No. S259216

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

YAZMIN BROWN, et al.
Petitioners,
v.
UNITED STATES OLYMPIC COMMITTEE, et al.
Respondents.

After Decision by the Court of Appeal
Second Appellate District, Division 7, Case No. B280550
Los Angeles County Superior Court, Case No. BC599321
The Honorable Michael P. Vicencia

RESPONDENT UNITED STATES OLYMPIC COMMITTEE'S COMBINED ANSWER BRIEF TO AMICI CURIAE BRIEFS FILED IN SUPPORT OF PLAINTIFFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. Introduction

All parties agree with the compelling need to prevent sexual abuse of minors.[1] In fact, the USOC has spent much of the past few years engaged in generational governance and structural reforms driven in large part by the need to strengthen the US Olympic and Paralympic community and make it more resistant to individuals bent on this abuse. The Amici briefs filed in support of Plaintiffs go far beyond that fundamental point, however, and attempt to re-cast this case under legal theories contrary to existing precedent, false factual allegations outside the amended complaint, and even arguments inconsistent with those put forth by Plaintiffs. As explained in the USOC's Answer Brief on the Merits, the Court of Appeal appropriately applied the proper methodology to address the question of duty by analyzing whether the amended complaint adequately alleges a special relationship with the USOC.

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[1] The Amici briefs filed in support of Plaintiffs to which the USOC responds are: (1) the Amici Curiae Brief of National Crime Victim Bar Association and Manly, Stewart & Finaldi ("Manly Br.") and (2) the Amicus Curiae Brief of Consumer Attorneys of California ("CAOC Br.").

The Court of Appeal correctly concluded that the allegations of the complaint do not support a special relationship for the USOC. The Court of Appeal's analysis took into account the relevant factors of dependence and control, considering Plaintiffs' minor status and their vulnerability to sexual abuse. Even if there had been a special relationship, the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, would not support imposition of a duty to protect for the USOC. The allegations of the complaint, the court found, adequately alleged that USAT—but not the USOC—controlled Plaintiffs' third party abuser.

Without identifying legal error in the Court of Appeal's analysis, Plaintiffs' Amici nonetheless propose a plethora of new, unsupported, and vague legal theories, including a suggestion that "youth organizations" be subject to a separate new rule; that this Court create a presumption on the issue of duty, shifting the focus of legal analysis to the question of breach rather than duty; and that the tort law distinction between misfeasance and nonfeasance be disregarded as an outmoded construct. Amicus further argues that the special relationship doctrine should be just one of a "constellation" of "tools" available to courts in finding that a duty exists to protect a plaintiff from a third party. (CAOC

Br. at 36.) In fact, Amicus seems to suggest that the Court should discard the concept of duty altogether in cases involving minor plaintiffs. (CAOC Br. at 30–36.)

Amici's proposals ignore the established, appropriate analysis to determine whether a duty to protect from the acts of a third party exists. As recently as *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, the Court confirmed the special relationship doctrine as the first step in that determination. *Regents* further held that, if there is a special relationship, the *Rowland* factors must then be considered to determine whether imposition of a duty to protect would nonetheless be inappropriate.

The *Regents* analytic framework provides ample room for courts to take into account the relevant considerations, including, as here, minors who are victims of sexual abuse. The Court of Appeal found that Plaintiffs were more dependent for protection on others because they were minors at the time of abuse. The Court of Appeal also concluded that Plaintiffs adequately alleged USAT had a duty to protect them because USAT had the ability to control their third party abuser, Marc Gitelman, a coach for a USAT team. The same analysis correctly led the Court of Appeal

to the opposite conclusion for the USOC. The court found that the USOC does not operate USAT teams or control those coaches. Instead, Congress created the USOC to promote amateur athletics and provide support to independent sports organizations such as USAT and other National Governing Bodies (NGBs). Thus, despite Plaintiffs being minors, the Court of Appeal concluded that the complaint did not adequately allege the level of control necessary to support a special relationship on the part of the USOC. Amici present no valid basis to reverse the Court of Appeal's decision regarding the USOC; their scattershot arguments only underscore this point.

