Ibid.*) The trial court sustained the school district's demurrer without leave to amend on the ground that the plaintiff had failed to comply with the Claims Act. (*Id.*, at 206.) The plaintiff appealed, arguing that she had "timely presented her government tort claim" "because it was only then [more than twenty years after the alleged abuse ended] that 'she discovered the cause of her adult psychological injuries.'" (*Ibid.*)

The plaintiff in *Shirk* made two arguments to the California Supreme Court. First, she argued that her claims were subject to a statutory revival provision, which is inapplicable in this case. (*Shirk*, *supra*, 42 Cal.4th at 210.) Second, she argued "that her duty to present her claim to the School District, as required under the government claims statute, *first arose* on September 12, 2003, when she discovered that her psychological injury was caused by the teacher's sexual abuse." (*Id.*, at 210-11, italics added.) The Court rejected both arguments: "We conclude that neither of her contentions is supported by the language and history of the legislative scheme." (*Id.*, at 211.) In other words, the Court in *Shirk* rejected the very same position adopted by the Court of Appeal in this case, i.e., that a person's duty to present a timely claim to a public entity is delayed under Section 340.1 until the person discovers that adult-onset injury was caused by earlier abuse.

In 2009, two years after this Court issued its decision in *Shirk* and one year after the California Legislature partially overturned that decision by enacting Government Code section 905(m), which is discussed at length below, the Second District Court of Appeal issued a decision in *K.J. v. Arcadia Unified School District* (2009) 172 Cal.App.4th 1229. Of the multiple cases that address the interplay between Section 340.1 and the Government Claims Act, *K.J.* was the only decision cited by the Court of Appeal in this case. For the reasons set forth below, *K.J.* is an outlier decision that contains statements that are irreconcilable with the holdings in *V.C.* and *Shirk*.

In *K.J.* the plaintiff was allegedly abused by her high-school teacher beginning when she was fifteen years old. (*K.J.*, *supra*, 172 Cal.App.4th at p. 1235.) The sexual conduct lasted for three years and, after the student turned eighteen, she informed her mother of the relationship in July 2006.

The teacher was arrested in October 2006, and then, in September 2007—approximately fifteen months after the last act of molestation—the student presented the school district with a tort claim. (*Id.*, at 1236.) The school district rejected the tort claim as untimely, the student filed suit, and the district demurred based on the plaintiff's failure to timely comply with the Claims Act. (*Id.*, at p. 1236.) The trial court sustained the demurrer without leave to amend and the plaintiff appealed. (*Id.*, at p. 1233.)

On appeal, the plaintiff argued that her claim was timely because, "[e]ven after [the teacher's] arrest, [she] 'believed that she was in love with [him] and that he had done nothing wrong.'" (*K.J.*, *supra*, 172 Cal.App.4th at p. 1234.) Consistent with *V.C.* and *Shirk*, the court in *K.J.* first noted that a "civil cause of action for child molestation generally accrues at the time of the molestation" (*id.*, at p. 1239) and that Section 340.1 does not technically apply to public entities (*id.*, at p. 1242). The court went on to say, however, that Section 340.1 "codifies the delayed discovery doctrine" and "guides our understanding of the accrual date applicable to [the] presentation of a tort claim to the District." (*Id.*, at 1242-1243.) These statements directly conflict with the statements in *V.C.* and *Shirk.*

As to the statement that Section 340.1 "codifies the delayed discovery doctrine," this statement fails to appreciate the difference between the common law delayed discovery rule and the statutory rule set forth in Section 340.1. Contrary to the assertion in Ms. Rubenstein's brief, the doctrines are not the same. (See Answer Br. p. 38, fn. 7.) In the context of childhood sexual abuse, the common law delayed discovery doctrine traditionally applied where the child had suppressed the memory of the abuse or failed to appreciate that she was molested due to young age. (See *Marsha V. v. Gardner* (1991) 231 Cal.App.3d 265, 272-73.) If a victim realized that the molestation was wrong, the fact that she "was unaware of

additional harm ('feelings of great shame, embarrassment, humiliation, fear, confusion about herself, guilt, self-blame, self-hate, anxiety, extreme depression, psychosomatic and sleep-related complaint, inability to differentiate between sex and affection, and difficulty forming meaningful trust relationships') only created 'uncertainty as to the amount of damages [and did not] toll [] the period of limitations.'" (*Ibid.*; see also *Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1618, citing *Jolly v. Eli Lilly & Co.*, *supra*, 44 Cal.3d at 1110.) In contrast, as noted by this Court in *Quarry v. Doe I*, Section 340.1 "*created its own statutory delayed discovery rule*" that "extend[s] delayed discovery principles beyond what had been recognized in the case law." (*Quarry*, *supra*, 53 Cal.4th at p. 963, italics in original.) Given this Court's statement in *Quarry*, it is clear that *K.J.*'s statement that Section 340.1 codified the delayed discovery rule is simply wrong.[8]

