S259216

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

YAZMIN BROWN, ET AL.

Appellants / Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,

Defendant / Respondent.

After Decision by the Court of Appeal
Second Appellate District, Div. Seven (B280550)

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF; AND BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Cal. Rules of Ct., rule 8.208, the Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. CAOC and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that CAOC and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: October 8, 2020

Respectfully submitted,

By: _____
David M. Arbogast

Attorneys for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California (CAOC) seeks permission to file the accompanying brief as a friend of the Court. (Cal. Rules of Court, rule 8.520 subd. (f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. CAOC's members represent individuals and small businesses in various types of cases including class actions and individual matters affecting such individuals and entities such as claims for personal injuries and property damage. CAOC has taken a leading role in advancing and protecting the rights of employees, and injured victims in both the courts and the Legislature.

CAOC has participated as amicus curiae in precedent-setting decisions shaping California law. (*See, e.g.*, *Regents of University of California. v. Superior Court* (2018) 4 Cal.5th 607, *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, *Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024, and *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764.)

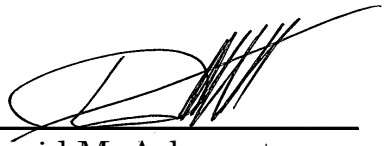
CAOC is familiar with the issues before this Court and the scope of their presentation in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context of the issues presented. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.) The briefs submitted by Plaintiffs, Petitioners and Appellants Yazmin Brown, Brianna Bordon, and Kendra Gatt fully address the issues presented, namely, the

statutorily created duty to protect children-minor athletes under the United States Olympic Committee's ("USOC") authority and control. The overall policy of preventing future harm to the category of children, minor Olympic athletes at issue here, will be served, in tort law, by imposing the costs of negligent conduct upon those responsible for allowing and failing to take reasonable steps to reduce the risk of sexual assault in the "Olympic movement," defendants the USOC and USA Taekwondo ("USAT").

CAOC voices its strong opinion to ensure California's laws are interpreted broadly in favor of protecting children, particularly sexually abused minor Olympic athletes and the organizations that are required by law, and public policy to protect.[1]

Dated: October 8, 2020

Respectfully submitted,



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[1] No party or its counsel authored any part of this brief. Except for CAOC and its counsel here, no one made a monetary contribution, or other contribution of any kind, to fund its preparation or submission. (Cal. Rules of Ct., rule 8.520 subd. (f)(4).) Counsel gratefully acknowledge the assistance of William Liang, a third-year student at Berkeley Law, with the final review and editing of this brief.

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INTRODUCTION

This case concerns whether sexually abused children, then minor Olympic athletes, have plead a proper cause of action for negligence against the organizations charged with their care and protection, the United States Olympic Committee ("USOC") and USA Taekwondo ("USAT"). For pleading purposes, CAOC strongly believes that the USOC owed this category of persons, minor athletes in the USOC's "Olympic movement," a duty of care. Thus, the next question for the Court to decide is what the minor Olympic athletes must allege, at the pleading stage, to state a proper cause of action against the USOC for its concealment and willful blindness of sexual abuse and its negligent failure to take any action to protect these United States athletes.

The rampant sexual abuse of children under the USOC's authority and control is wide reaching and spans decades. In particular, the USOC has known of the sexual assaults in the so-called "Olympic movement" since the 1990's, and likely earlier. USOC failed to do anything about it until 2014, and even then fell woefully short.[2] USOC failed to protect its minor athletes, all the while benefiting from the hundreds of millions of dollars in revenue generated by these athletes each year.

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[2] Plaintiffs' complaint alleges that the USOC has known of sexual assaults within the Olympic movement since the 1980's. (Appellant's Appendix ("AA"), 46, ¶53 ["Since the late l980's defendant USOC received numerous complaints of sexual assaults… ."]

The USOC's own Ropes & Gray investigation and report, which the USOC commissioned in 2018, provides abundant evidence that the USOC had a duty to minor Olympic athletes under the USOC's authority and control, and that the USOC breached that duty. In particular, the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501, et seq., supports a finding of duty at the pleading stage.

Additionally, the USOC had a duty to ensure the SafeSport guidelines are followed and enforced, because the USOC commercially benefits from the athletes and has a special relationship with them. California courts have a long history of finding a duty of care where, like here, the parties have a special relationship. Not only did the USOC have the authority to protect the minor Olympic athletes within the Olympic movement, but the USOC has enjoyed enormous revenues—for years in the hundreds of millions of dollars, annually—from the medals earned by Olympic athletes, including the category of persons at issue, minor Olympic athletes.

Adherence to the arcane and draconian misfeasance-nonfeasance dichotomy, championed by the USOC and its amici, is outmoded and leads to error because it is not a reliable test for determining duty, particularly at the pleading stage. The duty analysis is categorical, not case-specific: Plaintiffs, minor Olympic athletes under the USOC's authority and control, are owed a duty of care at least commensurate to the commercial value these persons have provided to the USOC.

The alternative *Rowland* and *Biakanja* factors, in addition to the Restatement's Special Relationship doctrine, are all valuable tools for courts to consider in finding duty, at the pleading stage and at summary judgment. However, when analyzing duty, courts should rely more heavily on the general rule that a duty is presumed, and instead, focus their analytical attention on whether the defendant has breached its duty of care. To assist courts grappling with this issue, the Court should embrace a flexible constellation of factors test for negligence, as it has done in *Rowland*, in *Biakanja,* and, more recently, in *Kesner*. The special relationship doctrine, as it has evolved, should be one of those factors.

Only in the rarest of circumstances should a court conclude "no-duty" at the pleading stage. Upon review of the complaint at issue, it appears to CAOC that Plaintiffs have adequately pled a cause of action for negligence against the USOC, sufficiently alleging duty. Accordingly, this case should be determined on the merits, after affording Plaintiffs discovery. To the extent the Court finds that Plaintiffs have not adequately alleged a proper cause of action against the USOC, there exists a plethora of facts, developed by the USOC's own investigators, from which Plaintiffs could state a cause of action. Of course, if permitted to amend their complaint after being provided guidance as to what must be plead to state a proper cause of action against the USOC. For all of the reasons discussed herein, and in the Plaintiffs' briefing, CAOC strongly urges this Court to reverse the Court of Appeal, and find that, for pleading purposes, Plaintiffs have stated a proper cause

of action for negligence against the USOC. The Court of Appeal's finding of a special relationship against the USAT, for the same reasons as discussed herein, should be affirmed. Protection of all children, including our minor Olympic athletes, is paramount. Public policy strongly supports a finding of duty against both the USOC and the USAT.

ARGUMENT

I. The Rampant Sexual Abuse of Children, Minor Athletes in Olympic Sports under the USOC's Control.

A. The USOC has known of the Sexual Abuse in the Olympic movement since the 1990's and failed to do anything about it until 2014, and even then, fell woefully short.

