

S250734

IN THE SUPREME COURT OF CALIFORNIA

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**B.B., a Minor, etc., et al.,**  
*Plaintiffs, Respondents, and Petitioners,*

vs.

**County of Los Angeles, et al.,**  
*Defendant and Appellants.*

**T.E., a Minor, etc., et al.,**  
*Plaintiffs and Respondents,*

vs.

**County of Los Angeles, et al.,**  
*Defendant and Appellants.*

**D.B., a Minor, etc., et al.,**  
*Plaintiffs and Respondents,*

vs.

**County of Los Angeles, et al.,**  
*Defendant and Appellants.*

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

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF  
IN SUPPORT OF DEFENDANTS AND APPELLANTS**

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN  
SUPPORT OF DEFENDANTS AND APPELLANTS**

TO THE HONORABLE CHIEF JUSTICE:

The League of California Cities (“League”) and the California State Association of Counties (“CSAC”) seek leave to file the enclosed amicus brief in support of Defendants and Appellants County of Los Angeles and Deputy David Aviles (collectively, the “County”).

The League is an association of 475 California cities united in promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all regions of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the instant matter, that are of statewide significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels’ Association of California and is overseen by the Association’s Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee

monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League and CSAC request the Court consider the attached brief so they may convey their opinions regarding the interpretation of the statute at issue in this case, Code of Civil Procedure section 1431.2. This section was enacted in 1986 by Proposition 51, a voter effort to curb perceived lawsuit abuses by eliminating joint liability for so-called “deep pocket” defendants, including local agencies. The issue in this case—whether Section 1431.2 eliminates joint liability for non-economic injuries when defendants are determined to act intentionally, though are found only partially responsible—is of great importance to the League’s and CSAC’s members. Cities and counties are regularly defendants in a wide range of tort matters in many municipal contexts, particularly the law enforcement context presented here. The decision in this matter could significantly affect the costs these agencies incur in paying judgments and defending against litigation.

As explained in their proposed brief, the impact of joint liability on city and county finances and their provision of public services was an important concern that led to Proposition 51’s enactment. The proposed *amici* believe they can assist in the consideration of the issue before the Court by explaining the importance of the initiative’s ballot materials—the impartial analysis and arguments for and against—in resolving any

ambiguity found in Section 1431.2's language. Although the proposed *amici* agree with the County that the text of this section is susceptible of a plain meaning, they believe their explication of the ballot materials would be helpful to the Court should it decide the section's text is ambiguous, requiring it to apply rules of statutory construction.

No party in this action authored this brief in whole or in part. Nor did any party or person contribute money toward the research, drafting, or preparation of this brief, which was authored entirely on a pro bono basis by the undersigned counsel.

Dated: May 2, 2019

Respectfully submitted,

COLE HUBER LLP

By: /s/ Derek P. Cole  
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## ***AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS**

### **I. INTRODUCTION**

Proposition 51, which enacted Code of Civil Procedure section 1431.2, was an effort to curb the perceived abuse of joint liability in California's comparative-fault system. Enacted as part of the tort reform movement active in the 1980s, the measure was intended to address the practice of requiring so-called "deep pocket" defendants to pay more—and in some cases far more—than their share of fault for plaintiffs' non-economic injuries.

As *Amici Curiae* League of California Cities ("League") and the California State Association of Counties ("CSAC") explain within, the Plaintiffs' position here—that section 1431.2 does not abrogate joint liability for non-economic injuries in cases involving intentional tortfeasors—is fundamentally at odds with the purpose for which Proposition 51 was enacted. The measure's advocates portrayed local governments as particular victims of joint liability. The ballot materials presented to voters made reasonably clear the initiative would protect local agencies against perceived lawsuit abuse by enacting a *bright-line* prohibition against such liability for non-economic injuries in *all* cases. The materials did not advise voters that joint liability would be retained in cases involving intentional torts.

The League and CSAC author this brief to provide what they believe is critical context for issue on review. Proposition 51 was the product of a broad, nationwide tort-reform movement and its ballot materials reflect the force with which reformers sought to challenge then existing lawsuit practices. Should the Court find the text of Section 1431.2 to be ambiguous, it should give strong preference to these materials over other, more technical canons of statutory construction. And in doing so, it should find the Second District Court of Appeal correctly interpreted the section below.

## II. DISCUSSION

The League and CSAC agree with Defendants County of Los Angeles and Deputy David Alves (collectively, “County”) that the language of Section 1431.2 is plain.<sup>1</sup> As this Court has explained, the section “contains no ambiguity.” (*Da Fonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602.) “In every case, it limits the joint liability of every ‘defendant’ to economic damages, and it shields every ‘defendant’ from any share of noneconomic damages beyond what is attributable to his or her own fault.” (*Ibid.*) The League and CSAC agree with the County that the text of Section 1431.2 is

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<sup>1</sup> The full text of subdivision (a) of this section states:

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



not ambiguous and, for that reason, that resort to canons of statutory construction should not be necessary. (See *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1151.)