The most problematic aspect of the ruling in *K.J.*, was the court's statement that Section 340.1 "guides" the accrual analysis. (*K.J.*, *supra*, 172 Cal.App.4th at p. 1243.) That proposition was rejected by the Court of Appeal in *V.C.*, which unequivocally stated that "nothing in the language or legislative history of section 340.1 [] establishes the Legislature intended to modify [] the date of accrual" for childhood sexual abuse cases against public entities. (*V.C.*, *supra*, 139 Cal.App.4th at 514.) Notwithstanding the language in *V.C.*, which the court in *K.J.* did not cite, *K.J.* reached this conclusion by reference to Government Code section 901. That statute provides that "the date of accrual of a cause of action [for purposes of the Government Claims Act] ... is the date upon which the cause of action

[8] Ms. Rubenstein argues in her brief that, even if Section 340.1 does not govern the accrual issue in this case, her tort claim was timely presented under the common law delayed discovery rule. That issue was not decided by the Court of Appeal and Amici Curiae do not believe the issue is properly before this Court.

would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented ...." (Gov't Code, § 901.) The court reasoned that, since the accrual date under the Government Claims Act is the same as the accrual date for a corresponding civil cause of action, and because Section 340.1 sets the limitations period for childhood sexual abuse claims against non-public entity civil actions, "the conclusion is ineluctable that the date of accrual in ... section 340.1, pertaining to private defendants, is applicable to the presentation of a claim to a public entity." (*K.J.*, *supra*, 172 Cal.App.4th at p. 1243, fn.7.)

This is the same flawed reasoning adopted by the Court of Appeal in this case. The reasoning presupposes that Section 340.1 speaks to the issue of accrual. As recognized by the court in *V.C.*, however, nothing in Section 340.1 speaks to the issue of accrual. A cause of action accrues "when, under the substantive law, the wrongful act is done ... and the consequent liability arises." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397, internal quotation marks omitted.) In other words, a cause of action accrues when it is complete with all of its elements and "the plaintiff is first entitled to sue." (*Buttram v. Owens-Corning Fiberglas Corp.* (1987) 16 Cal.4th 520, 531, fn. 4.) This Court made clear in *Quarry v. Doe I*, that Section 340.1 does not alter the elements of a cause of action for childhood sexual abuse. (*Quarry*, *supra*, 53 Cal.4th at p. 982 [stating that Section 340.1 did not "giv[e] rise to a new cause of action with its own accrual and limitations period"].) Thus, a cause of action for childhood sexual abuse, even after the enactment of Section 340.1, continues to accrue at the time of molestation when the claim is complete with all of its elements and the victim is first entitled to sue. (*V.C.*, *supra*, 139 Cal.App.4th at p. 510 ["as cases decided both before and after the enactment of section 340.1 have

confirmed, '[a] civil cause of action or child molestation generally accrues at the time of the molestation."].) Viewed in this light, Section 340.1 simply operates as a tolling mechanism and provides that, notwithstanding the accrual date, the statute of limitations for claims of childhood sexual abuse is extended—based on policy considerations—to three years after a victim realizes a certain species of injury related to such claims, i.e., adult-onset psychological injury. Because Section 340.1 does not alter the accrual date for childhood sexual abuse claims, as recognized by *V.C.* and *Shirk*, the statute does not "guide" the understanding of when a claim for childhood sexual abuse accrues under the Claims Act. The statement in *K.J.* is therefore irreconcilable with the holding in *V.C.* and represents a minority divergence in the case law that is inconsistent with this Court's holdings in *Shirk* and *Quarry*.