The nation was shocked to learn of the rampant sexual abuse of minor-athletes in Olympic sports that are overseen by the United States Olympic Committee ("USOC"). Many athletes have come forward and reported that they had been sexually abused by their coaches, the very people who they put the most trust in. Yet many sexually abused children (and adults) do not report the sexual assaults out of fear, powerlessness, and the very culture created by the USOC and its organizations charged with managing the various individual sports. (Chloe Meenan, *Sexual Assault of United States Olympic Athletes: Gymnastics, Taekwondo, and Swimming* (2019) Sacred Heart University Scholar, Vol. 3, No. 1, Art. 6.)[3]

While the admitted years of sexual abuse by Dr. Larry Nassar, the U.S. Gymnastics' doctor has now become well known, the same sexual abuse of children, minor Olympic athletes, has also been occurring in swimming and, as is pertinent here, Taekwondo. All of the reported cases share a common thread. The coaches and persons charged with the responsibility for the care and protection of these minor Olympic athletes inflicted sexual

[3] https://digitalcommons.sacredheart.edu/shuscholar/vol3/iss1/6.

assault on these United States Olympic athletes. In many cases, the USOC and the organizations that were in charge of each sport overlooked the abuse and stood by, knowing it was occurring and allowing the abuse to happen. Most well-known incidents involve "the women of the USA's Gymnastics Teams from 2012 and 2016 who spoke out about their team's osteopathic physician, Larry Nassar, who had been sexually abusing athletes for years, even after athletes brought the issues to USA Gymnastics. (*Id.*) The rampant, ongoing, and long-standing sexual abuse by Larry Nassar was no outlier but merely brought to light the pervasive culture of silence and the do-nothing approach adopted by the USOC.

The USOC knew about sexual abuse in gymnastics more than two decades ago, in the 1990's, long before the sexual abuse by Larry Nassar became a high-profile scandal. More recently, the USOC's board commissioned an independent investigation of the sexual abuse occurring within the "Olympic movement." The 2018 report by Ropes & Gray LLP ("Ropes & Gray") details numerous failings on the part of the USOC, namely, the USOC's failure to embrace a "child-first approach" that "led to stark failures in implementing effective measures to protect athletes from sexual and other forms of abuse." (See James McPhee, James P. Dowden: *Report of the Independent Investigation: The Constellation of Factors Underlying Larry Nassar's Abuse of Athletes,* (Dec. 10, 2018) at 4, hereafter the "USOC's 2018 Report" or "Report.".)[4] "The

[4] https://www.ropesgray.com/-/media/Files/USOC/ropes-gray-full-report.pdf

USOC, despite having been directly informed by National Governing Bodies ("NGBs") of the threat of sexual misconduct in elite sports, failed to address the risk until 2010, and then failed to take effective action for many years, permitting NGBs to continue adhering to inadequate and harmful policies and practices." (Report at 5.) The USOC failed to exercise appropriate oversight to protect athletes from sexual abuse. (*Id.*) "[T]he USOC took no meaningful steps to protect athletes from the danger…" but instead, focused on maintaining secrecy and "controlling the flow of information" about the numerous allegations of sexual misconduct. (Report at 6.) "The USOC's inaction and concealment had consequences: dozens of girls and young woman were abused…" (Report at 9.) While the Report focused on Dr. Larry Nassar's decades of sexual assault on children and young woman, its findings have a much wider import directly relevant to the sexual abuse that occurred in the Olympic sport, Taekwondo.

B. The findings from 2018 Ropes & Gray Report, commissioned by the USOC, provides abundant evidence upon which the Court may find the USOC had a duty, and breached that duty.

On February 2, 2018, a subcommittee of the Board of Directors of the USOC engaged Ropes & Gray to conduct an independent investigation "into the decades-long abuse by Larry Nassar to determine when individuals affiliated with USA Gymnastics or the USOC first became aware of any evidence of Nassar's abuse of athletes, what that evidence was and what they did with it." (The USOC's 2018 Report at 12.)

The investigation for the Report was led by former federal prosecutors Joan McPhee and James Dowden. (*Id.*) "Their mission, [from the USOC], was to independently collect facts and publicly issue a comprehensive report that addresses both the underlying facts and individual and institutional accountability." (*Id.*)

The Report investigators interviewed "over 100 individuals, including more than 60 current and former employees of the USOC …, ranging from the most senior leadership throughout the relevant time period to junior employees with potentially relevant information." (*Id.* at 12.) The investigators were provided "access to over 1.3 million documents, including hard copy material, reports and files, emails, contemporaneous notes-to-self, text messages and cell phone data." (*Id.*) The investigators also "reviewed publicly available material, including transcripts from Nassar's criminal proceedings, social media and news coverage spanning the relevant period, topical books and biographies and various other sources, to assist [their] understanding of the relevant facts.") (*Id.*)

The Report was "the culmination of ten months of investigative efforts and reflects [the former federal prosecutors'] distilled conclusions based on a detailed review of the factual record. (*Id.*)

The Report concluded that the USOC *failed* "to exercise appropriate oversight to protect athletes from sexual abuse." (*Id.* at 2.) Furthermore, "the USOC's inaction and concealment had consequences: dozens of girls and young women were abused during the year-long period between the summer of 2015 and

September 2016." (*Id*. at 9; see also Alexandria Murphy, *Why the USOC Took So Long to Fix a Failing System for Protecting Olympic Athletes from Abuse* (2019), 26 Jeffrey S. Moorad Sports L.J. 157, 179 ["The USOC capitalizes from its athletes' success and is quick to celebrate their moments at the Olympic Games, but has looked away when called to change a failing system for protecting abuse in its organization."].)[5]

The Report observes that "the USOC [] focused almost exclusively on winning, to the detriment of other values in sport, and that their individual welfare is subordinate to the organizations' medal-count mission." (Report at 137.) Additionally, the Report found that the athletes "are a means to an end," and were purposefully "treated like a business plan." (*Id.* at 137.) Furthermore, "the USOC placed a heightened emphasis on earning medals *and generating revenue,*" "generating more than $350 million" in one year, off of the hard work and dedication of the Olympic athletes, many of whom are children, young women, like Plaintiffs (*Id*. at 142). As one former executive recalled, "the words 'money and medals' were probably uttered at every staff meeting, typically more than once, with the effect of marginalizing other topics …" (*Id*. at 144.) "As a result, the USOC evaluated much like a professional sports organization or any other company evaluating assets and examined the return in athletic success on its monetary investments." (*Id*.) In other words, the USOC placed

[5] https://digitalcommons.law.villanova.edu/mslj/vol26/iss1/5.

revenue over the health and safety of its athletes, many of whom are minors and young women, like Plaintiffs.

