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IN THE SUPREME COURT OF CALIFORNIA

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 and Respondents,
v.
COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

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

After a Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B264946

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The ABM reveals that Defendants do not like the hand they were dealt—whether from a legal, grammatical, or public policy perspective. Beginning with the Introduction's second sentence, the ABM broadly mischaracterizes the real issues here.

That sentence proclaims that California voters did not intend "to force a party to pay for the wrongs of others—*merely because* the former has deeper pockets than the latter ...." (ABM 10, italics added.) Of course they didn't, and we have never suggested otherwise. This entire case is about intentional wrongdoing, not purse size.

Continuing in the same vein, Defendants contend that "[t]he new statutory scheme [under Civil Code section 1431.2] mandated fairness for all defendants, *no matter the nature of fault* assigned." (ABM 10, italics added.)[1] They then quote the following from section 1431.1(c): "'To treat them differently is unfair and inequitable.'" (ABM 10.)

But the "them" referred to above are *not* intentional-versus-negligent tortfeasors. Rather the foregoing reference focuses

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1 Unless otherwise noted, all references are to the Civil Code.

solely on ensuring that "deep pocket" defendants are not forced to bear "all the damage" despite there being "little or no basis for finding them at fault." (§ 1431.1(b).)

The real issue is whether, in stating that any non-economic damages allocation (in specified cases) would be "based upon principles of comparative fault," the voters wanted to afford intentional wrongdoers *the benefit* of reducing their liability vis-à-vis the class of merely negligent actors (whether co-defendants or the plaintiff). (§ 1431.2(a).) Put another way, did the voters intend to overturn the long-established principles that intentional wrongdoers are in a different category than negligent actors and that fairness dictates that intentional tortfeasors may never benefit from their own wrongdoing to the detriment of the less culpable?

At one point, the ABM proclaims that "'every [statutory] word should be given some significance.'" (ABM 30.) The irony is breathtaking. Defendants' entire argument is predicated on a statutory interpretation that would render the clause at the very heart of this appeal utterly meaningless:

> In any action for personal injury, property damage, or wrongful death, ***based on principles of comparative fault***, the liability of each defendant for non-economic damages shall be several only.

(§ 1431.2(a), emphasis added.)

Although we make this a key argument in our OBM, Defendants can never explain how—if *every* defendant in such actions is limited to paying only "several" damages, i.e., only those damages attributable to that defendant's conduct—the bolded language adds anything.

Defendants therefore retreat to the position that the disputed phrase was inserted simply to "express[] how the liability of each defendant is to be determined—*i.e.*, by principles of comparative fault." (ABM 16.) But this attempted escape is foredoomed. Our OBM details (and this brief confirms) that those very principles have long established that intentional wrongdoers receive no benefits under this *equitable* doctrine.

Defendants contend that section 1431.2(a)'s reference to "each defendant" alone demonstrates that *every* defendant is subject to the statute's apportionment rule and that we have "no response" thereto. (ABM 19.) Ironically, the very answer to that charge can be found on the next page of the ABM, which quotes

Sierra Club v. Superior Court (2013) 57 Cal.4th 157, 165, for the accepted proposition that courts "do not examine [statutory] 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." (ABM 20.)

Amazingly, Defendants assert that we "disregard the statutory text of 1431.1," which states the purpose of the statute in clear terms. (ABM 20.) In truth, we cite section 1431.1 repeatedly and quote it at OBM 6, 29, and 33–34.

Defendants devote an entire subsection to refuting their made-up argument that we allegedly contend the statute is intended to "**Exclude[] Intentional Tortfeasors**." (ABM 32.) Nonsense. Our consistent position has been that the statute created a "one-way street" under which intentional tortfeasors would be denied any statutory benefits, although their portion of fault would limit the exposure of any merely negligent party. (See, e.g., B.B. OBM 8, 31–32, 34.)

This raises a final point. As we discuss below, under our interpretation, *negligent co-defendants* would receive additional protection limiting their ultimate liability. Thus, for example, if for some reason the plaintiff chose to pursue a 10% negligent

defendant for that portion of the judgment, that relatively blameless defendant would be able to recoup their 10% payment from the intentional tortfeasor who is legally 100% responsible. (See Parts III(A), IV(B), *post*.)

I.

SECTION 1431.2 DOES NOT UNAMBIGUOUSLY APPLY APPORTIONMENT TO THE BENEFIT OF ALL DEFENDANTS, INCLUDING INTENTIONAL TORTFEASORS. INDEED, NOTHING SUGGESTS THAT THE STATUTE WAS INTENDED TO LIMIT INTENTIONAL TORTFEASORS' LIABILITY.

A. The statute does not explicitly apply apportionment to all defendants.

Defendants contend that the statutory phrase "'each defendant'" means that section 1431.2 limits the liability of "every defendant regardless of the nature of fault assigned." (ABM 18–19, quoting § 1431.2(a).) Thus, Defendants conclude that even intentional tortfeasors enjoy the benefits of section 1431.2's limits on liability. (ABM 18–19.)

Not so. The limitation of liability of "each defendant" in section 1431.2 applies only to a defendant in an action "based upon principles of comparative fault." (§ 1431.2(a).) As our OBM explains, preexisting principles of comparative fault do not *reduce*

an intentional tortfeasor's liability. (B.B. OBM 23–27; *post*, Part III(A).)

Since Proposition 51's enactment, this Court has repeatedly described section 1431.2 as limiting a defendant's liability only in a case "'based upon principles of comparative fault.'" (*Diaz v. Carcamo* ("*Diaz*") (2011) 51 Cal.4th 1148, 1156; see *Myers v. Philip Morris Companies, Inc.* ("*Myers*") (2002) 28 Cal.4th 828, 835 [describing Proposition 51 as applying "'in a tort action governed by principles of comparative fault .... [Citations]'"]; *Rutherford v. Owens-Illinois, Inc.* ("*Rutherford*") (1997) 16 Cal.4th 953, 959, fn. 1 [same].)

Our Courts of Appeal have done likewise. (See, e.g., *Henry v. Superior Court* ("*Henry*") (2008) 160 Cal.App.4th 440, 458–459; *Munoz v. City of Union City* ("*Munoz*") (2007) 148 Cal.App.4th 173, 179; *Bostick v. Flex Equipment Co., Inc.* ("*Bostick*") (2007) 147 Cal.App.4th 80, 93; *Wimberly v. Derby Cycle Corp.* ("*Wimberly*") (1997) 56 Cal.App.4th 618, 623, fn. 1; *Scott v. County of Los Angeles* ("*Scott*") (1994) 27 Cal.App.4th 125, 149; *Galvis v. Petito* ("*Galvis*") (1993) 13 Cal.App.4th 551, 564–565.)