The statements in *K.J.* did not gain much traction. A year after the decision, the Second District Court of Appeal issued a decision in *S.M. v. Los Angeles Unified School District* (2010) 184 Cal.App.4th 712. There, the court of appeal once again affirmed that the statutory delayed discovery rule set forth in Section 340.1 had no application to the question of accrual. (*Id.*, at pp. 720-21.) The court also recognized that, while the enactment of Government Code section 905(m) changed the law with regard to sexual abuse occurring after January 2009, the amendment did not change the law with regard to claims of sexual abuse against public entities based on conduct that occurred prior to 2009. The court stated:

> In apparent recognition of the dilemma faced by families of children abused by public school officials, the law has changed. For claims described in [Section 340.1] for the recovery of damages suffered due to childhood sexual abuse occurring after January 1, 2009, the tort claim presentation requirement no longer applies. [Citation.] However, the Legislature did not see fit to include an earlier cut-off date

> that would have preserved S.M.'s claims and we have no power to rewrite the statute.

(*Id.*, at p. 721 fn. 6.)

These cases show that the Courts of Appeal and this Court have unanimously held that Section 340.1 does not apply to public entities. The cases also show that the *K.J.* decision, which was relied upon by the Court of Appeal in this case, misstates the law and is not in accordance with the majority view that the statutory delayed discovery rule contained in Section 340.1 has no bearing on when a claim accrues for purposes of the claims presentation statute. This point was once again reaffirmed in *A.M. v. Ventura Unified School District* (2016) 3 Cal.App.5th 1252, which was decided after the petition in this case was filed. There, the court stated that, "[i]n *Shirk*, our Supreme Court concluded that the delayed discovery provisions in section 340.1 did not toll the period in which to present a claim under the Government Claims Act." (*Id.*, at p. 1258.)

III. The Legislative History Surrounding the Enactment of Government Code Section 905(m) Demonstrates that Section 340.1, Including its Statutory Delayed Discovery Rule, Does Not Alter the Accrual Date for Purposes of the Government Claims Act for Claims Arising from Conduct Prior to January 2009

In response to Petitioner's opening brief, which directs the Court to the legislative history surrounding the enactment of Government Code section 905(m), Ms. Rubenstein asserts that "[t]here is simply no benefit gleamed from examining" these materials. Amici Curiae disagree and believe that the enactment of Government Code section 905(m) is the key to the analysis in this case.

This Court decided *Shirk* in 2007. In direct response to *Shirk*, in 2008, the Legislature proposed Senate Bill 1339. The Senate Judiciary Committee's analysis stated that "existing case law [referring to *Shirk*] holds that, notwithstanding [] section 340.1 *and its delayed discovery*

provisions, a timely [public entity six-month] claim is a prerequisite to maintaining an action for childhood sexual abuse against a public entity [school district]." (Sen. Judiciary Com., Analysis of Sen. Bill No. 1339 (2007-2008 Reg. Sess.), as introduced, p. 4 [second and third brackets in original, italics added].)[9] As introduced, the bill would "amend [Government Code] Section 905 to provide that claims against local public entities for the recovery of damages suffered as a result of childhood sexual abuse made pursuant to CCP Section 340.1 would be exempt from the Government Tort Claims Act and its six-month public entity claim presentation requirement." (*Id.*, p. 4.) The author of the bill stated that "SB 1339 would respond to the *Shirk* decision by specifically exempting Section 340.1 civil actions for childhood sexual abuse from government tort claims requirements, thereby treating Section 340.1 actions against public entities the same as those against private entities." (*Id.*)

Ultimately, Senate Bill 1339 was relegated to the "suspense file" and never passed. (Sen. Appropriations Com., Analysis of Sen. Bill No. 1339 (2007-2008 Reg. Sess.), as amended Feb. 20, 2008). However, Senate Bill 640 did pass, and was "identical to SB 1339 [], except that this bill applies prospectively only, to claims arising out of conduct occurring on or after January 1, 2009 ... [which] should reduce the bill's financial impact on local public entities." (Sen. Rules Com., Analysis of Sen. Bill No. 640 (2007-2008 Reg. Sess.), as amended July 14, 2008, p. 1.) Thus, a year after *Shirk* was decided, the Legislature amended the Government Code, exempting claims for childhood sexual abuse claims from the claims

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[9] Because the legislative history cited in this section is publically available (www.leginfo.ca.gov), no motion for judicial notice is necessary. (*Wittenburg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654, 665, fn.4.)

presentation requirement, but only for those claims "arising out of conduct occurring on or after January 1, 2009." (Gov't Code, § 905(m).)