The Report observed that the USOC purposefully changed its organizational structure to a more traditional corporate structure, adopting "a differential, service oriented approach to the NGBs," and that "[n]o later than 1999, the USOC was alerted to the risk of child sexual abuse in gymnastics, and in 2004, it was "similarly apprised of the risk of child sexual abuse" in swimming. (*Id*. at 139.) Knowing this, the USOC did nothing. (*Ibid*.) All the while, the USOC reaped hundreds of millions of dollars in revenue, rewarding its executives with lucrative six-figure salaries and lavish dinners and banquets, along with first class-airfare for themselves and their entire families. (See Sally Jenkins, *The USOC spends exorbitantly on its executives, but not on athletes* (Mar. 31, 2018);[6] see also Rich Perelman, *U.S. Olympic Committee tax return shows $323 million in 2018 revenue, and a lot of other things more interesting that Scott Blackmun's severance* (July 7, 2019).)[7]

Numerous "observers have identified the USOC's decision not to exert greater authority over NGBs as a critical element in

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[6] https://www.thelily.com/the-usoc-spends-exorbitantly-on-its-executives-but-not-on-athletes/#:~:text=The%20only%20real%20public%20disclosure,money%2C%20royalties%20and%20donations

[7] http://www.thesportsexaminer.com/lane-one-u-s-olympic-committee-tax-return-shows-323-million-in-2018-revenue-and-a-lot-of-other-things-more-interesting-that-scott-blackmuns-severance/

the USOC's inability to respond effectively to sexual abuse in sports." (Report at 150.) Indeed, former acting CEO of the USOC, Suzanne Lyons, testified before Congress in May 2018 "that the USOC 'did not exercise the authority that I think the [Ted Stevens] act gives us,' and opined that 'I think a change we need to make is for us to exercise the authority that I think the act gives us,' 'to exercise that authority more thoroughly." (Report at 150, citing Susanne Lyons, Testimony Before the Senate Subcommittee on Oversight and Investigations (May 25, 2018.)

The USOC is a part of the structure of the national and international so-called "Olympic movement." "The USOC and the NGBs engage in fundraising and develop Olympic sports in accordance with powers and responsibilities rooted in a statute passed in 1978, the Ted Stevens Act."[8]

C. It is well-settled that duty may be created by statute: The Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501, et seq. supports a finding of duty at the pleading stage.

It is well-settled that a duty of care can arise directly by statute. (See *States Liability Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594; Evid. Code, § 669.) Here, the Ted Stevens Olympic and Amateur Sports Act of 1998, codified as 36 U.S.C. § 220501, *et seq.* (the "Act") gives rise to such a duty.

The Act was a revision of the Amateur Sports Act of 1978, and reflected changes such as the fact that amateurism is no

[8] https://www.sportsbusinessdaily.com/Journal/Issues/2018/01/08/Olympics/USOC-Foundation.aspx

longer a requirement for competing in most international sports (the admission of professionals was caused by the extensive cheating of the Soviet Union, which listed its best pros as soldiers and broke the Olympic rules). The Act represented an expansion of the USOC's role to include the Paralympic Games, and increased athlete representation. The Act also protected the USOC against lawsuits involving athletes' right to participate in the Olympic Games. However, the Act did not insulate the USOC from breach of its duties to protect athletes within the Olympic movement.

Under the Act, "corporation" is defined to mean "the United States Olympic Committee." (36 U.S.C. § 220501(b)(5).) The "corporation" or USOC purpose is to "establish national goals … and encourage the attainment of those goals." (36 U.S.C. § 220503(1).) The purpose of the USOC is also to "coordinate and develop amateur athletic activity in the United States [and] to foster productive working relationships among sports-related organization." (36 U.S.C. § 220503(2), (5-7).) The USOC also must "exercise exclusive jurisdiction, directly or through constituent members of committees, over all matters pertaining to the United States' participation in the Olympic games …." (36 U.S.C. § 220503(3)(A), (B).) The USOC is also charged with the responsibility "to foster the development of amateur athletic facilities for use by amateur athletes"; to "provide and coordinate technical information on physical training, … coaching, and performance analysis"; and "to encourage and **provide assistance to amateur athletic activities for women**." (36 U.S.C. § 220503(9), (10) and (12).) Pursuant to § 220501 (5) "

'child abuse' has the same meaning given the term in section 212 of the Victims of Child Abuse Act of 1990 (34 U.S.C. 20302)."

The USOC's powers include, making contracts, to "approve and revoke membership in the corporation," to "sue and be sued," and to "**do any other act necessary and proper to carry out the purposes of the corporation**." (§ 220505 (b).) (Bold added.)

While section 220507 (a) provides that the USOC "may not engage in business for profit…," its income and payments to its officers has been enormous. In 2018, it reported over $322 million in revenues, of which $121.8 million of those revenues were from selling broadcast rights. (*See* 2018, Tax Form 990, as required under the Act, 36 U.S.C. § 220511.)[9]

Commentators who have followed the numerous sexual abuse cases within the USOC have commented that the USOC's reference to "The 'Olympic movement' is a misnomer: The only thing moving in it is the cash from one suit pocket to another." (*See* Sally Jenkins, *The USOC spends exorbitantly on its executives, but not on athletes,* (Mar. 31, 2018) ["The chronic sex abuse of our gold medalist athletes in multiple sports is the direct result of a structure with zero accountability. Make no mistake, the two are related: The USOC is a nest of self-dealing in which athletes are expected to pick up the tab for official excesses and stay silent for fear of losing funding. 'Athletes are starving and hungry, and this is their dream. They'll be willing to do anything to get there, including take any amount of abuse,' says Ben Barger, a former

[9] https://www.teamusa.org/footer/finance

Olympic sailor who has tried to confront the USOC on its fiscal habits.").[10]

Pursuant to section 220525, the Act provides that: "a national governing body shall … demonstrate [to the USOC] that … appropriate measures have been taken *to protect* the amateur status of athletes who will take part in the competition and to *protect* their ability to compete in amateur athletic competition." (*Id*. at 220525 (4)(A).) This section also requires that the NGB demonstrate to the USOC that "proper safety precautions have been taken to protect the personal welfare of the athletes … ." (36 U.S.C. § 220525 (F).)

Section 220527(a)(1) provides that a "… person that belongs to or is eligible to belong to a national governing body may seek to compel the national governing body to comply with sections 220522, 220524, and 220525.." Section 220527(a)(2) provides: "The corporation [USOC] shall establish procedures for the filing and disposition of complaints under this section." Section 220522 provides that an organization may "be recognized, or to continue to be recognized, as a national governing body *only if* it…. (2) has the managerial and financial capacity to plan and execute its obligations"; 220524(6) "provides equitable support … for participation by women"; and "(9) encourage[s] and support[s] research, development, and dissemination of information in the

[10] https://www.thelily.com/the-usoc-spends-exorbitantly-on-its-executives-but-not-on-athletes/#:~:text=The%20only%20real%20public%20disclosure,money%2C%20royalties%20and%20donations.

area[] of … sports safety." Section 220525(b)(4)(A) provides that the NGB shall ensure that "appropriate measures have been taken *to protect* the amateur … athletes… ." (Italics added.)

Section 220527(d)(2)(B) provides that "If the [USOC] decides … that the national governing body is not complying with sections 220522, 220524, and 220525 … *it shall* … (B) revoke the recognition of the national governing body." (Italics added.)

Section 220530 provides: "An applicable amateur organization [which necessarily includes the USOC] *shall* "(1) *comply with the reporting requirements* of section 226 of the Victims of Child Abuse Act of 1990 (34 U.S.C. § 2031)," and

> (2) establish reasonable procedures to limit one-on-one interactions between an amateur athlete who is a minor and an adult (who is not the minor's legal guardian) at a facility under the jurisdiction of the applicable amateur sports organization without being in an observable and interruptible distance from another adult, except under emergency circumstances;
>
> (3) offer and provide consistent training to all adult members who are in regular contact with amateur athletes who are minors, and subject to parental consent, to members who are minors, regarding prevention and reporting of child abuse to allow a complainant to report easily an incident of child abuse to appropriate persons; and
>
> (4) prohibit retaliation, by the applicable amateur sports organization, against any individual who makes a report under paragraph (1).