II. Argument

A. Amici's Proposals to Impose a New Duty on the USOC to Protect Regardless of Dependency and Control Should be Rejected.

The Court does not "write on a blank slate" when determining the reach of tort liability in a particular case. (*Beacon Residential Cmty. Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573.) Amici would impose tort liability on the USOC because of its alleged breach of a duty to protect against a third party whom the USOC did not control.

But such a duty could be warranted only if the "wrongs and injuries are comprehensible and assessable within the existing judicial framework." (*Nally v. Grace Cmty. Church* (1988) 47 Cal.3d 278, 298.) In particular, this Court should refrain from creating such a duty "when to do so would involve complex policy decisions, especially when such decisions are more appropriately the subject of legislative deliberation and resolution." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 136 (citing *Nally*, *supra*, 47 Cal.3d at p. 299) (internal quotation marks omitted).) Otherwise, individuals and entities held liable based on events that took place before the new duty was created would have had no notice or opportunity to conform their conduct to the law. For entities like the USOC that do not themselves exercise control but promote best practices by organizations and individuals that do, such a change in the law could prompt a re-assessment of whether their efforts are warranted in light of expanded liability for the conduct of third parties beyond the entity's control. That is just the type of complex policy issue that would benefit significantly from legislative deliberation and resolution.

Contrary to these principles for the appropriate development of tort law, Amici propose that the Court presume a duty for "any organization engaged in activities expressly involving children," to protect minors against criminal and tortious conduct of third parties. Amici would apparently apply this presumption to events and injuries that occurred before the rule was announced, and regardless of whether the special relationship factors of dependence and control were present. (*See* Manly Br. at 8, 13–16; CAOC Br. at 12–15, 37–38, 49–50.) One Amicus also proposes expanding a duty to protect under various other tests, and even advocates discarding the concept of duty altogether in tort cases involving minor plaintiffs. These proposals insinuate that any test for the application of a duty would be appropriate so long as it yields a duty under which the USOC could be held liable for a third party's past abuse of plaintiffs. (*See* CAOC Br. at 14 (suggesting that Plaintiffs "could state a cause of action" regardless of any test the Court might adopt); *see also* CAOC Br. at 13, 14, 33–43.)

Amici's result-oriented proposals should be rejected. They fail to recognize that the existing special relationship doctrine and *Rowland* factors already take into consideration the policy

concerns that Amici imply their tests would advance. And Amici's proposal for a duty to protect that is disconnected from a defendant's ability to control a third party tortfeasor would not, in the end, advance those policy concerns.

1. Amici's proposals are contrary to foundational tort principles that already address relevant policy concerns through the special relationship doctrine and *Rowland* factors.

Amici fail to acknowledge that their proposals for a new tort duty to protect—whether through a presumption of duty in cases involving minors, or shifting the focus of analysis from duty to a breach, or rejecting the nonfeasance-misfeasance distinction, or any of their other vague and undeveloped theories—are all contrary to foundational tort principles that already account for the policy concerns that purportedly underlie Amici's arguments.

As recently as 2018, this Court confirmed those fundamental principles: "In general, each person has a duty to act with reasonable care under the circumstances. However, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. A person who has not created a peril is not liable in tort merely for failure to take affirmative

action to assist or protect another unless there is some relationship between them which gives rise to a duty to act." (*Regents of Univ. of California v. Superior Court, supra*, 4 Cal.5th at p. 619 (internal citations and quotation marks omitted).) "Generally, the relationship has an aspect of dependency in which one party relies to some degree on the other for protection." (*Id.* at p. 620.) "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." (*Id.* at p. 621.) These principles do not carve out a *per se* exception when minors are involved, but instead require consideration of the nature of a plaintiff's dependence and the defendant's control in the special relationship doctrine.