Three important points can be gleaned from the above legislative history. First, by amending the Government Code in 2008, the California Legislature understood *Shirk* to hold that Section 340.1 did not alter the accrual date for the purposes of the claims presentation statute. In other words, if the statutory delayed discovery provision contained in Section 340.1 did in fact alter the accrual date for claims against public entities, Government Code section 905(m) would have been entirely unnecessary. Second, by enacting Government Code section 905(m), the Legislature chose, for policy reasons, to legislatively overrule *Shirk*, but *only* for claims based on post-January 1, 2009 conduct. Third, because the Legislature left in place its understanding of *Shirk* for pre-2009 conduct, the Legislature's interpretation of *Shirk* is presumptively correct. (*Estate of Heath* (2008) 166 Cal.App.4th 396, 402 ["[w]hen a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it."]; See also, *Marina Point. Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 [same].)

If there was any doubt as to whether *Shirk* addressed the issue of Section 340.1's application to the claims presentation statute, the enactment of Government Code section 905(m) ended that doubt. The legislative history of the statute makes clear that the Legislature interpreted *Shirk* the same way that Petitioner and Amici Curiae have in this case, i.e., the Legislature understood *Shirk* to hold that Section 340.1 did not alter the accrual date for the purposes of the claims presentation statute. By enacting Government Code section 905(m), the Legislature chose, for policy reasons, to legislatively overrule *Shirk*, but *only* for claims based on post-

2009 conduct. The holding in *Shirk*, as it was understood by the Legislature, therefore remains applicable to pre-2009 claims. In other words, for claims arising from conduct occurring after January 1, 2009, a plaintiff need not comply with the claims presentation requirements of the Government Claims Act and the timeliness of the claim is determined solely by reference to Section 340.1. However, for claims arising from conduct prior to 2009, plaintiffs were required to present a claim to the public entity within six months of the accrual of the cause of action, which, according to well-settled case law, occurs at the time that all of the elements of the cause of action are present and the plaintiff is first entitled to sue. According to *Shirk*, which remains applicable to pre-2009 claims, claims for childhood sexual abuse accrue at the time of molestation and nothing in Section 340.1 alters that analysis. It is undisputed that this analysis may leave some plaintiffs without redress. This result, however, was considered and intended by the Legislature, which stated that distinguishing between pre- and post-2009 claims would have the effect of reducing the financial impact on public entities.

Ultimately, as a matter of statutory interpretation, the position taken by Petitioner in this case harmonizes Government Code sections 901 and 905(m) with Code of Civil Procedure section 340.1. In contrast, the Court of Appeal's decision in this case renders Government Code section 905(m) superfluous. Put another way, if Section 340.1 governs the accrual date of claims under the Government Claims Act, there would have been no need to exempt childhood sexual abuse claims from the claims presentation requirements because, if the statute applied, claims could be presented to public entities anytime within three years that a plaintiff discovered adult-onset psychological injury was connected to childhood sexual abuse. Based on *Shirk*, the Legislature clearly understood this not to be the case and

chose to distinguish between pre- and post-2009 claims. *Rubenstein* does away with this distinction.

IV. The Holding in *Rubenstein*, if Upheld, Will Have a Catastrophic Impact on Risk-Sharing Pools in California and Will, in Turn, Have a Significant Impact on the Public School System in this State

This case presents an issue of exceptional importance to the public schools of this state and organizations, such as Amici Curiae, that provide liability coverage and risk management services to public school districts in California. It may not surprise the Court to hear that public schools in this state suffer from a severe lack of funding. The Court might be surprised, however, to learn that public school districts in California have historically had problems obtaining insurance to cover potential liabilities. Indeed, as pointed out in the application accompanying this brief, in the mid-1980s—due to a hardening in the commercial insurance market and skyrocketing premiums—the situation reached the point where many school districts in California were unable to secure any commercial insurance. Recognizing this problem, a steering committee was formed in 1985 consisting of representatives of northern and southern California school districts to address the issue. That steering committee resulted in the formation of the Northern California Regional Liability Excess Fund ("NorCal ReLiEF"), the Southern California Regional Liability Excess Fund ("SoCal ReLiEF"), and the Statewide Association of Community Colleges ("SWACC").

These groups are non-profit member-owned and operated Joint Powers Authorities organized pursuant to the California Joint Exercise of Powers Act (Gov't Code, § 6500.1 et seq.) By pooling tax revenues from multiple school districts, these groups provide public school districts in California with the ability to pool risk and self-insure. It is the express mission of these entities to provide public schools in California with broad

liability and property coverage, stable rates, and quality, specialized risk management services. Together with the Schools Association for Excess Risk ("SAFER"), which is an additional Joint Power Authority formed in 2002, these groups provide liability coverage and risk management services to approximately half of the public school districts in California, representing more than two million students across the state.