(Section 220530(a)(2)-(3).)

Section 220531 authorizes the Attorney General to award grants "in order to support oversight of the United States Olympic

Committee, [and] each national governing body… to oversee regular and random audits to ensure the policies and procedures used by the United States Olympic Committee, [and] each national governing body … **to prevent and identify the abuse of an amateur athlete**… ." (Bold added.) Specifically, section 220531(c) directs that the USOC and the NGBs use the grant monies "to develop and test new training materials for emotional, physical, and sexual abuse prevention ... [and] to oversee the administration of th[ose] procedures… ." (36 U.S.C. § 220531(b)(1-3).) And, through passage of the Act, Congress appropriated "$2,500,000 for each of the fiscal years 2018 through 2022."

Section 220541 designates the United States Center for Safe Sport ("USCSS") as the independent national safe sport organization to "exercise jurisdiction over the corporation [USOC], and each national governing body. (36 U.S.C. § 220541(1-2).) Section 220541(c)(2) contains a saving clause which states "[n]othing in this section shall be construed as altering, superseding, or otherwise affecting the right of an individual within Center's jurisdiction to pursue civil remedies through the courts for personal injuries arising from abuse in violation of the Center's policies and procedures."

Section 220542 also provides mandatory reporting requirements "whenever such members or adults learn of facts leading them to suspect reasonably that an amateur athlete who is a member has suffered an incident of child abuse." (36 U.S.C. § 220542(a)(2)(A)(i-ii).)

While the Ted Stevens Act is not a model of clarity as to the extent to which the USOC owed a duty to the minor Olympic athletes within the "Olympic movement," CAOC strongly believes that the Act provides enough, at the pleading stage, to state a *prima facie* case of negligence against both the USOC and the USAT, specifically, a duty of care owed to the sexual assault victims within its organizations. (See Elysha M. Savarese, (Spring 2018), *Could the USOC and USA Gymnastics Pay the Price in Sex Crimes Case?,* Florida Atlantic University Undergraduate Law Journal ["The acts of Dr. Nassar were heinous in nature. The total disregard demonstrated by the USOC and USA Gymnastics was reprehensible. To prevent atrocities like this from happening again, and to protect other organizations from liability, organizations must be more proactive."].)[11]

II. The Alternative *Rowland* and *Biakanja* Factors, In Addition to the Special Relationship Doctrine, Should Be Used as Valuable Tools for Courts to Consider in Finding Duty, at the Pleading Stage.

The Special Relationship doctrine, the *Rowland* factors, and the *Biakanja* factors share several key considerations, one being foreseeability. (*Cf*, *Biakanja v. Irving*, (1958) 49 Cal.2d 647, 650, *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, and Rest. (Third) of Torts: Phys. & Emot. Harm § 40 (2012).) Broadly, all three doctrines recognize various circumstances when a duty, or

[11] https://journals.flvc.org/FAU_UndergraduateLawJournal/article/view/106321.

exception to a duty, may be found. They are all helpful guides for courts to reach the correct conclusion.

CAOC agrees with Plaintiffs that the special relationship test is not the only test that should be considered in order to determine whether a defendant, generally, and the USOC, specifically, are bound by a duty of reasonable care. The Restatement itself provides that it is merely a guide, and not the ceiling but rather the floor when evaluating the parties "Special Relationship." (Rest. (Third), supra, § 40, comm. o ["The list of special relationships provided in this Section is not exclusive. Courts may, as they have since the Second Restatement, identify additional relationships that justify exceptions to the no-duty rule contained in § 37."]

CAOC also agrees that the application of the Special Relationship test, the *Rowland* factors test, and the *Biakanja* factors may each be viewed as independent tools for evaluating the same duty of care question at the pleading stage.

With regard to the *Rowland* and *Biakanja* factors tests, CAOC believes this Court attempted to create a constellation of factors for courts to consider when determining whether a duty of care is owed to a particular category of persons. Like the Restatement, those attempts to create a categorical list of factors were not meant to be finite or exhaustive. (*Rowland*, *supra* at 117 ["Without attempting to labor all of the rules relating to the possessor's liability, it is apparent that the classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those

immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity"; see also *Biakanja*, *supra* at 650.) As noted above, the factors enunciated by the Court in *Rowland* and *Biakanja* are the floor, and not the ceiling. Therefore, CAOC strongly urges the Court to adopt a flexible approach to address the myriad of different negligence cases where duty is not always entirely clear, at least initially, at the pleading stage.

In CAOC's view, the instant case provides a number of exceptionally strong connections between the plaintiffs, minor Olympic athletes, and the USOC's direct authority, control, and enormous revenue stream from this category of persons, and thus, strongly militates toward a find of duty, at least at the pleading stage.

III. Courts Should Rely More Heavily on the General Rule That a Duty Is Presumed And, Instead, Focus Their Analytical Attention on Whether the Defendant Has Breached its Duty of Care.

As noted above, whether a defendant owes a plaintiff a duty to exercise some degree of care for the plaintiff's safety is a matter of law, which is decided by a judge. (*Regents of University of*

California v. Superior Court (2018) 4 Cal.5th 607, 618 ("*Regents*"), ["Duty, being a question of law, is particularly amenable to resolution by summary judgment."].) However, "[to] say that the defendant is under a duty is merely to say 'that the defendant should be subject to potential liability in the type of case in question.' " (Michaela Goldstein, *California's No-duty Law and its Negative Implications,* California Supreme Court Historical Society ("2017 Supreme Court Historical Society Article"),[12],[13] citing Dan B. Dobbs et al., *The Law of Torts* § 124. (2d ed. Practitioner Treatise Series 2011).)

As one scholar put it, "**[D]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.**" (2017 Supreme Court Historical Society Article at 477, citing Dobbs et al., *supra* at § 255.) The author goes on to observe that "[l]egal scholars have agreed that '[a] general duty of *reasonable* care is by definition not burdensome.' [Citations.] And in most negligence cases, "elaborate efforts to describe particular duties are both unnecessary and undesirable.' " (*Ibid*.)

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[12] https://www.cschs.org/wp-content/uploads/2018/02/Legal-Hist-v.-13-Articles-Californias-No-Duty-Law.pdf

[13] *Id*. at 473 fn. ("This paper was awarded first place in the California Supreme Court Historical Society's 2017 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.')

Without question, California's no-duty rule has been applied inconsistently and there are anomalous exceptions harbored within the rule making it a difficult, if not impossible, to develop a bright-line test. (*Id*. at 479-480.) This is "because duty is a live element in every negligence case, as opposed to '[the] general rule in California is that everyone is responsible . . . for [their negligence],' it [is therefore] difficult to know when the issue of duty does or does not arise." (*Id*. at 480.)

> [R]ather than the parties' focusing on whether the defendant fell below the standard of care, and therefore breached its duty, the parties spend much of their time establishing whether a duty exists. California has partaken in a flawed, fundamental move away from deciding negligence cases based on whether a defendant breached its duty of care. Instead, California courts wrongfully focus on the first element of negligence: whether a duty exists. In doing so, California has created an intricate, inconsistent common law surrounding whether a duty exists. Often, cases are won and lost on summary judgment on whether a duty exists — a question of law. Deciding negligence cases on summary judgment inevitably leads to cases being removed from the hands of the jury.