The nature of the relationship between a minor plaintiff and a defendant, and whether a defendant controlled a third-party actor, are, as they should be, exactly the types of information that the special relationship doctrine requires a court to assess. (*See, e.g.*, *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1131 (special relationship existed because entity determined which coaches "had custody and supervision of children involved in its programs"); *Romero v.*

Superior Court (2001) 89 Cal.App.4th 1068, 1080–81 ("adult who invites a minor into his or her home assumes a special relationship with that youngster based on the minor's vulnerability to third party misconduct and dependence on the adult for protection from risks of harm while in the home").) In the case of a minor plaintiff, there may be a higher likelihood of a special relationship because minors are often particularly dependent on others for their safety. But a special relationship is less likely to be found when a defendant has little or no control over the third party actor. The special relationship doctrine thus weighs and accounts for the policy considerations ostensibly animating Amici's proposals. That analysis recognizes a duty to protect between a minor plaintiff and those who could have and should have protected the minor from a third party. At the same time, it does not reflexively extend liability to a defendant that lacks a relationship of control and dependence with the plaintiff, even if the defendant is involved with another party that does have such a relationship.

Amici are wrong that either everyone is liable, or no one will be. (Manly Br. at 16.) Here, for example, applying the special relationship doctrine, the Court of Appeal held that the complaint

allegations supported the existence of a relationship of control and dependence between Plaintiffs and USAT, but not between Plaintiffs and the USOC. Indeed, Amici purport to accept the special relationship doctrine as appropriate at times (for example, when asking the Court to affirm the decision with regard to USAT) but they fail to acknowledge the Court of Appeal's careful and correct application of the same doctrine to the USOC. (*See* Manly Br. at 44, CAOC Br. at 54.)

The creation of a duty to protect every minor plaintiff from third party conduct, no matter the circumstances, would require proactive conduct by a defendant going far beyond that required by traditional tort duties or the special relationship doctrine. Such a rule would abandon decades of precedent that has carefully delineated when a tort duty to protect does and does not attach, including when minors are involved. Such a radical change is unwarranted and unnecessary in light of the fact that the existing judicial framework effectively takes into consideration the policy considerations cited by Amici.

2. Creating a new tort duty to protect would not further the policy considerations Amici advance.

Creating a new duty for a defendant to protect minors against the acts of third parties, even when there is no relationship of control and dependence, as Amici propose, would not further the policy considerations Amici suggest. To the contrary, it would create disincentives for organizations that articulate best practices and guidelines for members that do have special relationships with minors. Rather than causing coordinating organizations to focus on affirmative efforts to persuade members to do more to protect minors from third parties, Amici's proposed rules would create a presumptive duty for the coordinating organization to do what it cannot—namely, to protect minors from third parties beyond its control. Organizations like the USOC, which are far removed from the countless interactions between minors and adults affiliated with local clubs and organizations, would nevertheless be confronted with the unrealistic responsibility (and beyond the USOC's legal authority) of somehow controlling such interactions across all NGBs, each with thousands of athletes and dozens or even hundreds of teams and their affiliated coaches and trainers. Amici's proposed presumption of a duty to protect minors, regardless of dependency and control, would thus deter

coordinating organizations from promoting anti-abuse guidelines and best practices by its members, and could diminish such organizations' willingness to focus on opportunities for minors at all.

Moreover, the adoption of the multiple, undeveloped, and vague, alternative tests for a duty to protect would ignore the need for clear standards in tort law. Fairness demands that persons and entities be able to understand their legal duties and order their conduct accordingly. Moreover, to make a point that should be obvious—although tort damages undoubtedly serve as a strong incentive in certain circumstances, the critical policy objective here is to prevent sexual abuse of minors, not just to allow for tort damages when prevention fails.

The USOC recognizes the seriousness of sexual abuse of minors and, as Amici acknowledge, has taken extensive actions within its authority to prevent it. Among other things, the USOC has launched, funded, and pushed Congress to adopt and mandate the authority of an independent national organization called the US Center for SafeSport ("SafeSport"). SafeSport's primary objective is to prevent abuse among the NGBs. To that end it provides training and oversight to sports organizations,

and investigates and resolves allegations of abuse, at a level unparalleled in sport anywhere in the world. (*See* Manly Br. at 27–28; CAOC Br. at 41.) The USOC also has required that entities that it recognizes as NGBs, like USAT, subject themselves to the jurisdiction of SafeSport and adhere to SafeSport policies.