The Court of Appeal's decision in this case threatens the continued viability of school district risk-sharing pools in California. The viability of risk-sharing pools depends largely on two factors: (i) the ability to identify and predict risk; and (ii) the ability of public school districts to provide funds sufficient to cover those risks. The holding in *Rubenstein* affects both of these factors.

Prior to 2008, the law appeared well-settled in this state that: (1) plaintiffs with claims of sexual abuse against public entities were required to comply with the claim presentation requirements of the Government Claims Act prior to filing suit by presenting a claim within six months of the accrual of the cause of action; (2) claims for childhood sexual abuse accrue at the time of molestation; and (3) nothing in Section 340.1 altered the accrual date of sexual abuse claims for purposes of the claims presentation statute. (*Shirk*, *supra*, 42 Cal.4th at p. 214; *V.C.*, *supra*, 139 Cal.App.4th at p. 514; *County of Los Angeles*, *supra*, 127 Cal.App.4th at p. 1269.) The Legislature altered this framework in 2008 when it enacted Government Code section 905(m), which was introduced in response to this Court's holding in *Shirk* and exempts childhood sexual abuse claims from the requirements of the Government Claims Act, but only for those claims arising from abuse that occurred after January 1, 2009.

The enactment of Government Code section 905(m) presented a daunting challenge to Amici Curiae and their school district members. The

statute had the effect of expanding school districts' potential liability for childhood sexual abuse by twenty one years. Under the statute, every five-year-old starting kindergarten each school year has until age 26 to file a lawsuit for sexual abuse occurring after January 2009. Amici Curiae were therefore required to appropriately manage their reserves for an exposure that runs twenty one years for each fiscal year beginning in 2009. This, in turn, required Amici Curiae to raise the rates of its school district members so that the risk-sharing pools had sufficient funds to cover this potential liability.

Since the enactment of Government Code section 905(m), sexual assault and molestation claims have become the leading liability for public school districts. For instance, between 2010 and 2015 NorCal ReLiEF alone received approximately 100 claims for sexual assault and molestation, resulting in over $46 million of incurred liability. This is more than double the amount of the next highest loss leader, which was $22 million related to supervisory claims for the same time period. SoCal ReLiEF recognized the importance of this issue in its 2014-2015 Annual Report, telling its members:

> Our primary focus for the 2015-2016 year continues to be student safety. Child abuse is an epidemic that demands our attention like never before. It not only destroys lives but costs public schools hundreds of millions of dollars annually. It is the single biggest challenge our program faces today. As such, ReLiEF is committed to eradicating this epidemic from our schools. Mandated Reporter training is just the beginning. We must change the culture, help everyone understand they are the front line of defense, and encourage them to get involved. If you see something suspicious, report it! We must keep our children safe at school in order to achieve our education goals.[10]

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[10] Available at https://www.socalrelief.org/sps/index.jsp?site=scr&menu=about_annual%20report&nocache=true, last visited December 2, 2016.

As discussed in the above legal analysis, the holding in *Rubenstein* nullifies Government Code section 905(m), treating pre-2009 abuse claims the same as post-2009 abuse claims, eliminating the well-settled six month claims presentation requirement, and holding that pre-2009 abuse claims may be brought any time within three years of the victim's realization that adult-onset psychological injury was caused by childhood sexual abuse. Thus, while Government Code section 905(m) required public school districts to contribute funds sufficient to cover twenty one years of potential liability for every school year since 2009, *Rubenstein* has the effect of creating exposure to an additional twenty-two years of liability. In other words, because the court in *Rubenstein* held that there is essentially no difference between pre- and post-2009 claims, if the ruling is allowed to stand, Amici Curiae will be required cover potential liability not only for the post-2009 claims contemplated by Government Code section 905(m), but also for claims arising from conduct that occurred any time from 1986—when ReLiEF was formed—into perpetuity.

The example provided by Petitioner of the effect of the *Rubenstein* demonstrates the potential impact on public school districts. As pointed out by Petitioner, under *Rubenstein*, a 65-year-old plaintiff may present a tort claim to a public school district (and then file suit) for abuse that allegedly occurred more than 50 years ago so long as the claim is presented within three years of the plaintiff discovering that adult-onset psychological injury was caused by the abuse. In such a case, all of the teachers and administrators who worked at the school at the time of the alleged abuse would no longer by employed by the school district and would be in their late 80s. Such a situation circumvents every public policy underlying the requirements of the Government Claims Act—affording public entities to opportunity to promptly investigate while tangible evidence is still

available, memories are fresh, and witnesses can be located; providing notice to public entities so that they can remedy the condition giving rise to the injury thereby minimizing risks to others; and enabling the public entity to engage in fiscal planning related to potential liabilities. (See *Shirk*, *supra*, 42 Cal.4th at p. 213; see also *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738.)

