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September 30, 2024

VIA TRUEFILING ELECTRONIC FILING / U.S. MAIL

The Honorable Patricia Guerrero, Chief Justice
and Honorable Associate Justices
Supreme Court of the State of California
350 McCallister Street
San Francisco, CA 94102-3600

Re: *West Contra Costa Unified School District v. Superior Court of Contra Costa County (A.M.M)*
California Supreme Court Case No. S286798
Amicus Curiae Letter Supporting Petition for Review

Dear Chief Justice Guerrero and Honorable Associate Justices:

The School Excess Liability Fund ("SELF"), Public Risk Innovation, Solutions, and Management ("PRISM"), and California Association of Joint Powers Authorities ("CAJPA"), submit this letter as amici curiae in support of Petitioner, West Contra Costa Unified School District. These amici request the Court accept review of this case, which concerns the "revival" of historic child sexual abuse claims against California school districts and public entities under 2019's Assembly Bill ("AB") 218.

Introduction

The amici represent joint powers authorities ("JPAs") and risk pools that enable nearly every educational institution in the State and most of its local agencies to plan for and pay liability claims. They write to explain how AB 218 has completely upended the model on which their members have long relied to manage the liability risks with public funds. This model cannot function without the actuarial information needed to evaluate, plan for, and fund the payment of liability claims. The Government Claims Act has *always* assisted the actuarial process by providing the information necessary for these purposes.

The amici are concerned the decision below disregards the fundamental role claims presentation has historically had in enabling districts and agencies to manage and plan for risk. Public entities throughout the state—vested with constitutional obligations to provide services to California's children, their parents and other members of the public—are now forced to choose between providing the services they were established to provide or funding their new and unpredictable AB 218 liabilities.

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AB 218 creates a "lookback" window that resurrects child sexual abuse claims going back as far as the 1950s.[1] Relevant here, the bill relieves lookback plaintiffs from the obligation to have submitted timely government claims near the time of their alleged injuries. (Gov. Code, § 905, subds. (m), (p)). Many school districts and local agencies are now defending or face a spate of new lawsuits for negligent supervision of teachers, coaches, foster parents, or personnel associated with claims of historical abuse.

As these districts and agencies have learned, defending against the revived claims can be overwhelming. Understandably, persons claiming to be adult victims of child sexual abuse present as sympathetic plaintiffs with often highly stirring accounts of past abuses. While many of these accounts are true, little evidence often remains *today* to determine whether school districts or agencies could have known of or prevented the abuses when they occurred. Records that may have been gathered or prepared at the time rarely exist decades later. And defendants often have great difficulty even identifying or locating witnesses who might still be alive and who can assist in their defenses. Trials in the revived cases are often decided primarily—or even solely—on plaintiff testimonies.

Not surprisingly, districts and agencies have found their new exposures in these cases can be limitless. In the modern era of "nuclear" verdicts, AB 218 claims force school districts and local agencies—including small ones—to confront exposures to verdicts well into the eight figures. The funds for these vast new exposures must come from somewhere—and often risk pools have footed the bills because the impacted districts or agencies pooled their liability claims with other entities within the risk pools.

Both JPAs and risk pools fund based on *known* and *anticipated* liabilities. But with AB 218, they now must *retroactively* account for decades of *un*known or *un*anticipated liabilities. Through the requirement they make substantial new contributions to cover years of past obligations, pool members are diverting today's public moneys away from instruction and programs to cover both their and the pools' enormous and unanticipated liabilities.

Even when historic insurance coverage may be available for these liabilities, the limits of the old policies—which may have covered claims had they been brought many years ago—are well below the current levels needed to cover exposures. Adding to the challenge, some of the old insurers are bankrupt or defunct, leaving no money available to provide defenses or pay claims even when policies exist.