But the USOC does not have access to information that would permit it to know whether a particular club or team within an NGB's organization is, in its day-to-day operations, adhering to or enforcing those policies or whether, despite rigorous enforcement efforts, an adult affiliated with that NGB club or team is violating those policies. And USOC's legal authority relates to NGBs and derives from its authority to recognize the sports organization in question as an NGB, rather than authority to require an individual sports club or team to bring itself into compliance with its NGB policies or to sanction a specific offender. In other words, the USOC lacks the authority or knowledge necessary to control the actions of a third party coach of a team affiliated with an NGB in this context.

B. Amici's Proposed Legal Tests Are Premised on Significant Mischaracterizations of Governing Law and Should Be Rejected.

The various tests by which Amici try to support imposition of a duty to protect on the USOC, notwithstanding the lack of a special relationship, are rooted in mischaracterizations of governing law.

1. Amicus incorrectly suggests that the duty analysis in tort law is of lesser significance and gives way to consideration in the context of breach and causation.

One Amicus incorrectly argues that a duty analysis at the pleading stage is superfluous because liability requires proof of two additional elements, breach and causation. (CAOC Br. at 30–37.) But governing law makes clear that the "threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection." (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 837.) "Whether this *essential prerequisite* to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court." (*Ibid.* (emphasis added).)

Basic tort law countenances courts to consider at the pleading stage whether the defendant owes the plaintiff a duty that could give rise to tort liability. (*See, e.g.*, *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201 (affirming trial court judgment sustaining a demurrer because plaintiffs' complaint failed to establish a special relationship, and therefore could not establish a tort duty).) Foregoing a duty analysis or waiting to conduct such an analysis along with breach and causation at the summary judgment stage would risk "potentially infinite liability which would follow every negligent act." (*Thompson v. Cty. of Alameda* (1980) 27 Cal.3d 741, 750.)

This concern about limitless litigation is significant where a defendant's alleged duty arises, not from its own conduct, but from a defendant's alleged failure to protect the plaintiff from a third party. In the absence of a finding of duty at the pleading stage, tort law could be pressed to a new extreme—generating litigation over allegations of something the defendant failed to do regarding a third party, without having determined that a legal duty required the defendant to take that action regarding the third party in the first place. Governing tort law does not and should not countenance a defendant being sued to explain why it

did not prevent tortious actions of a third party, regardless of whether the defendant could exercise control over that third party.

2. Amici are wrong that the distinction between nonfeasance and misfeasance is outmoded and that it would make a difference here.

Amici attempt to evade the requirements of the special relationship doctrine by recasting this case as one of misfeasance, a negligent act, rather than nonfeasance, a failure to act. (*See* Manly Br. at 24; CAOC Br. at 45–48.) They suggest, for instance, that "Defendants here *created the very risk*" and "fostered the very environment upon which the sexual abuse of children could and did occur." (Manly Br. at 29, 31.) The complaint and Amici's own arguments for creation of a tort duty to protect, which are firmly rooted in allegations of failure to act, belie this argument.

The amended complaint does not allege that the USOC created the circumstances in which Plaintiffs were abused by the third party or made that abuse worse; rather, the complaint alleges that a third party, Marc Gitelman, committed the abuse and defendants should have acted to prevent it. (AA at 42 ¶ 24.) Plaintiffs' negligence claims are premised on purported failures

to act—that the USOC failed to enforce or enact policies to protect minors, and that the USOC failed to conduct a background check or otherwise restrict Gitelman's access to minors—not affirmative acts. (AA at 53–56 ¶¶ 92–104.)

The absence of alleged affirmative acts by the USOC defeats Amici's attempt to fit this case into the misfeasance category, in contrast to the authorities cited by Amici. In *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, the Court held that a police officer owed a duty of reasonable care because "plaintiffs' cause of action does not rest upon an assertion that [the officer] should be held liable for failing to come to plaintiffs' aid, but rather is based upon the claim that [the officer's] *affirmative conduct itself*, in directing [the plaintiff] to stop the [car] in the center median of the freeway, placed plaintiffs in a dangerous position and created a serious risk of harm to which they otherwise would not have been exposed." (*Id.* at pp. 716–17 (emphasis added).) Likewise, in *Weirum v. RKO Gen., Inc.* (1975) 15 Cal.3d 40, the Court held that a radio station owed a duty of care to plaintiffs whose husband and father died in a crash after he was forced off the road by teenagers participating in a dangerous contest organized by the station. (*Id.* at p. 47.) The