This result was neither anticipated by Amici Curiae nor contemplated by the Legislature. If Amici Curiae are required to maintain funds sufficient to cover potential liability for childhood sexual abuse that occurred as early as 1986, the risk-sharing pools will no longer be sustainable. If Amici Curiae are required to defend and potentially indemnify for all abuse cases dating back to their formation in 1986, there is a high probability of having to assess school district members for claim years that have been fiscally closed for a number of years as a result of existing statutory exposures at the time that matters are resolved, which, in some cases, would come decades later. The decision to close out these years did not include the exposure contemplated by the holding in *Rubenstein* because that exposure did not exist at the time. There is no possible way to determine and manage an unlimited exposure of this type or set appropriate reserves.

Put simply, the holding in *Rubenstein* will likely put an end to risk-sharing pools for public school districts in California. Without the benefits of risk-sharing pools, public school districts will either have to obtain commercial insurance (which many will not be able to procure) or directly pay for these liabilities out of their own coffers. Indeed, excess insurance carriers are already refusing to underwrite the risk due to the current elongated statute of limitations under Section 340.1 and it applicability for post-2009 claims to public school districts under Government Code section

905(m). If the holding in *Rubenstein* is upheld, Amici Curiae have no doubt that this market will evaporate, leaving districts to deal with a catastrophic risk exposure without liability coverage. This result was not contemplated by the Legislature and cannot be allowed to stand.

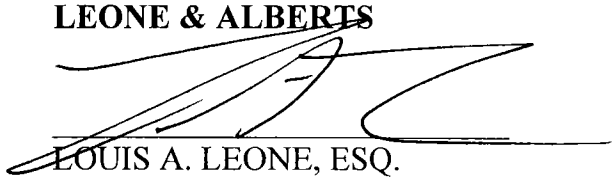
Conclusion

For the reasons articulated in this brief, Amici Curiae respectfully request that this Court reverse the decision in *Rubenstein*.

Respectfully submitted,

Dated: December 5, 2016

LEONE & ALBERTS



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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I, Seth L. Gordon, counsel for Amici Curiae, hereby certify that the foregoing application and proposed brief consists of 11,031 words as counted by the Microsoft Office word-processing program used to generate this document.

DATED: December 5, 2016

LEONE & ALBERTS

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Attorney for Amici Curiae

Re: Latrice Rubenstein v. State of California
Supreme Court Case No.: S234269
Court of Appeal Case No.: D066722

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the City of Walnut Creek, State of California. I am over the age of 18 years and not a party to the within cause; my business address is 2175 N. California Blvd., Suite 900, Walnut Creek, California.

On December 5, 2016, I served the following documents:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, AND SCHOOL ASSOCIATION FOR EXCESS RISK IN SUPPORT OF DEFENDANT/RESPONDENT DOE NO. 1

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Court of Appeal
Fourth Appellate District,
Division 1
750 B Street
San Diego, CA 92101

VIA MAIL

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above and placing each for collection and mailing on that date following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at Walnut Creek, California, with postage thereon fully prepaid, that same day in the ordinary course of business.

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and depositing each envelope(s), with postage thereon fully prepaid, in the mail at Walnut Creek, California.

VIA OVERNIGHT MAIL/COURIER

[X] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service, or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence/documents for overnight mail or overnight courier service, and that it is to be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

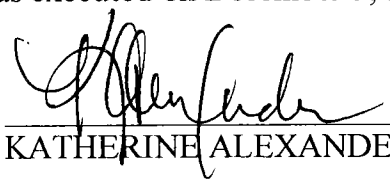
VIA FACSIMILE

[ ] By arranging for facsimile transmission from facsimile number 925-974-8601 to the above listed facsimile number(s) prior to 5:00 p.m. I am readily familiar with my firm's business practice of collection and processing of correspondence via facsimile transmission(s) and any such correspondence would be transmitted via facsimile to the designated numbers in the ordinary course of business. The facsimile transmission(s) was reported as complete and without error.

VIA HAND-DELIVERY

[ ] By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and causing each envelope(s) to be hand-served on that day by D&T SERVICES in the ordinary course of my firm's business practice.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 5, 2016, at Walnut Creek, California.



KATHERINE ALEXANDER