The League and CSAC recognize that two district courts of appeal have interpreted Section 1431.2 differently than the Second District Court of Appeal has below. These include the Fourth District in *Thomas v. Duggins Construction Co.* (2006) 139 Cal.App.4th 1105, and the First District in *Burch v. Certainteed Corp.* (Cal. Ct. App., Apr. 15, 2019, No. A151633) 2019 WL 1594460, a case decided after this Court granted review here. Both decisions looked beyond the plain language of Section 1431.2 in construing the section's meaning. Because a dispute exists as to whether it is appropriate to resort to canons of construction to interpret the section, the League and CSAC write to express their view regarding the section's intent should the Court find the section ambiguous. The *Amici* do not repeat the many compelling arguments the County has made in support of the Second District's opinion.

As a starting point for the analysis, the League and CSAC note that Section 1431.2 is a product not of the Legislature, but of a voter effort to rein in perceived lawsuit abuse. The section was enacted by initiative as part of a tort-reform movement that had gained prominence in the 1980s. (F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement* (2006) 35 Hofstra L. Rev. 437, 470.) Although ballot measures are not always drafted

with the same precision as legislative enactments, they are still interpreted under the same rules that apply in the construction of statutes. (*People v. Park* (2013) 56 Cal.4th 782, 796.) Thus, when the language of a ballot measure is ambiguous, courts may refer to indicia of voters' intent, including the official analysis and arguments in the official ballot pamphlet. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593.) The objective of the analysis is to effectuate the voters' intent, and in cases of uncertainty regarding the measure, consideration must be given to the consequences that will flow from a particular interpretation. (*People v. Valencia* (2017) 3 Cal.5th 347, 364.)

To the extent there is ambiguity in Section 1431.2, presumably that would arise from the second clause of subdivision (a)'s first sentence. That clause inserts the phrase, "based upon principles of comparative fault," between the subdivision's opening and closing clauses. The Plaintiffs assert very technical arguments for why this middle clause should be interpreted to continue the supposedly established rule at the time of Proposition 51's enactment that intentional tortfeasors would be jointly responsible for non-economic damages. (Opening Brief of B.B. and B.B., at 22-27; Opening Brief of T.E, D.B., and D.B, at 26-29.) But the Plaintiffs' reading, based on attempts to apply a number of canons of statutory construction, runs contrary to the purpose for which *voters* reasonably understood the section was enacted.

Proposition 51 was approved as part of broader movement to address the perceived unfairness in the application of California’s comparative-fault doctrines. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1199–1200.) An important target of this tort reform movement was the doctrine of joint-and-several liability. Believing liability should be based solely on fault, reformers at the time had argued it was inequitable to hold tortfeasors liable for more than their respective degrees of responsibility for harm. (Jerry J. Phillips, *To Be or Not to Be: Reflections on Changing Our Tort System* (1986) 46 Md. L. Rev. 55, 61.) To this end, the proponents of Proposition 51 asserted joint-and-several liability had effectively devolved into a “deep pockets” standard. They contended defendants with only limited responsibility for a plaintiff’s harm—the so-called “deep pockets”—were being forced to pay for all of plaintiffs’ injuries because other, much more culpable defendants lacked the resources to pay.

Local governments were viewed by tort reformers as especially rich targets for abuse of joint-and-several liability. For this reason, the arguments in favor of Proposition 51 focused heavily on the effect of the so-called “deep pocket” rule on cities and counties. It illustrated the impact of this rule with a hypothetical in which a city is found 5% responsible for the harm a drunk driver—who is without insurance or assets—inflicted on innocent motorist. Despite the drunk driver’s 95% share of responsibility, the argument stated, the City would be required to pay all of the judgment under then existing law.

The argument contended this scenario was unfair to taxpayers, who “foot[] the bill,” and was resulting in “reduced governmental services.” Owing to these concerns, the argument asserted that “[e]very California county—and virtually all its cities—are IN FAVOR OF PROPOSITION 51.”

To emphasize the effect of the “deep pockets” rule particularly on the public safety services local governments provide, the then president of the California Police Chiefs Association signed as a co-author to the Argument in Favor of Proposition 51. The League’s President and a county supervisor co-authored the Rebuttal Argument in support of the measure. The League and CSAC<sup>2</sup> were also expressly identified as supporters of Proposition 51.

To voters, cities and counties’ prominent support for Proposition 51 could not have been missed. The measure was portrayed to voters as an essential reform necessary to protect the public fisc. And it was portrayed as a reform necessary to protect the ability of local governments to provide public services, including law enforcement and public safety.