Nevertheless, Defendants insist that all the foregoing authority got it wrong because the following slice of dicta in

DaFonte v. Up-Right, Inc. ("*DaFonte*") (1992) 2 Cal.4th 593 boldly stated that section 1431.2 "'shields *every* "defendant" from any share of noneconomic damages beyond that attributable to his or her own comparative fault.'" (ABM 21–22, citing 2 Cal.4th at 602 and adding italics.) This claim of stare decisis cannot stand given that intentional tort liability was not even at issue in *DaFonte*. (B.B. OBM 17–19; see, e.g., *People v. Macias* (1997) 16 Cal.4th 739, 743 [holding that "stare decisis principles" did not bind Court of Appeal to follow Supreme Court dictum].)

The proof is in the pudding. Contrary to Defendants' contention and despite *DaFonte*'s dicta, this Court *itself* and the Courts of Appeal have both recognized that section 1431.2 does not in fact limit *every* defendant's liability for non-economic damages. (ABM 18–19, 21–24.) For instance, section 1431.2 does not limit the liability of a defendant who is only vicariously liable for another's tort. (*Diaz, supra,* 51 Cal.4th at 1156–1157.) Nor does it limit defendants' liability "in a case of strict products liability where there is one defective product and all of the defendants are in the same chain of distribution." (*Bostick, supra,* 147 Cal.App.4th at 93–94; see also *Wimberly, supra,* 56

Cal.App.4th at 633; accord, *Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400.)

The glue that binds Defendants' entire brief is the contention that the words "each defendant" are absolute and can brook no exceptions. But, as the foregoing cases demonstrate, those words are subject to certain exceptions. In short, Defendants' reliance on an all-or-nothing argument dooms its entire position.

B. Section 1431.1's express statements and Proposition 51's ballot materials each suggest that section 1431.2 was intended to limit only unintentional tortfeasors' liability.

Defendants heavily rely upon the fact that section 1431.1 and Proposition 51's ballot materials do not explicitly mention an "exception for intentional tortfeasors." (ABM 20; see ABM 24–25.) They argue that these sources therefore demonstrate that section 1431.2 was intended to limit even intentional tort liability. (ABM 19–20, 24–25.)

We note, initially, that the absence of any explicit discussion of intentional tortfeasors in these materials is irrelevant because section 1431.2(a)'s "comparative fault" clause definitionally excludes such tortfeasors from enjoying the

statute's benefit. (See Part III(A), *post* [explaining that the comparative fault doctrine prohibits intentional tortfeasors from reducing their liability based on others' negligence].)

Moreover, section 1431.1 and Proposition 51's ballot materials emphasize section 1431.2's expected effect on insurance coverage, strongly suggesting that the measure would limit only unintentional tortfeasors' liability. (See Ins. Code, § 533 [voiding insurance coverage for intentional acts].) For instance, section 1431.1(c) describes "the soaring costs of ... insurance premiums" as a justification for section 1431.2's liability limitation. Likewise, concerns about insurance availability and high costs permeated the ballot arguments. (See *Evangelatos v. Superior Court* ("*Evangelatos*") (1988) 44 Cal.3d 1188, 1245–1246 [setting forth ballot materials in appendix].)[2]

Given that California law prohibits any insurance coverage for intentional torts, both the language of section 1431.1(c) and of

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2 Proponents insisted that Proposition 51 would increase liability insurance's "availab[ility] to cities and counties" and decrease "[p]rivate sector liability insurance premiums." (44 Cal.3d at 1245–1246.) Opponents countered that the measure—"an attempt by big insurance companies to avoid paying victims for the injuries they suffer"—would neither "make insurance more available" nor "lower insurance rates." (*Ibid.*)

the ballot arguments strongly suggests that the measure would benefit only unintentional tortfeasors. (See Ins. Code § 533; *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co.* (2018) 5 Cal.5th 216, 222, 229; see also B.B. OBM 32.)

Furthermore, had anyone thought that Proposition 51 would benefit intentional tortfeasors, the measure's opponents presumably would have highlighted that key fact in their ballot arguments given that it "might well have detracted from the popularity of the measure." (*Evangelatos, supra,* 44 Cal.3d at 1219.)

C. Defendants' reliance upon an unenacted California bill and an out-of-state statute signals their own self-doubts about their interpretation of section 1431.2.

Defendants argue that, had "voters meant to create exceptions [in Proposition 51] for intentional tortfeasors, they could have done so." (ABM 18.) In support, they invoke unenacted Assembly Bill No. 4271 (1985–86 Reg. Sess.) and Florida Statute section 768.81, apportionment legislation that explicitly provides exceptions for intentional tortfeasors. (ABM 18–19; RJN, Exh. A at 4.)

This argument is riddled with holes. Whatever little insight an unpassed bill and a Florida statute could possibly provide in

deciphering the intent of California voters is immediately dispelled by the fact that those pieces of legislation—unlike Proposition 51—*had to* specifically refer to intentional tortfeasors in order to exclude them from benefiting from apportionment. Unlike Proposition 51, neither the California bill nor the Florida statute uses the term "comparative fault." That term nowhere appears in Assembly Bill No. 4271's proposed amendment to section 1431 et seq. (See RJN, Exh. A at 2–4.) Likewise, the term does not appear anywhere in the body of the Florida statute. (See Fla. Stat. § 768.81.)

In contrast, Proposition 51 had no need to discuss intentional tortfeasors because the phrase "based upon principles of comparative fault" already excluded them from benefiting from several liability. (§ 1431.2(a); see Part III(A), *post.*)

Another fatal flaw in Defendants' argument is that it is irreconcilable with this Court's recognition of *implicit exceptions* to section 1431.2(a)'s language concerning "each defendant's" several liability that Assembly Bill No. 4271, if enacted, would have made explicit. If Defendants' argument were correct, this Court would have been barred by the language of unenacted

Assembly Bill No. 4271 from finding *any* implied exception to section 1431.2's broad language.

But that's not the case. For example, *Diaz, supra*, construed section 1431.2(a)'s "comparative fault" clause as precluding application of the statute's several-liability rule to persons who are only vicariously liable for others' torts. (51 Cal.4th at 1156–1157 ["Because Proposition 51 applies only to 'independently acting tortfeasors who have some fault to compare,' the allocation of fault it mandates cannot encompass defendants 'who are without fault and only have vicarious liability.' [Citations]"].) The Court so held *despite* the facts that (1) section 1431.2 never mentions "vicarious liability" and (2) Assembly Bill No. 4271 would have amended section 1431 et seq., to state that "vicariously liable" persons would not be subject to the amended statute's several liability rule. (RJN, Exh. A at 4.)