(*Id*. at 474.)

In *Rowland*, this Court enunciated a turn away from the traditional categories of duty applied to invitees, licensees, and trespassers, and instead moved to an analysis more centered on the *Rowland* factors. (*Id*. at 478.) Specifically, *Rowland* spawned an overthrow of the traditional categories — invitee, licensee, and

trespasser, by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth century. In *Rowland*, this Court concluded that "the correct inquiry was whether, in the management of his property, the defendant acted as a reasonable person in view of probability of injuries to others." (Article at 479, citing *Rowland v. Christian*, supra at 100.) Importantly, in *Rowland v. Christian,* this Court concluded that the plaintiff's status as a trespasser, licensee, or invitee was not determinative. (*Ibid*.) The issue in *Rowland* was whether the tenant had been negligent in failing to warn the plaintiff that a faucet handle was defective and dangerous at the time that the plaintiff was about to come in contact with the faucet handle. (*Rowland*, *supra* at 100.)

> [B]ecause duty is a live element in every negligence case, as opposed to "[the] general rule in California is that everyone is responsible . . . for [their negligence]," it becomes difficult to know when the issue of duty does or does not arise. [Citations.] This is where the California courts make their most fatal error: the courts have created very specific factual circumstances where there is no duty, which undoubtedly creates complex and narrow exceptions to what is supposed to be a general presumption of duty. From the precedential narrow factual circumstances where the court has held that the defendant is under no duty of care as a matter of law, the courts must then determine whether other narrow factual circumstances are similar enough to the previous narrow factual circumstance to warrant a no-duty ruling. However, this determination of fact is essentially an issue for the jury. Whether or not a duty exists is supposed to be determined on a categorical

> basis; instead, judges are determining an essentially factual issue, which is reserved for the jury.

(2017 Supreme Court Historical Society Article at 480.)

Numerous negligence cases are decided on summary judgment on the narrow issue of whether a duty exists. (*Id*. at 480.) Thus, the *Rowland* factors, which were originally supposed to be used in a very narrow set of circumstances to clear up confusion over the previous invitee, licensee, and trespasser categorical rules, have merely created another complicated area of law. (*Id*.) Returning to those arcane common law principles, as advocated by the USOC and its amici, is not the answer.

At the pleading stage, only in the rarest of circumstances should a court conclude "no-duty." Rather, the starting point should be, in all but the clearest of cases, a finding of at least a presumption of duty. To the greatest extent possible, cases should be determined on their merits, after affording the parties an opportunity to conduct discovery to ferret out all of the conditions and factors which militate either for or against a finding of duty at summary judgment.

Here, for pleading purposes, there is no question that there exists a *prima facie* finding of a duty. Specifically, there is no question that the plaintiffs, minor Olympic athletes, were sexually assaulted while they were under the direction and control of the USOC and USAT, and dependent upon the USOC and USAT for their health, safety and welfare. (See, e.g. decision on appeal following conviction of one of the abusers, Marc Gittleman, *People v. Gittleman*, (Cal.App.2nd Dist., Div. 1, Jun. 19, 2017) 2017 WL

2628433, unpublished.)[14] Also, when considering the scathing findings of the USOC's 2018 Report, discussed above, the USOC not only failed to exercise reasonable care, when it had the authority to do so, but its active concealment actually increased the risk of harm to other minor Olympic athletes and thus, at the pleading stage, the USOC owed a duty to Plaintiffs. (See, e.g., USOC's 2018 Report at § III, *Who Knew What and When and Was Not Done in Response*, 44 ["Over a period of decades, numerous adults ignored credible reports of [] criminal abuse," and "Mr. Blackmun [then-CEO of the USOC] told Mr. Larry Buenhoff, then-Chief Security Officer at the USOC, … that he was aware of the situation and did not further engage the USOC's then-Chief of Security on the matter *or* [take] *appropriate child-protective measures*."]) (Emphasis added.)

Particularly at the pleading stage, myopically focusing on duty without evaluating a constellation of factors leads to inconstant results in the trial courts followed by numerous appeals. Embracing a broad constellation of factors test as this Court formulated in *Rowland* and *Biakanja* for finding a duty of reasonable care, at the pleading stage, would ensure cases with

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[14] See Cal. Rules of Court, rule 8.1115(B)(2), unpublished decisions may be cited "[w]hen the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action." Defendant Marc Gittleman is one of the perpetrators of the sexual abuse and inappropriate conduct with minor Olympic athletes at issue in this case. (Complaints, AA at 6, 37)

merit are allowed discovery and subsequently decided on their merits, either at summary judgment or trial.

IV. This Court Should Embrace a Flexible Constellation of Factors Test for Evaluating Negligence, the Special Relationship Doctrine, as it Has Evolved, Being One of Those Factors.

CAOC believes the Court should adopt a common-sense, flexible approach which analyzes a constellation of factors when determining the existence of duty under negligence. A constellation of factors approach is simultaneously more sophisticated and common-sense than the traditional analysis, and would ensure a duty on the part of organizations like the USOC who reap huge benefits (hundreds of millions of dollars in revenue, each year) from a category of persons, like the sexually assaulted athletes within the Olympic movement, particularly the minor Olympic athletes, children. It is clear to CAOC that the USOC and its National Governing Body ("NGB"), USAT, should bear the costs of unreasonable and unnecessary risks of harm they create by the manner in which they accept enormous benefits (revenue) from this category of person's hard work and excellence in their sport while failing to ensure the safety of the minor Olympic athletes who generate that revenue. The USOC has the authority, power, and capacity to take affirmative action, but did nothing when it knew or should have known the sexual assaults were occurring. The USOC not only created an increased risk of severe harm, but it could have taken action to reduce or eliminate the culture of sexual abuse it has caused or contributed to. The USOC has the ability and power to regulate all of their NGBs by

ensuring the SafeSport guidelines are enforced and complied with. Discovery will reveal what the USOC knew, when it had the knowledge and the appropriate action the USOC should have taken, and should take in the future to prevent the rampant sexual abuse in the Olympic movement from reoccurring.

V. The Law of Negligence Creates a Social Contract for Safety: Our Most Vulnerable, Our Children, Deserve Special Protection.

"The law of negligence," common across jurisdictions, "effectively creates a social contract of safety." (*Virgilio v. Ryland Grp., Inc.* 1282 (M.D. Fla. 2010) 695 F. Supp. 2d 1276, aff'd, 680 F.3d 1329 (11th Cir. 2012). In California, Civil Code section 1714 is the general source of authority for a duty owed on a negligence theory. It provides in relevant part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ." (Cal. Civ. Code § 1714(a).) Unsurprisingly, then, this Court in *Rowland v. Christian*, nearly a half century ago, described Civil Code section 1714 as reflecting the "basic policy of this state" and constituting the "foundation of our negligence law." (69 Cal. 2d 108, 112, 118 (1968).) It still is.

"Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." (*Palsgraf v. Long Island R. Co.* (N.Y. 1928) 162 N.E. 99, 103 (Andrews, J., dissenting). Consistent with the *Palsgraf* opinion of Judge Andrews, which identified proximate cause as

cabining negligence liability, this Court more recently in *Kesner* identified several limiting principles so that negligence exposure is not excessive. Duty is just the first of multiple elements that plaintiff must establish: "Breach, injury, and causation must be demonstrated on the basis of facts adduced at trial, and a jury's determination of each must take into account the particular context in which any act or injury occurred." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1144.)

Contrary to the Court of Appeal's approach below, exceptions to the presumptive duty of care are not lightly recognized. (*Id*. at 1143.) In *Kesner*, this Court reiterated the factors guiding this inquiry. "In determining whether policy considerations weigh in favor of such an exception," this Court has observed that the "most important factors" are as follows (set forth verbatim from *Kesner*):

- foreseeability of harm to the plaintiff;
- degree of certainty that the plaintiff suffered injury;
- closeness of the connection between the defendant's conduct and the injury suffered;
- moral blame attached to the defendant's conduct;
- the policy of preventing future harm;
- extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and
- availability, cost, and prevalence of insurance for the risk involved.

(*Id*. at 1143 (quoting *Rowland*, 69 Cal.2d at 113).)

VI. Each of the *Rowland* Factors Confirm That the USOC and USAT Had a Duty to Implement Sexual Abuse Management and Protocols for the Protection of its Athletes Within the Olympic Movement.

Here, all seven factors disfavor an exception under section 1714. Consequently, the USOC and USAT owe the Plaintiffs, and all similarly situated minor Olympic athletes, a duty of care.

First, it was foreseeable to the USOC that minors such as Plaintiffs were under an increased risk of sexual assault, abuse and other forms of inappropriate conduct—and due to the organization's complete lack of care and concern for its athletes, the USOC chose to conceal and ignore the repeated reports of sexual abuse it was made aware of. USOC was on notice, since at least the 1990's, and likely earlier, from the numerous reports of sexual assaults occurring in the Olympic movement.[15]

According to *Kesner*, foreseeability is the "most important" factor of the seven in assessing whether to create an exception under section 1714 to the general duty of care. (*Id*. at 1145 (internal quotation marks and citation omitted).) In particular, this Court clarified that the foreseeability inquiry is not "whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct" but, instead, "whether the category of negligent conduct at issue is sufficiently likely to result

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[15] Discovery, if permitted, would likely reveal what the USOC knew, and when. What the USOC did with that knowledge is already known, at best, nothing, and at worst, concealed and thwarted investigations of claims in favor of revenue, thereby increasing the risk of sexual assaults.

in the kind of harm experienced." (*Id.* (internal quotation marks and citation omitted).)

Second, the Plaintiffs' allegations regarding their injuries, sexual assaults and other inappropriate conduct are quite serious and must be taken as true at the pleading stage. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, citations omitted, [stating standard on review when a demurrer is sustained without leave to amend].) Thus, the second factor is also easily satisfied.

Third, there is a close connection between the sexual abuse and the USOC's failure to implement any effective youth safety protocols. Plaintiffs allege sexual assaults, abuse, and other inappropriate conduct with a minor, and the USOC and USAT breach of a duty of care each owed to the Plaintiffs. Based on that, but for the USOC's concealment, inaction, and conscious disregard for the health and safety of Plaintiffs, the sexual abuse would not likely have occurred if the USOC had taken an interest and steps to reduce the risk of sexual assaults within the Olympic movement. (Complaint, AA 37, 56.)

Fourth, the USOC is morally blameworthy because the USOC was responsible for the safety of the minor Olympic athletes. The organization had the authority and has admitted to its failure of its obligations, as part of its comprehensive investigation and Report following the decades of abuse that was allowed to continue as to Dr. Larry Nassar alone, and in Olympic sports nationally. Parents trusted USOC-sanctioned teams with the care and safety of the children, only to see those children suffer

avoidable sexual assaults at the hands of the coaches and trainers charged with their immediate care.

Fifth, declining to recognize an exception to the general duty of care owed under section 1714 deters similar misconduct. Organizations such as the USOC, when it holds itself out as prioritizing safety, need to be held accountable to prevent others from engaging in similar misconduct.

Sixth, there is little or no "burden to the defendant" for at least two reasons. (*Kesner*, 1 Cal. 5th at 1143.) The USOC has already drafted and promulgated the SafeSport Guidelines for its NGBs, like the USAT. Applying those policies to itself, at minimum, would require the USOC to report any claims of sexual abuse or other inappropriate conduct with minors to the appropriate local, state, and federal investigative agencies. And, surely the USOC could, with little to no extra burden, include more detailed questionnaires to its NGBs and diligently follow-up on any irregularities it obtains from those questionnaires. More appropriately, given the hundreds of millions of dollars in revenue the USOC has enjoyed from its athletes, the USOC certainly has an obligation to implement periodic spot-checking, confidential reporting lines, and effective follow-up from any report of sexual abuse of its athletes. The duty that Plaintiffs have alleged was owed is now largely co-extensive with the USOC's SafeSport statutory duties under the Ted Stevens Act—so there is no real burden. (*Kesner*, 1 Cal. 5th at 1143.)

Finally, as to the availability, cost, and prevalence of insurance for the risk involved, given the hundreds of millions of

dollars in revenue enjoyed by the USOC, there are ample financial resources to purchase insurance, and fund a rigorous and appropriate effort to reduce the risk of sexual assaults within the USOC's Olympic movement. This factor is satisfied.

VII. The USOC's Special Relationship with the Minor Olympic Athletes Supports A Duty to Ensure the SafeSport Guidelines Are Followed and Enforced.

"It is black-letter law that one may have an affirmative duty to protect another from harm where a 'special relationship' exists." (*Nally v. Grace Community Churc*h (1988) 47 Cal.3d 278, 310 dissent, citing *Williams v. State of California* (1983) 34 Cal.3d 18, 23; *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 48; Rest.2d Torts, § 314; Prosser & Keeton, Torts (5th ed. 1984) § 56, p. 374.) The critical question, therefore, is whether there existed some special relationship between the minor Olympic athletes and the USOC, which would give rise to an affirmative duty to act to prevent or reduce the sexual assaults the USOC has known have been occurring since the 1990's.

The existence and scope of duty are legal questions for the court. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.) In determining those questions, courts "begin always with the command of ... section 1714, subdivision (a): 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person....' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 885.) There are, however, exceptions to this rule. Some are established by the Legislature

through enactment of statutes. Others are judicially established where "clearly supported by public policy. [Citations.]" (*Rowland v. Christian, supra* at 112.)

Of course, the mere foreseeability of a harm or knowledge of a danger is insufficient, by itself, to create a legally cognizable special relationship giving rise to a legal duty—but this Court has also found a duty where a commercial relationship exists. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 297; see also Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, com. h, p. 43 ["although relationships often have advantages for both participants, **many special relationships especially benefit the party charged with a duty of care.**"].) (Bold added.) Here, the commercial relationship between the USOC and each of the Olympic athletes, many of whom are minors, children, cries out for a finding of duty, at least at the pleading stage, so that Plaintiffs can engage in discovery to explore and determine if there exists an actual case or controversy that can and should be determined on the merits. Indeed, the Report provides a glimpse of what the victim's attorneys will likely find if provided an opportunity to conduct discovery and develop the merits of their case.