Court reasoned that "reckless conduct by youthful contestants, *stimulated by* defendant's broadcast, constituted the hazard to which decedent was exposed." (*Ibid.* (emphasis added).)[2]

The complaint allegations against the USOC include nothing similar. Plaintiffs use group pleading to allege that "molestations and abuse began at events sponsored and promoted" by the "defendants," without a specific allegation that such conduct occurred at events managed by USOC (Amici repeatedly mischaracterize USAT events as USOC events, as explained below at pages 37–38), or that Gitelman was present at those events. (AA at 42 ¶ 22.) The complaint does not allege that the USOC acted affirmatively to place Plaintiffs in a high-risk situation as in *Lugtu*, or affirmatively created a situation of risk

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[2] Amici also cite (Manly Br. at 30–31) a case involving a defendant who allegedly "encouraged, "invited," and "entice[d]" minor plaintiffs to her home and left them unattended with her husband, whom she knew had a history of molesting children and it was reasonably foreseeable he would do so again. (*Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, 210.) Like in *Weirum* and *Lugtu,* the court of appeal concluded that was a case of misfeasance because the defendant's "own acts increased the risk of such harm occurring." (*Id.* at p. 210.) The amended complaint includes no such allegations against the USOC.

as in *Weirum*. If an organization could be held to have created or increased the risk whenever a third party caused harm at its event or on its premises (although neither circumstance is alleged against the USOC), that organization would essentially become the insurer of its visitors' safety against all third parties. Amici's sweeping approach is thus contrary to this Court's fundamental tort law precedent. (*See, e.g.*, *Morris v. De La Torre* (2005) 36 Cal.4th 260, 274–77 (a duty to protect patrons because they were on the business's premises is not absolute and is instead based on the special relationship doctrine and limited by the *Rowland* factors).)

3. Amici wrongly assert that a commercial relationship alone can create a special relationship or a duty to protect.

Amici are wrong in arguing that a commercial relationship alone can support the existence of a special relationship or a duty to protect. Here, Amici assert that the USOC financially benefits from the participation of athletes in amateur sports (the inaccuracy of the factual assertions is discussed below at pages 39–40). Amici argue, in essence, that by virtue of a commercial relationship alone, the USOC could be held liable for failing to protect all athletes on all the NGB teams against all third

parties, regardless of whether the factors of control and dependency support a special relationship. (Manly Br. at 13; *see also* CAOC Br. at 43–44, 48 (suggesting special relationship because the USOC benefits from Plaintiffs' participation in Olympic Games).) But again, the amended complaint does not allege that Plaintiffs were abused during events managed by USOC.

Amici provide no authority to support their argument that, if an entity benefits from an individual's participation in an activity, it necessarily owes the person a duty of care, much less a duty to protect. In fact, case law is to the contrary, holding that a financial benefit alone is not sufficient to create a duty or a special relationship. (*See, e.g.*, *Regents*, *supra*, 4 Cal.5th at p. 625 (focusing on the control and dependence over students, not whether universities profit from them); *Verdugo v. Target* (2014) 59 Cal.4th 312, 336 (rejecting that the "size of the Target store" and "number of customers who patronize the store" meant that the business owed a duty of care to protect every customer from health risks).)

One Amicus relies on a wholly unrelated line of cases concerning the negligent performance of contracts as the source

of a duty to protect. (CAOC Br. at 28–30, 50–53.) Amicus cites *Biakanja v. Irving* (1958) 49 Cal.2d 647, and cases citing it, for the proposition that a defendant owes a duty to protect a plaintiff from economic losses caused by the defendant's negligent performance of a contract when there is not privity of contract between them. (*Id.* at 648; *see also S. California Gas Leak Cases* (2019) 7 Cal.5th 391, 399–400; *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804.) These cases hold generally that "[r]ecovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs." (*J'Aire Corp.*, *supra*, 24 Cal.3d at p. 806.) That holding is inapposite here, where Plaintiffs allege physical tort injuries, not economic harm from contract performance. (*See S. California Gas Leak Cases*, *supra*, 7 Cal.5th at pp. 391, 399–400 (distinguishing cases involving negligence for purely economic losses, including *Biakanja* and *J'Aire*, from those involving physical harm).) Plaintiffs do not allege the existence of any contract or economic harm from the breach of a contract. (*See id.* at pp. 401–02 (first prong of the *Biakanja* test is "the extent to which the [financial] transaction was intended to affect the plaintiff").) Nothing in

these cases supports an alternative test that would allow a court to sidestep the special relationship doctrine or require applying the *Rowland* factors despite the lack of a special relationship.