Nor is the implied exception concerning vicarious liability a one-off. Assembly Bill No. 4271, if enacted, would also have amended section 1431 et seq., to specify that

> [t]he apportionment [provided] shall be made without regard to *any immunity from liability* of any one or more of the persons for conduct normally imposing

> liability such as the immunity of an employer from liability to an employee covered by *workers' compensation.*

(RJN, Exh. A at 3, italics added.) Despite the fact that Proposition 51 did not discuss immunity from liability (e.g., under workers' compensation laws), this Court held in *DaFonte, supra,* that section 1431.2's "comparative fault" clause implied the existence of such an unstated rule. (2 Cal.4th at 604.) In short, the non-passage of Assembly Bill No. 4271 was irrelevant.

Given this Court's interpretations of section 1431.2's "comparative fault" clause in *Diaz* and in *DaFonte*, Assembly Bill No. 4271's unadopted language regarding intentional tortfeasors has no bearing. (Cf. ABM 18–19.)

This point was further nailed down in *Wilson v. John Crane, Inc.* ("*Wilson*") (2000) 81 Cal.App.4th 847, which rejected an argument similar to Defendants'. There, plaintiffs cited out-of-state and unenacted California legislation to illustrate "that the voters could have explicitly referred to strict liability claims had they" intended to include them within section 1431.2's ambit. (81 Cal.App.4th at 855–856.) The Court of Appeal, however, reasoned that "[i]t does not follow that the voters'

failure to include such a reference shows an intention to exclude those claims from the operation of the statute." (*Id.* at 856.)

Likewise, here, the lack of explicit reference to intentional tortfeasors does not demonstrate that the voters necessarily intended the statute to limit such tortfeasors' liability. (See *Wilson*, *supra*, 81 Cal.App.4th at 856.) Rather, the voters expressed their intent by specifying that the statue apply only to an action "based upon principles of comparative fault." (§ 1431.2(a).) As we demonstrate *post*, Part III(A), those principles do not apply to the benefit of intentional tortfeasors. (See B.B. OBM 23–27.)

Wilson added a sage observation, explaining that the drafters' "choice of a general descriptive phrase ('action for personal injury, property damage, or wrongful death, based upon principles of comparative fault') undoubtedly left some area for judicial interpretation." (*Supra*, 81 Cal.App.4th at 856.) But, consistent with *Wilson*'s analysis, intentional tortfeasors fall outside "that area of potential ambiguity because they" were "clearly understood at the time of the measure's enactment to fall [outside] the description chosen." (*Ibid.* [discussing strict liability claims].)

II.

DEFENDANTS' GRAMMATICAL ARGUMENT THAT THE "COMPARATIVE FAULT" CLAUSE "SUPPLIES ONLY THE MANNER FOR CALCULATING LIABILITY PERCENTAGES" FAILS FOR THREE REASONS.

Defendants insist that section 1431.2(a)'s "comparative fault" clause does nothing more than "suppl[y] only the manner for calculating liability percentages." (ABM 26 [arguing that the "comparative fault" clause simply "instructs courts *how* the percentage of fault should be calculated ..."]; cf. B.B. OBM 22.) In support, they rely on the "nearest-reasonable-referent canon" to argue that the "comparative fault" clause necessarily modifies the statutory clause that follows: "the liability of each defendant for non-economic damages shall be several only and shall not be joint." (ABM 26–28.) Additionally, they urge that it would be "unreasonable" to construe the "comparative fault" clause as modifying section 1431.2(a)'s description of the types of actions to which the statute applies. (ABM 29–31.)

Neither argument has merit. Moreover, Defendants' arguments also fail for a third reason. Even, assuming arguendo, this Court were to construe the "comparative fault" clause as explaining "*how*" liability is apportioned, the identical result

would still necessarily follow given that the long-established understanding of "comparative fault" was predicated upon the sharp distinction between the treatment of intentional tortfeasors vis-à-vis all other actors.

A. The so-called "nearest-reasonable-referent canon" has no bearing here because section 1431.2 contains two possible reasonable referents that are equally near the "comparative fault" clause.

Even were this Court to apply the so-called "nearest-reasonable-referent canon," the canon would be useless here. (Cf. Jordan T. Smith, *Faux Canons* (2014) 4 J.L.: Periodical Laboratory of Leg. Scholarship 270 [questioning validity of "nearest-reasonable-referent-canon"].) This is because section 1431.2(a)'s "comparative fault" clause has two *equally near* possible referents: (1) "any action for personal injury, property damage, or wrongful death" and (2) "the liability of each defendant for non-economic damages."

Nevertheless, Defendants argue that the term "liability" is the more reasonable referent because, unlike the term "action," it "has no other modifier." (ABM 28, 30.) This makes no sense. Defendants cite no purported support for the proposition that a term may have only one modifier. (ABM 30.) To the contrary, this

Court has recognized that more than one expression may modify the same statutory language. (See, e.g., *People v. Anderson* (2010) 50 Cal.4th 19, 30; accord, Strunk & White, *The Elements of Style* p. 16 <https://faculty.washington.edu/heagerty/Courses/b572/public/StrunkWhite.pdf> [as of Mar. 25, 2019] [recognizing that "several expressions [may] modify the same word"].) And, even according to Defendants' interpretation of section 1431.2(a), the word "action" already has more than one modifier: "any" and "for personal injury, property damage, or wrongful death."

Moreover, the word "liability" itself already has a modifier: the phrase "of each defendant for non-economic damages." (§ 1431.2(a).) Thus, "liability" is no more reasonable a referent than "action" for the phrase "based upon principles of comparative fault." (*Ibid.*)

Defendants further contend that *"[n]umerous* courts that have considered the question have adopted this same statutory interpretation." (ABM 28, italics added.) But Defendants can point to only two such decisions—and one of those is the very appellate decision under review here. (*Ibid.*, citing *Martin By and Through Martin v. U.S.* ("*Martin*") (9th Cir. 1993) 984 F.2d 1033,

1039 and *B.B. v. County of Los Angeles* (2018) 25 Cal.App.5th 115, 126, fn. 10.)

Moreover, Defendants ignore the multiple instances in which this Court and the Courts of Appeal have construed section 1431.2(a)'s "comparative fault" clause as modifying the initial statutory phrase, "In any action for personal injury, property damage, or wrongful death." (See Part I(A), *ante*, citing *Diaz, supra*, 51 Cal.4th at 1156; *Myers, supra*, 28 Cal.4th at 835; *Rutherford, supra*, 16 Cal.4th at 959, fn. 1; *Henry, supra*, 160 Cal.App.4th at 458–459; *Munoz, supra*, 148 Cal.App.4th at 179; *Bostick, supra*, 147 Cal.App.4th at 93; *Wimberly, supra*, 56 Cal.App.4th at 623, fn. 1; *Scott, supra*, 27 Cal.App.4th at 149; *Galvis, supra*, 13 Cal.App.4th at 564–565.)