It is plainly evident that, without Olympic athletes, the USOC would not have enjoyed the hundreds of millions of dollars in revenue it has enjoyed from the medals obtained by these athletes. Indeed, one could easily conclude there could be no Olympic program at all without the athletes, many of whom are children, minor Olympic athletes. Thus, the USOC has foisted on

Plaintiffs a relationship that is reminiscent of indentured servitude, as the USOC fully takes advantage of and exploits their hard work and talent without any regard for their protection in the face of known risks. As noted above, the "Olympic movement," controlled by the USOC, "is a misnomer: The only thing moving in it is the cash from one suit pocket to another," in complete disregard of the athletes from whom the review is generated. (Sally Jenkins, *The USOC spends exorbitantly on its executives, but not on athletes,* (Mar. 31, 2018)). At minimum, the USOC purposefully chose "willful blindness" as its response to the known consequences of its reckless and indifferent business practices, and, at least at the pleading stage, was negligent and indifferent to the suffering of the minor Olympic athletes and thus, unreasonable. (See, e.g., *Global–Tech Appliances, Inc. v. SEB S.A.* (2011) 563 U.S. 754, 766–768 [finding willful blindness equivalent to knowledge in patent infringement case]; *Levy v. Irvine* (1901) 134 Cal. 664, 671–672 [finding creditor's "willing ignorance is to be regarded as equivalent to actual knowledge" of debtor's insolvency]; and *U.S. v. Giovannetti* (7th Cir. 1990) 919 F.2d 1223, 1230 (7th Cir. 1990) [As explained by Judge Posner, the willful blindness can serve to "allow juries to convict upon a finding of negligence for crimes that require intent.")

VIII. Adherence to the Arcane and Draconian Misfeasance-Nonfeasance Dichotomy, Championed by the USOC and its Amici, Is Outmoded and Leads to Error because it is Not a Reliable Test for Determining Duty.

The USOC and its amici argue the Court should myopically analyze only the "Special Relationship" between the USOC and the limited category of persons this case presents, children, minor Olympic athletes, the revenue generating source for the USOC's "medals and revenue" machine. (Report at 142-145.) Specifically, the USOC and its amici claim that the USOC should not be liable for nonfeasance unless it has a "special relationship" with the victims of sexual abuse. (Respondent's Brief on the Merits (RBOM) at 21, 29.) As discussed herein, there is certainly a "special [commercial] relationship" between the USOC and the minor Olympic athletes. However, there are numerous other factors upon which a court could use to find, for pleading purposes, the USOC owed a duty of care to Plaintiffs.

The issue here is whether the misfeasance/nonfeasance dichotomy is accurate and reliable for determining duty. While the distinction between misfeasance and nonfeasance appears clear-cut in theory, in practice it is not always easy to draw the line and say whether conduct is active or passive. At some level, the difference between misfeasance and nonfeasance can appear to be only semantic. For example, an automobile collision can be described as misfeasance (the driver actively drove into the rear-end of another car) or nonfeasance (the driver merely failed to apply the brakes). As is relevant here, the USOC argues the latter,

that it "merely failed to" take action on what it knew was occurring. (RBOM at 9 ["An entity without legal authority to control a plaintiff's welfare is not in a position to prevent abuse of the plaintiff, much less a position superior to that of others." *Cf*, Report at 151-152 ["The USOC did exercise a certain degree of authority with a straightforward goal: provide NGBs with the resources to produce medal-winning athletes. And the USOC applied many tools – aside from the blunt instruments of decertification and probation – to promote athletic success at the NGBs. The USOC's most effective means of controlling and rewarding NGBs is its monetary resources, which are significant – in the two most recent Olympic years, 2014 and 2016, the USOC generated over $275 million and over $350 million, respectively. As Mr. Blackmun remarked, '[T]hey listen to us because we have the purse.' "].)

Thus, when put into terms of misfeasance, the USOC had the authority and power to take action, reaped enormous revenue in the hundreds of millions of dollars, each year, from this category of persons, minor Olympic athletes, and willfully chose to conceal what it knew, favoring "medals and revenue" over the health and safety of these athletes. (Report at 9.) Applying the numerous tools of analysis, it should not be too hard to determine, at the pleading stage, that the USOC owed a duty to Plaintiffs. Moreover, because the USOC actively concealed and thwarted investigations, the Court could easily conclude that the USOC increased the risk sexual assaults would continue to occur at an alarming rate. (Report at 96.)

Courts should be able to apply these concepts properly and to distinguish a defendant whose conduct created or increased a risk of harm to the plaintiffs from a defendant who merely failed to benefit the plaintiff by coming to his aid, under the classic bystander no-duty situation. And, the stakes are high if error in applying these concepts is made. Not only are the minor Olympic athletes denied a remedy for the wrongs done to them (i.e., Civ. Code § Civil Code § 3523 ["For every wrong there is a remedy."]), but the judiciary would be perceived as telling this category of persons they do not matter, that they are not believable, and not valuable to society, playing into many of the common fears that have kept survivors from coming forward. (Report at 47.)

Under the special relationship regime championed by the USOC, distinguishing between misfeasance and nonfeasance is all-important. (RBOM at 21, 29.) However, that approach allows the USOC to obtain a virtually complete exemption from liability for the harm resulting from their negligent control and supervision of the NGBs under its control if they win the semantic game and convince the Court to characterize the claims against them as concerning nonfeasance, as the USOC and its amici have advocated to the Court. (*Ibid*.)

In *Regents*, this Court observed that "the Restatement authors observed over 50 years ago that the law has been 'working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.'" (*Regents, supra,* 621, citing Rest.2d Torts, § 314A, com. b, p. 119.) Focused solely on the issues of dependence or mutual dependence, this Court

could easily conclude that based on the facts alleged, and those facts that are known and knowable (e.g., the Report), a cause of action for negligence against the USOC has been alleged or, could be alleged to state a proper cause of action.

As this Court has observed, "The corollary of dependence in a special relationship is control. Whereas one party is dependent, the other has superior control over the means of protection." (*Regents, supra* at 621 citing *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 245-246.) The category of persons at issue here are United States athletes under the authority and control of the USOC, minor Olympic athletes, many of whom are children. More should be required of those who commercially benefit from this category of persons.

"[A]lthough relationships often have advantages for both participants, many special relationships especially benefit the party charged with a duty of care. (*Regents, supra* at 621, citing Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, com. h, p. 43.)

Here, the USOC "especially benefits" from its relationship with United States Olympic athletes, many of whom are minors, reaping hundreds of millions of dollars each year from the hard work and dedication of the athletes. The USOC was not a mere bystander but rather, an active participant in the concealment and cover-up of the rampant sexual abuse that has occurred and is occurring in the Olympic program.

IX. There Are No Public Policy Factors That Weigh Against Finding a Duty of Care in this Case.

The category of persons who may allege a cause of action for negligence most certainly should include the sexually assaulted athletes in the USOC's Olympic program. As this Court has held, the most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care is whether the injury in question was foreseeable. (*Regents*, *supra* at 629.) This Court has also reaffirmed that a duty of care will not be held to exist even as to foreseeable injuries where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability. (*Id*. at 630.) Here, there is obviously no social utility gained by permitting sexual abuse of minor Olympic athletes. Thus, there simply is no social utility that weighs against the cost of avoidance, particularly when the USOC benefits from hundreds of millions of dollars each year in revenue.