4. Amici misconstrue the *Rowland* analysis.

Amici concede that courts typically apply *Rowland* to determine whether there is an exception to a duty that could otherwise exist. (Manly Br. at 8 ("USOC and USAT are correct that this Court's analysis in [*Rowland*] may justify carving out a categorical exception to a duty owed for a certain class of defendants if supported by public policy."); *id.* at p. 10 ("The *Rowland* analysis is typically used to determine whether a categorical exception should be carved out of an otherwise existing duty for a certain class of defendants.").)

Amici, however, argue that *Rowland,* in addition to determining when an exception to a duty exists, should be an alternate source of the duty. (Manly Br. at 10 ("while an analysis of *Rowland*'s foreseeability and policy considerations may justify a categorical no-duty rule, the same foreseeability and public policy considerations may give rise to the very finding of a duty").) This argument ignores *Rowland*'s explanation that when there is a general duty of care, such as under Civil Code section

1714 for affirmative acts, no "*exception* should be made unless clearly supported by public policy." (*Rowland*, *supra*, 69 Cal.2d at p. 112 (emphasis added).) "A *departure* from [a duty under section 1714] involves the balancing of a number of considerations." (*Id.* at pp. 112–13 (emphasis added).) Even if the cases applying *Rowland* have not always been a beacon of clarity, they have not suggested that the *Rowland* factors are a *source* of a duty when there would otherwise be no duty based on section 1714 or on a special relationship that could otherwise support a duty to protect.

Amici cannot have it both ways—*Rowland* cannot both give rise to the existence of a duty and, at the same time, support the existence of an exception to that same duty. That interpretation would sow confusion throughout the case law and undermine the significant role that *Rowland* currently serves in identifying circumstances where public policy militates against imposition of a duty. It would be difficult, for instance, to square Amici's interpretation with the many decisions in which the Court has applied *Rowland* to limit a duty that would otherwise have attached (e.g., because of a special relationship). (*See, e.g.*, *Ann M. v. Pac. Plaza Shopping Ctr.* (1993) 6 Cal.4th 666, 679–80,

disapproved of on other grounds by Reid v. Google, Inc. (2010) 50 Cal.4th 512 (shopping center had a special relationship with employee but no duty, based on consideration of the *Rowland* factors, to provide security guards in a common area where the employee was raped); *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1210, *as modified* (Oct. 17, 2007) (landlord had a special relationship with tenant but no duty, based on consideration of *Rowland factors,* because there was "no evidence to suggest that having security guards [on site] would likely have deterred" injuries sustained from a stray bullet fired by a gang member visiting another tenant).)

Amici mistakenly equate "foreseeability of abuse" under *Rowland* with the possibility that abuse could occur in particular circumstances. (*See* Manly Br. at 14, 25, 35.) Amici refer to the tragic pervasiveness of sexual abuse in society, but fail to recognize that tort liability requires knowledge that the tortfeasor posed a risk for harm to be foreseeable; otherwise, the consideration of foreseeability as part of the *Rowland* factors would be rendered meaningless. (*See, e.g.*, *Romero v. Superior Court*, *supra*, 89 Cal.App.4th at p. 1083 (defendant had a duty to protect minor against a third party only if the defendant "had

actual knowledge of, and thus *must have known*, the offending minor's assaultive propensities").)