B. Construing the "comparative fault" clause as modifying the statutory phrase "any action for personal injury, property damage, or wrongful death" is entirely reasonable and proper.

Defendants contend that construing "based upon principles of comparative fault" as modifying "any action for personal injury, property damage, or wrongful death" would be unreasonable. (ABM 29–31.) According to Defendants, "it is

unreasonable for an 'action'—*i.e.*, a lawsuit—to be based upon 'principles' of distributing fault." (ABM 29.)

This Court, however, has used this very construction. For example, *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 539, described the "plaintiff's cause of action herein [as] having been based upon 'principles of comparative fault.' [Citation]." Likewise, as noted in Parts I(A) and II(A), *ante*, this Court and the Courts of Appeal have repeatedly construed section 1431.2 as applying to *actions based on comparative fault principles*. (See e.g., *Diaz, supra,* 51 Cal.4th at 1156; *Myers, supra,* 28 Cal.4th at 835; *Rutherford, supra,* 16 Cal.4th at 959, fn. 1; *Henry, supra,* 160 Cal.App.4th at 458–459; *Munoz, supra,* 148 Cal.App.4th at 179; *Bostick, supra,* 147 Cal.App.4th at 93; *Wimberly, supra,* 56 Cal.App.4th at 623, fn. 1; *Scott, supra,* 27 Cal.App.4th at 149; *Galvis, supra,* 13 Cal.App.4th at 564–565.)

Defendants also contend that if the "comparative fault" clause were to modify the word "action," "the modifier 'any' [in 'any action'] would become surplusage." (ABM 30.) This is not so.[3]

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[3] Under our construction the statute means that in *any* action based upon principles of comparative fault for personal injury, property damage, or wrongful death, non-economic damages liability will be several only. Thus, the word "any" refers

As alluded to in the Introduction, Defendants' ostensible concern for averting surplusage is hypocritical. After detailing why surplusage must be avoided, Defendants bemoan the fact that the word "any" may have to be replaced with "an." (ABM 30–31.) While preoccupied with the supposed surplusage of a single word, they show no such concern that their interpretation would obliterate an entire clause. If Defendant's interpretation were correct, the emphasized language below could be *entirely* deleted without affecting the statute's meaning at all: "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."

Turning back to Defendants' grammatical attacks, they argue that, if our construction were correct, the "comparative fault" clause "would not be offset by commas in a later clause, but [would] instead [be] included in the introductory clause." (ABM 30.) Accordingly, they assert that our construction improperly "rewrite[s]" the statute by transposing the "comparative fault"

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to all listed actions within the specified subset, i.e., those actions based on comparative fault principles.

clause so that it immediately follows the words "any action." (ABM 30–31.)

In fact, our construction accords with the "series-qualifier canon": "[t]he presumption that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." (SERIES-QUALIFIER CANON, Black's Law Dictionary (10th ed. 2014).) In accordance with this canon, the "comparative fault" clause is set off by commas to delineate that it applies to all of the preceding types of action listed—"for personal injury, property damage, [and] wrongful death"—rather than to actions only for wrongful death, the last preceding element. (§ 1431.2(a); see *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [explaining that "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma"]; *American Intern. Group, Inc. v. Bank of America Corp.* (2d Cir. 2013) 712 F.3d 775, 781–782.) Absent commas surrounding the "comparative fault" clause, one would reasonably conclude, in accordance with the "rule of the last antecedent," that the clause refers only to actions

for wrongful death, the last element in the preceding series. (See, e.g., *Lockhart v. U.S.* (2016) 136 S.Ct. 958, 966 [explaining that, under last-antecedent rule, "if a friend asked you to get her tart lemons, sour lemons, or sour fruit from Mexico," the modifier "from Mexico" would refer only to "sour fruit"].)

Thus, contrary to Defendants' contention, *our* construction is not the one that requires this Court to rewrite the statute. On the other hand, Defendants—whose interpretation requires the deletion of the entire "comparative fault" clause—cannot make that claim.[4]

C. Even if this Court were to construe the "comparative fault" clause as dictating "*how*" each defendant's liability is to be calculated, the statute still would not limit intentional tortfeasors' liability.

There is a third major problem with Defendants' argument: Even if the argument were accepted, it would change nothing.

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4 Citing *Union Asphalt, Inc. v. Planet Ins. Co.* ("*Union Asphalt*") (1994) 21 Cal.App.4th 1762, 1766, Defendants suggest that it would be unreasonable to construe the "comparative fault" clause as modifying the statute's introductory clause because an introductory clause is not meant "'to create substantive law.'" (ABM 26.) But *Union Asphalt* does not support that contention. It commented that the specific introductory phrase there at issue "usually indicates that the statute is [not] meant to ... create substantive law." (21 Cal.App.4th at 1766.) The Court of Appeal did not suggest that introductory clauses *in general*, let alone the one at issue here, do not "create substantive law." (*Ibid.*)

Defendants repeatedly stress that the "comparative fault" language exists solely to instruct courts "*how* a defendant's liability should be calculated under the statute—*i.e.*, 'based on principles of comparative fault.'" (ABM 28, first italics added.)

How does that help Defendants' cause? If an intentional tortfeasor's liability is to be calculated based on comparative fault principles, as further detailed in Part III, nothing would change. The foregoing principles have long recognized that an intentional tortfeasor is not entitled to *the benefits* of any liability-shifting mechanisms. Therefore, the intentional tortfeasor would still be left with 100% liability, protecting all unintentional actors while simultaneously denying the wrongdoer any windfall arising because of the role that other less culpable actors played.

III.

SECTION 1431.2 INCORPORATES BY REFERENCE THE ESTABLISHED MEANING OF COMPARATIVE FAULT. HISTORICALLY, THAT DOCTRINE PROTECTED ONLY *UNINTENTIONAL* TORTFEASORS BASED ON OTHERS' FAULT.

A. The comparative fault doctrine historically did not benefit intentional tortfeasors.

Our OBM details the fact that before Proposition 51's enactment, the comparative fault doctrine was understood as

reducing only an *unintentional* tortfeasor's liability based on another's fault. (B.B. OBM 22–27.) Given that established understanding, this Court must presume that section 1431.2(a)'s phrase "based upon principles of comparative fault" was intended to continue the principle that intentional tortfeasors could not enjoy the benefits of several liability created under Proposition 51. (See *Hill v. National Collegiate Athletic Assn.* ("*Hill*") (1994) 7 Cal.4th 1, 23; *Wilson, supra*, 81 Cal.App.4th at 855.)