Because of these troubling experiences, the amici join the Petitioner in requesting the Court accept review of whether AB 218 violates the State Constitution's Gift Clause. (Cal. Const., art. XVI, § 6). The amici agree that in resurrecting long-expired child sexual abuse

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[1] AB 218 allows previously barred child sexual abuse claims—expired before January 1, 2020—to be revived if filed before December 31, 2022. (Code Civ. Proc., § 340.1, subds. (q)-(r)). It also extends the statute of limitations, enabling plaintiffs to file child sexual abuse lawsuits until they turn 40. (*Id*., § 340.1(c)).

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claims, the bill grants a "thing of value" to the new class of plaintiffs, many of whom are in their 50s, 60s, or 70s. AB 218 benefits this new class of adult plaintiffs at the expense of depriving risk-pool members of the protections of the Claims Act, on which they have relied for decades.

The amici laud the Legislature's understandable desire to provide recompense to victims of past child sexual abuse. But the means the Legislature has chosen—the abrogation of the claims presentation requirement— effectively benefits older generations at the expense of *today's* children, for whom the State constitution guarantees an education and other services. The Court should consider whether this outcome comports with its Gift Clause precedent.

Interest of Amici Curiae

The amici are JPAs with substantial memberships composed of California school districts, educational institutions, and local agencies such as counties, cities, and special districts.

SELF. Formed in 1986, SELF[2] is a joint powers authority established under Government Code sections 6500 et seq. It is not an insurer but instead provides an alternative manner for its members to self-insure by equitably pooling 100% of member liability costs. In its 40-year existence, SELF has provided excess liability coverage to more than 2,000 members. From its founding in 1986 through June 30, 2009, its 1,300 members included 457 kindergartens through twelfth grade schools, 596 charter schools, 34 county offices of education, 14 community college districts, 37 JPAs, 50 regional opportunity programs, and 14 foundations.

Until June 30, 2008, SELF members self-funded their liability costs entirely by pooling a portion of their respective tax revenues**.** Members paid annual contributions—based on an average daily attendance, or "ADA," basis—to fund the collective liability of all members for each coverage year. Critical to the effectiveness of such coverage have been the actuarial calculations SELF conducts in determining contribution amounts. These calculations rely on the information members provide following receipt of government claims. Moreover, because SELF is a public entity rather than a for profit enterprise, it has not kept any of its members' excess funds. Those have been returned after all claims that arose during the coverage period have been fully litigated. Until AB 218, this was an effective and fiscally responsible way for SELF's member school districts to predict—and fund—their likely liabilities. However, the retroactive assessments AB 218 has forced SELF to impose were not only completely unpredictable but were in addition to the assessments SELF requires of those districts to meet current obligations.

For all these reasons, SELF can attest that the Claims Act is essential to both the effectiveness of its pooling model and the ability of its member districts to effectively and responsibly make financial plans that do not threaten their abilities to provide today's students the education the Constitution mandates.

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[2] See https://www.selfjpa.org/

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SELF can also attest to the devastating results of AB 218 on California's public schools. All but three public K-12 school districts in California were members of SELF at some point during the 1986-2008 period. As a result, all but these few districts have diverted public funds intended for today's students to help pay for the "revived" AB 218 claims. The amount of these diverted funds is massive in both size and negative impact. During the period of January 1, 2020 (when AB 218 took effect) to June 30, 2024 (the close of last fiscal year), the monetary liability of SELF's members for AB 218 claims dwarfed the cost of all other sexual abuse claims filed against its members during the same period.

Additionally, to date, the combined total of school district funds that SELF has been required to retroactively assess, then disperse, for AB 218 claims is approximately $300,000,000. Because SELF can only assess its members in arrears, this figure will necessarily increase as the numerous AB 218 lawsuits filed against members are finally litigated. Compounding this problem, SELF's agreements with its members require them to pay either the first $1,000,000 or $5,000,000 of each loss before accessing the SELF jointly pooled funds. SELF's members also must find a way to fund the often-staggering cost of judgments in litigated cases even though, as of today's date, approximately 100 school districts—which are legally unable to file bankruptcy—are at risk of insolvency.