In addition, like Plaintiffs, Amici incorrectly apply the *Rowland* factors here to the USOC. (Manly Br. at 41–42; CAOC Br. at 39–42, 49–50.) As explained in the USOC's Answer Brief on the Merits (at pages 45–50), the *Rowland* factors would call for an exception to a duty even if there had been a special relationship as to the USOC. Apart from the amended complaint allegations not supporting knowledge by the USOC of the abuse of Plaintiffs when it occurred, or a foreseeable risk of abuse by Gitelman, the USOC did not control the circumstances in which Plaintiffs and Gitelman interacted. (*See* USOC Answer Brief on the Merits at 15, 38–39, 46–47.)

5. Amicus is wrong that the statute governing the USOC's federal charter created a duty for the USOC to protect against conduct by third parties it does not control.

One of the Amici invokes provisions of the federal statute that governs the USOC's charter, the Ted Stevens Amateur Sports Act (36 U.S.C. §§ 220501–220543), to claim that the statute either "gives rise to a duty" or "provides enough" to "state

a prima facie case of negligence," but its arguments misconstrue both the federal statute and state tort law. (CAOC Br. at 22–28.)

Amicus does not accurately analyze the scope of the statute or the limited authority that Congress allowed the USOC under the statute. As a threshold matter, the federal statutory provisions that pertain to abuse of athletes did not even exist at the time of the abuse at issue here, which Plaintiffs allege took place between 2007 and 2013. (*See* USOC Answer Brief on the Merits at 15.) Congress enacted these provisions as an amendment to the Ted Stevens Act in 2018. (*See* 36 U.S.C. §§ 220501(b)(5), 220530, 220531, 220541, 220542; Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126 (Feb. 14, 2018) 132. Stat 318; Consolidated Appropriations Act of 2018, Pub. L. No. 115-141 (Mar. 23, 2018) 132 Stat. 348.) Absent some indication that Congress intended these provisions to have retroactive effect and that such retroactive effect would be constitutionally permissible (Amici have not pointed to any such indication), these provisions cannot be the source of any enforceable legal duty in this case. (*See Elsner v. Uveges* (2004) 34 Cal.4th 915, 927 (court applies the rules of negligence at the time of the alleged incidents).)

Moreover, Amicus has made no showing that the USOC violated any statutory requirements, as is required to establish a legally enforceable duty or negligence per se. Indeed, as the USOC explained in its Answer Brief on the Merits (at pages 11–14), Congress enacted the Ted Stevens Act to maintain the private structure of amateur sports and "merely authorized the USOC to coordinate activities that always have been performed by private entities." (*S.F. Arts & Athletics, Inc. v. U.S. Olympic Committee* (1987) 483 U.S. 522, 544–45.) The statute is explicit that an NGB (*e.g.*, USAT, not the USOC) "independently decides and controls all matters central to governance," "does not delegate decision-making and control of matters central to governance," and "is free from outside restraint." (36 U.S.C. § 220522(a)(5).)

Amicus wholly fails to demonstrate that the statute created a duty that could give rise to support state tort liability, nor even to show that the statute "is designed to protect against the risk of a particular kind of injury." (*See Guzman v. Cty. of Monterey* (2009) 46 Cal.4th 887, 897.) To the extent that Amicus tries to establish that the statute could give rise to negligence per se, Amicus fails. To do so, Amicus must, but does not, show that the

USOC "violated a statute, ordinance, or regulation of a public entity," and the victim "was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (*See* Evid. Code § 669; *see also Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal.4th 1066, 1087 ("Reasonably construed, the act was intended to protect only those children in the custodial care of the person charged with reporting the abuse, and not all children who may at some future time be abused by the same offender.").)

And those statutory provisions establish requirements only for organizations such as USAT to be recognized as an NGB and address the USOC's ability to review complaints that an NGB violated those requirements. The statute focuses on the USOC's coordinating role, and the responsibilities of the NGBs for maintaining recognition. For instance, Congress provided that the USOC could withdraw recognition from, place on probation, or replace an NGB, if the NGB fails to comply with conditions for recognition. (36 U.S.C. §§ 220521(d), 220527, 220528.) Congress authorized the USOC to hear and resolve certain complaints regarding NGB eligibility requirements and NGB authorization of an amateur sports organization to hold a competition. (36

U.S.C. §§ 220522–220527.) One of those provisions refers to protecting "the amateur status of athletes" and "their ability to compete in amateur athletic competition," but that requirement applies to NGBs in the context of specific athletic events; it is not a legally enforceable responsibility of the USOC. (36 U.S.C. § 220525(a)(1).) These provisions therefore establish the relationship between the USOC and NGBs, not a relationship between the USOC and minor athletes or coaches on individual teams that NGBs sponsor.