Nonetheless, Defendants contend that intentional tortfeasors were not (and should not be) treated differently than negligent ones because, "at no time … did *the Court* exclude intentional tortfeasors from comparative fault." (ABM 32, italics added.) In support, Defendants note this Court's decisions in *Li v. Yellow Cab Co.* ("*Li*") (1975) 13 Cal.3d 804, *American Motorcycle Assn. v. Superior Court* ("*American Motorcycle*") (1978) 20 Cal.3d 578, *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, and *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322. (ABM 32–33.) But *none* of these decisions involved intentional tortfeasors. Thus, this Court had no reason to comment on intentional tortfeasors' liability.

Moreover, Defendants cite no authority even suggesting that this Court, as opposed to the Courts of Appeal, must define a term in order to establish the term's meaning. This Court's limited resources obviously preclude it from addressing the vast majority of legal issues that arise.

Defendants' further contention—that before Proposition 51 "*no California court* excluded intentional tortfeasors from the comparative fault doctrine"—misstates our position. (ABM 36, italics added.) Our OBM does not argue—nor do we believe—that intentional tortfeasors were "excluded" from the comparative fault doctrine. Quite the contrary—our consistent point has been that such intentional wrongdoers could not claim the "benefits" of the doctrine to lessen their liability. (See e.g., B.B. OBM 8, 15–16, 20–21, 23–24, 35–36.) Indeed, both in our OBM Introduction and later in the text we make clear that "intentional tortfeasors *are covered in par*t by section 1431.2." (B.B. OBM 8, italics added; see, e.g., B.B. OBM 20–21.) But that coverage is "purely a one-way street" in the sense that the conduct of intentional wrongdoers (who may be judgment-proof) can limit the liability of any merely negligent co-defendants, but the intentional

wrongdoers cannot enjoy the "benefits" of the operation of several liability. (B.B. OBM 8; see, e.g., B.B. OBM 31–32, 34.)

Besides misstating our position, Defendants' argument—regarding the historical treatment of intentional tortfeasors under the comparative fault doctrine—is also factually inaccurate. (ABM 36.) Fatally, Defendants ignore a consistent line of pre-Proposition 51 cases that established that an intentional tortfeasor may not reduce his or her liability based on another's negligence.

Indeed, during the entire relevant period, the only caselaw on the subject reached this very conclusion. For example, despite acknowledging *Allen v. Sundean* ("*Allen*") (1982) 137 Cal.App.3d 216, 226–227, Defendants ignore that *Allen* specifically declined to extend comparative fault principles to reduce an intentional tortfeasor's liability vis-à-vis a negligent plaintiff. (See ABM 33.) Likewise, *Phelps v. Superior Court* (1982) 136 Cal.App.3d 802, 805–806, 815, held that "damages resulting from intentional torts" were not subject to apportionment based on the plaintiff's negligence. Similarly, *Godfrey v. Steinpress* ("*Godfrey*") (1982) 128 Cal.App.3d 154, 164, 176, held that the plaintiffs' alleged negligence in encountering the defendant's intentional torts

(fraud by concealment and intentional infliction of emotional distress) was not a basis for reducing the plaintiffs' damages.[5] (Accord, *Blake v. Moore* (1984) 162 Cal.App.3d 700, 707 [explaining that "[v]oluntary intoxication .... is not so 'intentional' that it disqualifies an injured person from comparative negligence relief"]; *Southern Pac. Transportation Co. v. State of California* (1981) 115 Cal.App.3d 116, 121 ["*Unless* a defendant has *intentionally injured* a plaintiff, he is entitled to a reduction in his liability to the plaintiff to the extent plaintiff's own negligence has contributed to the injury"] [italics added].)

This line of cases wholly undermines Defendants' assertion that before Proposition 51's passage "no case excluded intentional tortfeasors from [benefiting from] comparative fault principles." (ABM 34.) Indeed, the Court of Appeal confirmed the established

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5 Defendants try to distinguish *Godfrey* based on the Court of Appeal's comment that the jury had "evaluate[d] the plaintiffs' conduct." (ABM 37, citing 128 Cal.App.3d at 176.) Pointedly, however, the Court did not suggest that the plaintiffs' alleged negligence was a basis for reducing the intentional tortfeasor defendant's liability. Rather, the Court simply noted "that one of the elements of fraud by concealment is that the plaintiffs must have been unaware of the concealed fact" and "that if the jury had found that the [plaintiffs] were aware of the [concealed fact] they would not be entitled to recovery" at all. (128 Cal.App.3d at 176.)

understanding of comparative fault shortly after Proposition 51's passage. (See e.g., *Considine Co. v. Shadle, Hunt & Hagar* ("*Considine*") (1986) 187 Cal.App.3d 760, 768–769 [barring party that has engaged in intentional misrepresentation from obtaining indemnity]; *Cicone v. URS Corp.* ("*Cicone*") (1986) 183 Cal.App.3d 194, 213 [noting *negligent* tortfeasor's entitlement to *full equitable indemnity* against concurrent intentional tortfeasor].)

Moreover, as we note in our OBM, the foregoing line of cases is consistent with this Court's own discussion of comparative fault principles vis-à-vis intentional tortfeasors. (See B.B. OBM 24–26.) *Li, supra,* itself cited with approval the view "that a comprehensive system of comparative negligence should allow for the apportionment of damages in *all* cases involving misconduct which *falls short of being intentional.*" (13 Cal.3d at 826, italics added; accord, e.g., *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1167 [noting with approval *Li*'s "broad pronouncements" regarding not apportioning intentional tortfeasor's damages liability].) Likewise, *American Motorcycle, supra,* 20 Cal.3d at 607–608, further suggested that only *unintentional* tortfeasors have a right to partial indemnity on a comparative fault basis.

Finally, none of the cases that Defendants cite undermines this established understanding of comparative fault. For instance, they cite *Sorensen v. Allred* ("*Sorensen*") (1980) 112 Cal.App.3d 717, 723, as noting "'a trend'" toward apportioning fault "'irrespective of the nature of the alleged operative negligence *or other basis for liability* in a particular case.'" (ABM 33 [adding italics].) However, *Sorensen* did not concern any intentional tort, but rather recklessness. (112 Cal.App.3d at 722, 725–726.) Moreover, *Sorensen* noted with approval a study recommending that only *unintentional* tortfeasors be permitted to reduce their liability via the comparative fault doctrine. (*Id.* at 724.)