PRISM. PRISM[3] is a JPA formed in 1979 to provide cost-effective risk management services for California counties. Its membership has expanded to presently include 95% of the State's counties, 70% of its cities, 10% of the school districts, and hundreds of special districts. Some of its members provide foster care services, recreation programs, youth sports, and other child-centered programs. PRISM provides several coverages to its members, including general liability coverage that provide for pooled first-level coverage up to $5,000,000 per member, after which layers of excess reinsurance are provided. As with SELF, PRISM relies on the Claims Act to provide the information essential to its actuarial calculations and apportionment of member contributions.

CAJPA. CAJPA[4] was formed in 1981 in response to the then greatly rising insurance costs and lack of liability coverage for public agencies. The organization was instrumental in pioneering the liability pooling model that many of its JPA members now provide to their respective educational and municipal members. CAJPA's members provide group self-insurance and risk-management services to a large majority of California public entities. Many of these member JPAs depend on the Government Claims Act to furnish the actuarial information necessary to provide stable and predictable risk control for their members. Like SELF and PRISM, CAJPA can attest to the Act's fundamental role in the effectiveness of the risk-pool model.

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[3] See https://www.prismrisk.gov/
[4] See https://www.cajpa.org/page/join

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Argument

The amici's members face substantial new exposures from "lookback" claimants. An actuarial analysis performed for SELF, for instance, indicates that as of June 30, 2024, its members faced actual or potential exposures of $250,000,000 for revived claims of child sexual abuse that occurred between SELF's founding in 1986 and 2008. SELF's members, which include nearly every school district in the state, face a quarter billion dollars in *new* exposure for over 20 *completed* liability years. SELF's members must make up for these years' exposure deficits through substantial *re*assessments, which they pay with *current* funds.

As the amici explain, this outcome disrupts the risk-pool models the amici have long administered. These risk pools have allowed school districts, educational institutions, and local agencies to each year identify their anticipated exposures, budget appropriately, and pay the judgments and settlements of injured parties. The Claims Act has been instrumental in providing the information needed for the actuarial calculations that underlie member contributions. AB 218's abrogation of presentation has pulled the rug out from underneath decades of sound financial planning. The amici believe their discussion of these points should inform the Court's analysis on one of the finer points of the Gift Clause question presented—specifically, whether, as the Petitioner contends, the Claims Act is a substantive element of causes of action.

As the amici also explain, risk pools can only do so much for their members. Even after paying reassessments for past claims years, members face additional hurdles in funding initial—or "retention"—levels before the pool funding is accessed as well as covering the amounts—the "excess"—above what risk pools cover. School districts and local agencies have often had little success in meeting these additional funding demands. These practical considerations weigh too in favor of considering the legal issues presented.

1. School Districts and Local Agencies Have Long Relied on Risk Pooling

Risk pooling emerged in response to the limited and often costly options available to public agencies in the private insurance market. In the late 1970s, California public entities formed JPAs under the Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.), allowing them to collectively pool their resources to manage liability risks. This innovative approach has provided educational institutions and local agencies a reliable way to fund and settle liability claims using tax revenues. For three decades, risk pooling has been the primary method by which most California public agencies manage risk.

The success of risk pooling lies in its not-for-profit structure. In traditional insurance models, premiums paid to private insurers include profit margins, which often inflate costs. Risk pooling, on the other hand, enables agencies to bypass the private insurance market by creating a JPA—a separate public entity—dedicated to administering, managing, and apportioning liability claims. The JPA's actuary calculates each member's fair contribution to the pool's liabilities, while also accounting for potential contingencies.

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Since their inception, risk pools have provided a stable and cost-efficient solution for school districts and local agencies to manage liabilities. They enable members to benefit from economies of scale, collectively funding defense efforts and covering liabilities through settlements or judgments. Risk pools have ensured that injured parties receive compensation while preserving essential resources for schools and local agencies—maximizing the funds available for education and public programs.