The overall policy of preventing future harm is ordinarily served, in tort law, by allocating the costs of negligent conduct to those responsible; the policy question is whether that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability. (*Regents*, *supra* at 632.) Based on plaintiff's operative complaint (AA 37), and The USOC's 2018 Report, both the USOC and USAT are, to differing degrees, responsible, and no public policy could possibly

outweigh a finding that the USOC owed plaintiffs a duty of care. At minimum, the USOC had the authority and control to investigate the numerous claims of sexual assault occurring within the Olympic movement and take steps to ensure the NGBs were complying with the USOC's SafeSport guidelines. Instead, the USOC chose to ignore, and conceal the sexual assaults favoring revenue over the health and safety of its Olympic athletes.

X. California's History of Finding a Duty of Care Where the Parties Have a Special Relationship Supports a Finding that the USOC Owed Plaintiffs a Duty of Care.

For over 60 years, California courts have held that a duty of care arises where a plaintiff and defendant have a "special relationship." As this Court recently explained, "What we mean by special relationship is that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 400 (*Gas Leak Cases*), citing *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 and *Biakanja v. Irving*, (1958) 49 Cal.2d 647, 650.)

Biakanja is the leading special-relationship case and sets forth six factors for determining whether a special relationship exists that gives rise to a duty of care:

> [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him (or her), [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the

> defendant's conduct, and [6] the policy of preventing future harm.

(49 Cal.2d at 650). This Court has cited *Biakanja* and analyzed its factors in nearly three dozen decisions, including several times within the last decade, confirming its enduring importance to duty-of-care analyses. (See *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1014-1017 [assessing each *Biakanja* factor and holding that health care plans owe a duty of care to providers of emergency medical services to ensure payment claims submitted by emergency providers are not delegated to insolvent agents of health care plans); *Beacon*, *supra*, 59 Cal.4th at 585-586 [assessing each *Biakanja* factor and holding that architecture firm responsible for design of residential building owes duty of care to future owners of the building); see also *Gas Leak Cases*, *supra*, 7 Cal.5th at 400-403 [discussing *Biakanja*, and evaluating countervailing considerations, in holding that economic-loss doctrine bars recovery of economic damages by businesses affected by months-long gas leak); *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 837-841 (citing *Biakanja* and finding no special relationship in holding that payroll vendor does not owe duty of care to employee of company to which it provides services)

Although the *Biakanja* test has often been used for negligence cases involving third-party plaintiffs, its use is not limited to that context. In *Connor v. Great Western Savings and Loan Association* (1968) 69 Cal.2d 850, 865-868 (*Connor*), for example, this Court applied the *Biakanja* test after acknowledging

that the parties were not strangers. (See *id.* at 867-868 [holding that plaintiffs, who were in privity with bank that had originated their mortgages, could sue bank in negligence for its role in facilitating the faulty construction of their homes].)

The *Biakanja* factors strongly support finding a duty here, for all the reasons discussed at length in Plaintiffs' briefs. The first two factors – "the extent to which the transaction was intended to affect the plaintiff" and "the foreseeability of harm to him" – *Biakanja*, *supra*, 49 Cal.2d at 650, are critically important. (See *Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 434 [calling foreseeability "the most important of [the duty-of-care] considerations"]; *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 166 [similar]). Both these factors unambiguously point to a duty of care.

The third, fourth, and fifth *Biakanja* factors – "the degree of certainty that the plaintiff suffered injury," "closeness of the connection between the defendant's conduct and the injury suffered, [and] the moral blame attached to the defendant's conduct," *supra*, 49 Cal.2d at 650 – weigh strongly in favor of recognizing the USOC owed a duty.

The sixth *Biakanja* factor, *supra*, 49 Cal.2d at 650, asks whether recognizing a duty of care would advance a public policy "of preventing future harm." Like foreseeability, this is a crucial factor driving the duty analysis. (See *Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659, 679 (*Barrera*) ["basic reason for the imposition of a duty" is to avoid "known hazard" to public]; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081

["One of the purposes of tort law is to deter future harm."].) This factor also weighs in favor of a duty. There is little doubt that the USOC's careless management choices and practices have harmed its athletes within the Olympic program that it controls, and has the authority to take action. Sexual assault, particularly sexual assault on minors, is most certainly a public safety concern.

All of the *Biakanja* factors are met. The USOC and USAT both owed the Plaintiffs a duty of care, and breached that duty when they failed to take any action to prevent, or at the very least, minimize the risk of sexual abuse occurring within the Olympic program.

XI. Plaintiffs Have Adequately Pled a Cause of Action for Negligence against the USOC, Sufficiently Alleging Duty: this Case Should Be Determined on the Merits, after Affording Plaintiffs Discovery.

Liberally construed, Plaintiffs' complaint states a cause of action for negligence, as a matter of law against the USOC and USAT. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 500 ["The elements of an action for negligence are the existence of duty (the obligation to other persons to conform to a standard of care to avoid unreasonable risk of harm to them); breach of duty (conduct below the standard of care); causation (between the defendant's act or omission and the plaintiff's injuries); and damages"; Complaint, AA 37.])

Regardless of whether this Court applies the presumption of duty or the constellation of factors, discussed above, it seems clear, at the pleading stage, that the USOC owed Plaintiffs a duty of care,

the extent to which to be determined on the merits. At minimum, the USOC's 2018 Report provides a glimpse of what the plaintiffs will likely uncover if allowed past the pleading stage and permitted to conduct discovery. Thus, this case presents the Court with an opportunity to adopt a constellation of factors test to resolve a large swath of cases that routinely become bogged down at the pleading stage on the issue of duty when they should be permitted discovery and decided on the merits, at summary judgment or trial.

CONCLUSION

For all of the reasons discussed above and in the Plaintiff's briefing, CAOC strongly urges this Court to reverse the Court of Appeal and find that, for pleading purposes, plaintiffs have stated a cause of action for negligence against the USOC. Specifically, for pleading purposes, the USOC owed plaintiffs, minor Olympic athletes a duty of care. The Court of Appeals finding of a special relationship against the USAT should be affirmed.

Dated: October 8, 2020

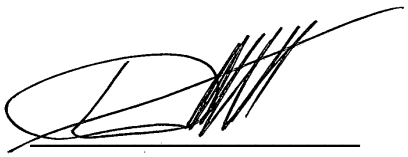
Respectfully submitted,

By: _____
David M. Arbogast

Attorneys for Amicus Curiae
CONSUMER ATTORNEYS OF CALIFORNIA

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that this brief was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word-processing program used to generate the brief, is **10,508** words, exclusive of the material that may be omitted under rule 8.204(c)(3) of the California Rules of Court.



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I, David M. Arbogast, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to this action. My business address is 7777 Fay Avenue, Suite 202, La Jolla, California.

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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 October 8, 2020, at San Diego, California.

DAVID M. ARBOGAST

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Yazmin Brown, et al., v. United States Olympic Committee

Supreme Court Case No. S259216

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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.

10/8/2020

Date

/s/David Arbogast

Signature

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