Defendants also cite *Baird v. Jones* ("*Baird*") (1993) 21 Cal.App.4th 684, 691, as purported support for applying apportionment to intentional tortfeasors' benefit. (ABM 36–37.) But *Heiner v. Kmart Corp.* ("*Heiner*") (2000) 84 Cal.App.4th 335, 350, pointedly noted that *Baird* itself

> cites with approval the holdings of *Allen* and *Godfrey,* which along with *Li* and *American Motorcycle* constitute *an unbroken line of authority barring* [the benefits of] *apportionment* where, as here, the defendant has committed an intentional tort and the injured plaintiff was merely negligent.

(Italics added.) *Baird* had nothing to do with an intentional tortfeasor seeking any relief from a merely negligent party. Rather, it solely concerned one intentional tortfeasor's ability to obtain comparative equitable indemnity from another *intentional* tortfeasor who was even more culpable. (21 Cal.App.4th at 690–693.)

Likewise, Defendants assert that *Weidenfeller v. Star & Garter* ("*Weidenfeller*") (1991) 1 Cal.App.4th 1 "suggests that section 1431.2 should apply to [benefit] intentional tortfeasors." (ABM 37.) This is nonsense. *Weidenfeller* concerned "an unprovoked armed assault" that the plaintiff suffered in the parking lot of a bar. (1 Cal.App.4th at 4.) Alleging that the bar's inadequate outside lighting and security were a negligent cause of his injuries, plaintiff sued the bar owners (but not his assailant) for his injuries. *(Ibid.)* The legal issue posed was whether, under section 1431.2, the negligent bar owners (found 20% at fault) would nonetheless be liable to plaintiff (who was only 5% at fault) for the remaining 95% of the non-economic damages because the unavailable assailant was guilty of intentional wrongdoing and, therefore, his 75% fault allocation

should not be included in any "comparative fault" analysis. (*Id.* at 4–6.)

Weidenfeller properly labeled the plaintiff's "hypertechnical" argument an "absurdity":

> It is inconceivable the voters intended that a negligent tortfeasor's obligation to pay only its proportionate share of the noneconomic loss, here 20 percent, would become disproportionate increasing to 95 percent solely because the only other responsible tortfeasor acted intentionally. To penalize the negligent tortfeasor in such circumstances not only frustrates the purpose of the statute but *violates the commonsense notion that a more culpable party should bear the financial burden caused by its intentional act.*

(1 Cal.App.4th at 6, italics added.)

Discussing *Godfrey, supra,* and *Allen, supra, Weidenfeller* declared that they reflect the *common law determination* "that a party who commits intentional misconduct should not be entitled to escape responsibility for damages based upon the negligence of the victim or a joint tortfeasor." (*Supra,* 1 Cal.App.4th at 6–7, citing Prosser & Keeton, Torts (5th ed. 1984) § 65, p. 462 ["Intentional 'conduct differs from negligence ... in the social condemnation attached to it'"].) In short *Weidenfeller* rejected a variant of Defendants' all-or-nothing type reasoning in favor of

the "one-way-street" position that we have consistently articulated.

Defendants also seek to marginalize *Heiner*, supra, 84 Cal.App.4th at 349–350, a battery case (like ours) that concerned whether an intentional tortfeasor can reduce its liability via apportionment. (ABM 38.) They argue that *Heiner*'s analysis is dicta because the defendant waived the apportionment issue and the verdict form did not even distinguish between economic and non-economic damages. (*Ibid.*)

But Defendants ignore that waiver was not the Court of Appeal's only reason for affirming the judgment (without any comparative fault reduction). After confirming that waiver had occurred, the court also addressed the substantive merits: "[A]pportionment of fault for injuries inflicted in the course of an intentional tort-such as the battery in this case-would have been improper." (*Heiner, supra,* 84 Cal.App.4th at 349 ["'As between the guilty aggressor and the person attacked the former may not shield himself behind the charge that his victim may have been

guilty of contributory negligence, for such a plea is unavailable to him.' [Citation]"].)[6]

In sum, given the established understanding of comparative fault before Proposition 51's passage, this Court must presume that section 1431.2(a)'s "comparative fault" clause was intended to exclude intentional tortfeasors from enjoying the benefits of several liability. (See *Hill*, *supra*, 7 Cal.4th at 23.)

B. Nothing in Proposition 51 altered the long-established understanding of comparative fault.

Defendants baldly assert that, even if comparative fault had previously been understood as not limiting intentional tortfeasors' liability, Proposition 51 did not incorporate that established understanding. (ABM 36.) As purported support, Defendants cite *Evangelatos*'s statement that "Proposition 51 unquestionably made a substantial change in this state's traditional tort doctrine." (ABM 36, citing 44 Cal.3d at 1199–1200.)

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6 Although the defendant did not request a verdict form that distinguished between economic and non-economic damages, the Court's analysis obviously concerned non-economic damages as apportionment would not even be a consideration regarding economic damages. (84 Cal.App.4th at 343.)

This quote proves nothing. There is no gainsaying that, as *Evangelatos* explains, Proposition 51 did change the status quo by limiting a tortfeasor's non-economic damages liability in accordance with his or her share of fault so that he or she would not be left paying an insolvent co-tortfeasor's share of non-economic damages. (*Supra*, 44 Cal.3d at 1198–1199.) Formerly, a plaintiff could sue any defendant for *all* of his or her damages, thus requiring the defendant to "bring other tortfeasors who were allegedly responsible for the plaintiff's injury into the action through cross-complaints" and "obtain equitable indemnity, on a comparative fault basis, from [those] other defendants." (See *id.* at 1197–1198, citing *American Motorcycle*, *supra*, 20 Cal.3d at 591–598, 604–607.) Proposition 51 obviated the need to seek indemnity by limiting a negligent defendant's liability to "only that portion of the plaintiff's noneconomic damages which is commensurate with that defendant's degree of fault for the injury." (*Evangelatos*, 44 Cal.3d at 1198.) But *Evangelatos* neither addressed whether nor suggested that Proposition 51's apportionment rule would "appl[y] to causes of action based on intentional tortious conduct." (*Id.* at 1202.) And

Proposition 51 never suggested any intent to change the established understanding of comparative fault.

C. Contrary to Defendants' assertion, indemnity and contribution principles are obviously relevant in construing section 1431.2's "comparative fault" clause.

Defendants fault us for construing section 1431.2 based in part on allegedly irrelevant "case law regarding statutory contribution and common-law indemnity." (ABM 38.) Specifically, they accuse us of relying "*almost exclusively* on California's contribution statute, Code of Civil Procedure section 875 [("section 875")], which prohibits intentional tortfeasors from seeking a right of contribution from co-defendants." (ABM 39, italics added.) But we actually cite the contribution statute only once in our OBM and—even then—only in our discussion of public policy considerations. (B.B. OBM 31; see also T.E. OBM 7, 18.)