2. Risk Pooling's Effectiveness Depends on the Claims Act

Since 1963, the Government Claims Act has required individuals asserting monetary claims against public agencies to provide notice before filing suit. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1243 [13 Cal.Rptr.3d 534, 90 P.3d 116]). The California Supreme Court has long held that such presentation is a foundational element of any cause of action against a public agency. (*Id.* at p. 1244). Presentation ensures agencies are not surprised, giving them a chance to evaluate and potentially settle claims before incurring the significant costs of litigation (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455 [115 Cal.Rptr. 797, 525 P.2d 701]). It also allows agencies to financially plan for their liabilities. (*Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 908 [221 Cal.Rptr.3d 761, 400 P.3d 372], *as modified on denial of reh'g (Nov. 1, 2017)*; *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738 [68 Cal.Rptr.3d 295, 171 P.3d 20]).

Claim presentation gives public entities the opportunity to address and resolve claims promptly, reducing the risk of similar harms occurring in the future. (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 215 [64 Cal.Rptr.3d 210, 164 P.3d 630], *as modified (Oct. 10, 2007)*). It also allows agencies to investigate claims while evidence is still accessible, memories are fresh, and witnesses can be located. (*Id.* at p. 213). Public entities possess these pre-lawsuit privileges because, unlike private defendants, taxpayers bear the costs for any injuries. (*Ibid.*)

Risk pooling depends on the Claims Act process for its function. Claims information informs actuarial assessments and determines appropriate contributions from risk-pool members. Claims provide critical details—such as the nature and circumstances of the incidents in question, and the extent of injuries—that risk-pool administrators rely on to assess exposure and ensure adequate claims funding. (Gov. Code, § 910, subds. (c)-(d)). When claims are presented, administrators open files, collect necessary documentation, and track the claims through litigation or the expiration of limitations period. This process is essential for understanding the total potential liability for a given coverage period. Without this data, administrators would be unable to accurately gauge exposure.

In short, claims information is the lifeblood for risk-pool actuarial calculations. Such information determines member contributions and ensures fair and sustainable risk management. To these ends, the California Supreme Court has rightly recognized presentation is an element of any cause of action against public agencies. (*State of California*, *supra*, 32 Cal.4th at p. 1244 [describing as "erroneous" holdings stating compliance with claims presentation requirement is

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not an element of a cause of action].) Without presentation, school districts and local agencies would be unable to engage in stable financial planning, depriving them of the ability to conserve funds for instruction and programs.

3. AB 218 Has Greatly Upended the Risk Pool Model and Has Left Members Exposed to Massive New Liabilities from the Past

AB 218 has fundamentally disrupted the risk-pool model. By reviving long-expired child sexual abuse claims, the bill has undermined decades of financial planning for school districts and agencies. Because of lawsuits filed during the bill's lookback period, many risk-pools and JPAs have been faced with substantial new deficits extending back even decades. In response, these JPAs have had to significantly reassess their members to cover these past-year deficits. Despite their many years of careful planning and budgeting for liabilities, school districts and local agencies must take money from *current* instruction and programs to address the revived claims.

Yet, for many school districts and local agencies, simply paying these retrospective contributions will not be enough. The nature of both JPAs and other risk pools is that all the entities that participate are required to contribute to the losses suffered by the pool, regardless of whether they are involved in those losses. Despite the Legislature's intention to impose liability only on districts that had roles in past abuses, *this is not what AB 218 has accomplished*. In risk pools, *all* districts and entities that were pool members are reassessed for the past liabilities. Risk pools assess members for their pro-rata shares of the pools' collective liabilities, not based on their individual claims or judgment histories. Thus, *every* member who participated in past pools is being reassessed to cover AB 218 liabilities.

Further, while risk pools operate differently from traditional insurance, they still impose coverage limits. Some pools, such as SELF and PRISM, provide excess coverage, which means that members must meet their initial coverage layers through other channels—whether through traditional insurance policies, participation in primary-level JPAs, or self-insured retentions. But some members—especially small school districts and agencies—do not have the financial resources to provide for even this initial layer of coverage.

Adding to the difficulty, locating applicable insurance policies from decades ago is often a hunt in the dark. Even when policies are identified, there is no guarantee that those insurers still exist or will honor claims. When coverage is available, the historic coverage amounts are often woefully inadequate to meet current exposures.