It is also important to observe that nothing in the ballot arguments or the Legislative Analyst’s impartial summary of Proposition 51 advised the measure would continue to hold intentional tortfeasors jointly responsible for plaintiffs’ non-economic injuries. Both the arguments for and against and

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<sup>2</sup> CSAC supported Proposition 51 under its formal, incorporated name, the County Supervisors Association of California, though it is better known doing business as the California State Association of Counties.

the Impartial Analysis referred to lawsuits generally, without once distinguishing between those involving intentional and negligent conduct. The Legislative Analyst's analysis of Proposition 51 also advised voters of the prediction that "approval of the measure would result in *substantial* savings to the state and local governments." The message conveyed to voters at the time was clear: Proposition 51 was a tort-reform measure intended to curb the practice of forcing defendants perceived to have "deep pockets"—*particularly* cities and counties—from paying beyond their share of fault.

Retaining joint liability for intentional torts would not have addressed this overarching concern. In fact, the contrary would have been true. The practice of holding agencies jointly liable under these circumstances would have continued to expose agencies to liability beyond their shares of fault. Effectively, the Plaintiffs proffer a number of technical canons of construction to contend Section 1431.2 was intended in at least some, if not many, cases to do exactly the *opposite* of what its proponents said it would do—prevent local agencies from serving as "deep pockets." Implicit in the Plaintiffs' interpretation of Section 1431.2 is that voters could, solely from the phrase, "based upon principles of comparative fault," have understood that cases involving intentional torts committed by public defendants would be treated differently than those involving negligent torts. However, nothing in the Impartial Analysis or arguments for or against Proposition 51 mentioned—or even hinted at—this possibility.

Moreover, given the vigor of the reform movement behind Proposition 51—as loudly and clearly expressed in the measure’s ballot materials—it is doubtful voters would have agreed to retain joint liability for non-economic injuries in cases involving intentional conduct. The line between intentional and negligent conduct is not always clear in cases against public defendants.

Indeed, this case well illustrates the problem that arises in assuming voters intended for a distinction to exist between negligent and intentional torts. Here, state of mind turned on very fact-specific determinations the Jury was required to make. Officer Alves, who was found to have acted intentionally in contributing to the decedents’ fatal injury, was acting in the course and scope of his employment as a police officer when he responded to the report of a domestic assault. There is no dispute in the record that Alves and other officers were justified in responding to the call and confronting the decedent. There also appears to be no dispute regarding the decedent’s uncooperativeness toward the responding officers or that *some* use of force was necessary to restrain him. Alves was determined to have acted intentionally, however, because the method he employed in securing the restraint was found unnecessary and excessive, ultimately contributing to the defendant’s asphyxiation.

The League and CSAC note that a number of other officers participated in forcibly putting the decedent into the prone position in which

he was found to have asphyxiated. Indeed, the decedent was brought to the ground when one officer “hockey-checked” him. Collectively, these officers were found 40% responsible for the decedent’s fatal injuries, but unlike Officer Alves were found to have acted negligently.

As the facts of this case establish, the line between intentional and negligent conduct is not always a clear one. Here, the same call for service resulted in different states of mind and percentages of fault being apportioned among the several officers named as defendants.

It is difficult to believe that voters, in enacting Proposition 51, intended for the abrogation of joint liability to depend upon the unique facts, circumstances, and nuances of cases like this. Rather, a reading of the ballot materials indicates the voters reasonably understood that Proposition 51 would enact a bright-line standard, precluding joint liability for non-economic injuries in *all* cases against local agencies, whether involving intentional or negligent conduct. This is the only fair reading the Court could give to the initiative in light of its ballot materials. Technical canons of statutory construction should not be applied to negate what the voters reasonably understood from the forceful messages conveyed in the measure’s ballot materials. To read the section as the Plaintiffs advocate is to elevate form over substance.

### III. CONCLUSION

For the reasons described above, the League and CSAC request this Court find that the Second District Court of Appeal correctly interpreted Section 1431.2 below. As the County's briefs have persuasively explained, the plain language of the section indicates that intentional tortfeasors may not be held jointly liable with other tortfeasors for plaintiffs' harms. Should this Court find the text of the section ambiguous, however, it should give great weight to the ballot materials for Proposition 51. These make clear the initiative's intent was to enact a bright-line abrogation of joint liability for non-economic injuries in *all* cases.

Dated: May 2, 2019

Respectfully submitted,

COLE HUBER LLP

By: /s/ Derek P. Cole  
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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rules of Court, rule 8.204, the attached brief is proportionately spaced, has a typeface of Times New Roman 13 point or more. I further certify that the attached brief contains 2213 words as calculated by the Microsoft Word 365 processing program, which is within the 14,000-word limitation imposed for Respondents' briefs.

Dated: May 2, 2019

COLE HUBER LLP

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**PROOF OF SERVICE**

I, Mylene Tiongco, declare that I am a resident of the State of California over the age of eighteen years and not a party to the within action. My business address is Cole Huber LLP, 2261 Lava Ridge Court, Roseville, California 95661. On May 2, 2019, I served the within documents:

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS**

X       by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Roseville, California, addressed as set forth below.

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X       via electronic/e-mail service. The document(s) listed above were served via email as set forth below.

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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 May 2, 2019, at Roseville, California.

/s/ Mylene Tiongco  
Mylene Tiongco