Defendants are also wrong in contending that section 875 "has no relevance" in construing section 1431.2. (ABM 40.) Undeniably, courts have indeed construed section 1431.2 in light of the policy underlying section 875. (See, e.g., *Weidenfeller*, *supra*, 1 Cal.App.4th at 6 [noting that section 875 reflects the

notion "that the intentional actor bear *full responsibility* for its act"] [italics added]; *Martin, supra,* 984 F.2d at 1039–1040 [noting "the principle that intentional tortfeasors should not be able to shift the financial burden to a negligent party"].)

As for indemnity, Defendants contend that caselaw concerning it, likewise, is irrelevant in interpreting section 1431.2 because "[t]he 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." (ABM 40–41.)

But comparative fault and indemnity are in fact interrelated doctrines. We cited cases concerning indemnity simply to demonstrate the established understanding of comparative fault vis-à-vis intentional tortfeasors. (See, e.g., B.B. OBM 24–26, citing *Allen, supra,* 137 Cal.App.3d at 226–227; *Considine, supra,* 187 Cal.App.3d at 768–769; *Cicone, supra,* 183 Cal.App.3d at 213.) This Court itself has recognized a right of partial indemnity among multiple tortfeasors on a comparative fault basis. (See *Diaz, supra,* 51 Cal.4th at 1156, citing *American Motorcycle, supra,* 20 Cal.3d at 583; see also *Baird, supra,* 21 Cal.App.4th at 688–693.) Likewise, the Court of Appeal has

applied comparative fault principles from indemnity actions in construing section 1431.2. (See *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 324; *Weidenfeller*, supra, 1 Cal.App.4th at 6.) Thus, indemnity cases are certainly relevant in interpreting section 1431.2.

IV.

BESIDES FAILING TO PROVIDE THEIR OWN REASONED ANALYSIS OF ANY PUBLIC POLICY WARRANTING APPLICATION OF SECTION 1431.2 TO INTENTIONAL TORTFEASORS' BENEFIT, DEFENDANTS SIMPLY IGNORE MOST OF OUR PUBLIC POLICY ARGUMENTS.

Defendants contend that section 1431.2 is totally unambiguous. (ABM 41.) However, our OBM demonstrates the statute's facial ambiguity, and, as we have shown, their strained grammatical attacks fall woefully short. (Compare B.B. OBM 19, 22–27 with ABM 17–23; see Part II, *ante*.)

Given the alternative—and unrebutted—reasonable interpretation set forth in the OBM, this Court should consider the dictates of public policy in construing the statute. (*Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 507.)

A. Defendants circularly represent their desired partisan outcome—that all defendants receive apportionment—as a neutral public policy goal.

Defendants contend that this Court should defer to the public policy preferences of the voters. (ABM 41.) We agree. Defendants' problem is that they do not state what that policy is.

Instead, Defendants merely adopt their own partisan interpretation of the statute, i.e., that apportionment applies to *all* defendants including intentional wrongdoers, as if that self-evidently furthers the public interest. It obviously does not as we further discuss below. (ABM 42–43.)

B. The established comparative fault doctrine, and section 1431.2 by extension, properly treats intentional tortfeasors, such as Aviles, differently than negligent actors, such as Burley.

Part C of our OBM devotes almost three pages to demonstrating that **"[s]ection 1431.2's very purpose was to relieve '*relatively blameless defendants*' from disproportionate liability."** (B.B. OBM 28–30.) Rather than tackle that discussion, which fully addresses *DaFonte* and *Evangelatos*, Defendants instead mischaracterize our entire analysis by suggesting that our position is that intentional tortfeasors are quantitatively "never 'less' or 'minimally'

culpable." (ABM 43–44.) We need not debate the quantitative issue because the point of our analysis, supported by the caselaw below, is that the law treats the intentional wrongdoer as qualitatively distinct from—and more culpable than—a negligent actor.

Defendants do not respond to the following caselaw cited in our OBM demonstrating the stark distinction that the law has consistently drawn between intentional and negligent conduct and why the law—whether under section 1431.2 or previously—precluded intentional tortfeasors from benefiting from apportionment:

- That public policy prohibits "'an intentional actor [from] rely[ing] on someone else's negligence to shift responsibility for his or her own conduct.'" (B.B. OBM 30, quoting *Weidenfeller*, *supra*, 1 Cal.App.4th at 6–7.)
- That it would be "'contrary to sound policy to reduce a plaintiff's damages under comparative fault for his "negligence" in encountering the defendant's *deliberately inflicted* harm.' [Citations]" (B.B. OBM 32, quoting *Heiner*, *supra*, 84 Cal.App.4th at 349, italics added.)

- That Proposition 51's purpose was to alleviate the "'exploitation of relatively blameless defendants.'" (B.B. OBM 28, quoting *DaFonte, supra,* 2 Cal. 4th at 599.)

Instead, Defendants seek to sidestep this immoveable body of law by attempting to label Burley an "intentional wrongdoer" (allegedly more culpable than Aviles). (ABM 44.) The fundamental sin in this argument is that it directly defies the jury's express findings. The jury found that Burley was merely negligent. (2AA 440 ["Was Darren Burley *negligent*?"; "Was Darren Burley's *negligence* a substantial factor in causing his death?"], italics added.)[7]

Equally bad for Defendants is that—despite their duty to establish their affirmative defense[s] based on Burley's conduct—they never even asked that the jury determine whether Burley

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[7] Given Burley's negligence, *Cicone, supra,* is instructive. (See B.B. OBM 25–26; Part III(A), *ante.*) There, the Court of Appeal commented that a negligent tortfeasor would be entitled to *full* equitable indemnity if the co-tortfeasor that it was suing for indemnity had acted intentionally. (183 Cal.App.3d at 213.) Because Burley's negligence in contributing to his harm is co-extensive with the negligence of the other actors, the same principle would apply. Therefore, vis-à-vis Aviles's intentional conduct, Burley's negligence, which is co-extensive with that of all of the negligent defendants' fault, cannot be used to reduce Aviles's 100% responsibility.

had acted intentionally. (18RT 5102–5103; see also 17RT 4952–53.)[8] Defendants long ago waived any conceivable argument that Burley's conduct was "intentional" by (1) failing to prove as much at trial, (2) acquiescing in the jury verdict, and (3) never raising this argument at the Court of Appeal.