The extent of the massive new exposures school districts and local agencies face is driven by the increasing phenomenon of exorbitantly high jury verdicts—often referred to as "nuclear" verdicts—common today. Jury sentiments surrounding child sexual abuse cases have evolved dramatically, often resulting in awards that can soar into the eight figures. Such amounts far exceed the coverage limits risk pools and other insurers offered. If these cases had been tried closer to the time of the alleged incidents, it is likely that verdicts would have been considerably

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lower, reflecting the societal attitudes of those earlier decades. Lower verdicts or settlements would have come well within the insurance limits that were in place at the time the alleged incidents occurred. The passage of time has only greatly inflated the potential damages, placing an overwhelming new exposure burden on today's districts and agencies.

Additionally, in the wake of AB 218, the perception of reinsurers and similar carriers—who provide excess insurance for the current generation of nuclear verdicts—is that nothing will stop the Legislature from retroactively eliminating the claims requirement in new areas of liability. Reinsurers and excess carriers are accordingly leaving the California market or dramatically scaling back on the risks and amounts they are willing to underwrite. SELF, for example, is now unable to procure reinsurance at its members' agreed levels and has begun looking for reinsurance options from carriers in New York and even out of the country. this presents an extra expense—and extra challenge—in ensuring its members can cover the astronomical exposures they can face.

Simultaneously, the ability of school districts and local agencies to mount effective defenses against the revived claims has greatly diminished. Documentation from decades past is often lost or destroyed due to previous record-retention policies in accordance with prior law. Key witnesses often are no longer alive, and even if they are, they may lack the detailed recollections needed to effectively contest 30- to 50-year-old claims. Moreover, in cases where some records exist, key public employee witnesses often testify differently because of the effects of the passage of time and prior assurances that the matters were resolved, resulting in apparent conflict in the defense witnesses' testimony where none should exist. This leaves districts at a severe disadvantage in defending against claims from adult victims of child sexual abuse—individuals who naturally elicit sympathy and support from jurors.

In sum, despite faithfully funding for their liability coverages for many years through membership in risk pools, school districts and other local agencies no longer are assured of protection from their long-expired liabilities. Many school districts and local agencies now face the prospect of catastrophic and uncoverable liabilities because of alleged errors and omissions of the distant past. That prospect detracts from their abilities to plan for the current and future needs of those are required to serve with the taxpayer funds.

The money school districts and other local agencies must pay for AB 218 liabilities must come from somewhere. And this can only mean they will come from current funding. As a result, despite years of carefully planning for and appropriating funding for liability obligations, districts and agencies are now being required to divert funds that would otherwise be used for instruction or benefit of today's students or, in the case of other public entities, funds that would be used for services that would benefit today's population, to cover claims that arose decades ago. There is no way to describe this as anything other than what it is: a massive intergenerational transfer of public moneys.

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Conclusion

The amici respect the Legislature's understandable desire to address the lifetime harm adult victims suffered from past child sexual abuse. But the Legislature has chosen an unconstitutional means to achieve the desired policy. Because of the wholesale disruption and massive new liabilities that AB 218 has caused to the amici's members, the amici believe this Court has ample ground to consider the legal and constitutional issues presented and request that it do so forthwith. The Court should accept review.

Sincerely,

Derek P. Cole
COLE HUBER LLP

cc: All parties
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PROOF OF SERVICE

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California Supreme Court Case No. S286798

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Placer, State of California. My business address is 2281 Lava Ridge Court, Suite 300, Roseville, CA 95661.

On September 30, 2024, I served true copies of the following document(s) described as

AMICUS CURIAE LETTER SUPPORTING PETITION FOR REVIEW

on the interested parties in this action as follows:

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BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. **Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules**.

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

Executed on September 30, 2024, at Roseville, California.

Kirsten Morris

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California Supreme Court Case No. S286798

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In accordance with C.R.C. 8.29(c)(1)

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