While trying to blacken Burley's name, Defendants simultaneously attempt to white-wash Aviles's—and the jury's finding of his intentional wrongdoing. Defendants misrepresent that "Plaintiffs concede [that] Deputy Aviles had disengaged from Mr. Burley when his heart first stopped." (ABM 44, citing B.B. Br. at 11–12.) We *never* conceded this. On the contrary, our Respondent's Brief, below, states that as eye witness Carl Boyer "watched the deputies disengage from Darren, Darren's head hit the concrete with a loud bump. Carl thought Darren was dead." (RB 24, citing 12RT 3444:9-21.) Thus, the evidence—which must be interpreted in favor of the jury's verdict—demonstrates that in all likelihood, Burley's heart had stopped before Aviles disengaged. In any case, this does not change the two relevant facts: that the jury determined that Aviles had intentionally

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8 Defendants' only objection to the special verdict form that we found concerned a different issue. (18RT 5306–5307.)

caused Burley's death and that Burley's own actions were merely negligent.

The strategy behind Defendants' decision to paint Burley as an intentional bad actor is obvious. Among other things, Defendants are self-conscious of their striking refusal to even address (much less rebut) our central argument that a

> one-way shifting of liability—permitting negligent tortfeasors to decrease their liability by that of intentional tortfeasors ... but not the inverse ... — ... furthers what this 'Court has [] emphasized [is] the purpose of section 1431.2[:] ... to prevent the unfairness of requiring a tortfeasor who is only minimally culpable *as compared to the other parties* to bear all the damages.'

(B.B. OBM 31–32, quoting *Weidenfeller, supra,* 1 Cal.App.4th at 6, quoting *Evangelatos, supra,* 44 Cal.3d at 1198.) Their silence on what this Court has described as the purpose of section 1431.2 and the Court's concomitant reference to negligent actors as minimally culpable compared to intentional tortfeasors is deafening.

As our OBM explains, California's decision to preclude intentional tortfeasors from benefitting from others' concurrent negligence is reflected in the law of indemnity, contribution, contracts, and insurance. (OBM 32; see *Allen, supra,* 137

Cal.App.3d at 226–227 [holding that intentional tortfeasor may not seek partial indemnity from negligent joint tortfeasor under comparative fault doctrine]); Code of Civ. Proc., § 875(d) [permitting contribution between negligent tortfeasors, but precluding contribution for "any tortfeasor who has intentionally injured the injured person"]; Civ. Code, § 1668 [voiding contracts exempting persons from liability for "fraud[] or willful injury to the person or property of another"]; Ins. Code, § 533 [voiding insurance coverage for intentional acts].)

Defendants, however, argue that "[t]he 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." (ABM 43.) However, in so arguing, Defendants ignore that the same public policy considerations that warrant treating intentional actors differently from those who are merely negligent in other contexts warrant the same outcome here. Despite Defendants' sweeping attempt to distinguish these examples as "other contexts," the common thread that binds them is "the policy of not allowing liability for intentional wrongdoing to be offset or reduced by the negligence of another." (*PPG Indus., Inc. v. Transamerica Ins. Co.*

(1999) 20 Cal.4th 310, 316 [barring intentional tortfeasor from obtaining insurance coverage for punitive damages liability, even though insurer's *negligent* failure to settle was *a cause in fact* of the liability].)

Likewise, Defendants ignore the statute's stated aim of remedying situations where "'defendants [who] are perceived to have substantial financial resources ... have [] been included in lawsuits even though there was *little or no basis for finding them at fault*.'" (B.B. OBM 33–34, quoting § 1431.1(a–b), italics added.) Notably, as this Court has recognized, "'the objective sought to be achieved by a statute as well as the evil to be prevented is of *prime consideration* in its interpretation.'" (*Wotton v. Bush* (1953) 41 Cal.2d 460, 467, italics added.) Here, unlike Proposition 51's intended beneficiaries, Aviles was not a tangential player dragged into the litigation despite his minimal culpability. Rather, his intentional exercise of excessive deadly force renders him extremely culpable.

Instead of responding to our public policy arguments, Defendants simply invite this Court to assume that the voters intended to remedy one unfairness (holding deep pocket defendants wholly liable even where they are minimally at fault)

by creating another unfairness—if not absurdity (permitting intentional wrongdoers to benefit from the fortuity that negligent tortfeasors may also have contributed to the injury). Our OBM exposes this false dichotomy's illogic. (B.B. OBM 34.) A one-way shifting of liability permitting negligent, but not intentional, tortfeasors to benefit from section 1431.2's apportionment rule would fully protect merely negligent "deep pockets" from being dragged into litigation solely because of their resources, while preserving the long-standing and fundamental principle that intentional wrongdoers not benefit at the expense of the merely negligent. Defendants' construction of the statute, on the other hand, would vitiate the latter, without reason (or analysis).

V.

NOTICE OF JOINDER IN PART VI (POLICE BATTERY ISSUE) IN CO-PETITIONERS' REPLY BRIEF ON THE MERITS

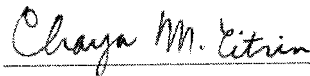
Petitioners B.B. and B.B. respectfully join in Part VI (police battery issue) in co-Petitioners D.B., D.B., and T.E.'s Reply Brief on the Merits.

CONCLUSION

For the foregoing reasons, Petitioners urge this Court to reverse the portion of the appellate Opinion requiring apportionment of non-economic damages for Aviles's intentional acts. In addition, Petitioners respectfully request their costs and such other relief that they are entitled to by law or that this Court finds appropriate.

Dated: March 29, 2019

PINE TILLETT PINE LLP



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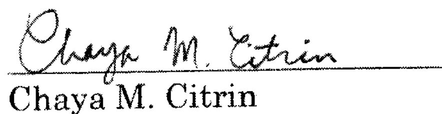
Attorneys for Plaintiffs, Respondents, and Petitioners B.B, a minor, and B.B., a minor, by and through their Guardian ad Litem, Shanell Scott

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word software used to prepare this document, I certify that this Reply Brief on the Merits contains 8,291 words, excluding those items identified in Rule 8.520(c)(3).

Dated: March 29, 2019



Chaya M. Citrin

PROOF OF SERVICE

I am over 18 years of age and not a party to this action. My business address is 14156 Magnolia Boulevard, Suite 200, Sherman Oaks, California 91423. On March 29, 2019, I mailed from Sherman Oaks, California, the Reply Brief on the Merits. I served the document by enclosing it in an envelope and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid. The envelope was addressed and mailed as follows:

Los Angeles Superior Court Hon. Ross M. Klein Dept. S27 c/o Court Clerk Governor George Deukmejian Courthouse 275 Magnolia Avenue Long Beach, CA 90802	Second District Court of Appeal, Division Three Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013
Office of the Attorney General Attn: California Solicitor General 1300 "I" Street Sacramento, CA 95814	Office of the Attorney General 300 S. Spring Street Los Angeles, CA 90013

I served the Reply Brief on the Merits on the following parties via email:

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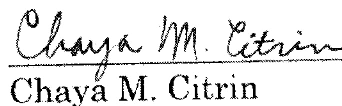
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 29, 2019, in Sherman Oaks, California.



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