C. Amici's Attempt to Recharacterize the Facts of the Case Should be Rejected.

Amici's wide-ranging discussion of allegations from other time periods, from other sports, involving other NGBs, and in other fora, cannot change the scope of Plaintiffs' amended complaint. Amici's factual arguments are untethered to the amended complaint allegations and fail, in particular, to grapple with the inadequacy of the complaint allegations against the USOC. Indeed, Amici's briefs are especially confusing and misleading in their failure to distinguish between allegations against the USOC and allegations against USAT.

1. Amici ignore the distinction between the complaint allegations against the USOC and those against USAT.

Amici repeatedly refer to the USOC and USAT as if they are one entity, as it suits their interest to create this misperception. (*See, e.g.*, Manly Br. at 16 (lumping organizations "such as USOC and USAT" together as if they are similar types of organizations and any duty must necessarily attach to both or to neither); CAOC Br. at 34 (concluding Plaintiffs must have been under direction and control of both the USOC and USAT with no mention of how the control and dependence are different between the two entities).) Amicus purports to recognize that "USOC and USAT are, *to differing degrees*, responsible" but argues that the same duty to protect nonetheless applies to both entities. (CAOC Br. at 49 (emphasis added).) As explained above in Section II.B.5 and in the USOC's Answer Brief on the Merits (at pages 11–14), federal law establishes the USOC's structure and mandates the independence of NGBs vis-à-vis the USOC. As a result, the two organizations are different in numerous respects relevant to dependence and control.

As the complaint allegations recognize, the USOC is a non-profit organization defined by federal charter to coordinate

among amateur athletic organizations in the United States. Other private amateur athletic organizations, such as USAT, pre-existed enactment of the statute. Those organizations continued, after enactment of the federal statute, to function in their respective sports as separate and independent entities, sponsoring teams and competitions, most of which have nothing to do with the Olympics.

The USOC's recognition of the USAT (or another organization) as the NGB for a particular sport renders the NGB's member athletes eligible to qualify for the Olympics. Such designation does not mean that the USOC takes over management or control of the NGB. Under the statute, NGBs "independently decide[s] and control[] all matters central to governance" and "do[] not delegate decision-making and control of matters central to governance." (36 U.S.C. § 220522(a)(5).) Amici's efforts to portray the USOC and USAT as a single entity are inaccurate and confuse the allegations that control the case.

Amici also refer to the abuse of Plaintiffs as occurring while they were participating in "Olympic level athletics" and "USOC sanctioned events." (Manly Br. at 26.) But the athletic events at which the abuse occurred were not "USOC sanctioned" but were

conducted consistent with the Ted Stevens Act, which explicitly vests authority to "sanction" such competitions exclusively with the NGBs. (36 U.S.C. § 220525.) The USOC has authority over the United States' participation in the Olympic Games, but there are no allegations that Plaintiffs participated in or were abused at such events.

2. Amici mischaracterize the complaint as alleging knowledge by the USOC of the abuse at the time it occurred.

Amici assert that "USOC and USAT knew or should have known" of Gitelman's "abuse and inappropriate relationship with young girls" based on his behavior with Plaintiffs "displayed in public and at USOC and USAT competitions." (Manly Br. at 17.) But that assertion is not based on complaint allegations and seems to be based on Amici's contentions that the USOC knew of sexual abuse of other minor athletes (Manly Br. at 17–20), and has recognized and taken action to help address the problem of abuse in sports (Manly Br. at 22–23; CAOC Br. at 12, 17–18). Those allegations do not support an inference that the USOC knew of Plaintiffs' abuse by Gitelman at the time it occurred. (*See* USOC Answer Brief on Merits at 15, 38–39, 46–47.)

3. Amicus' assertions that the USOC profits from athletes who are sexually abused is untethered to reality and any complaint allegations.

Amicus rests its "commercial duty" argument on the unfounded and unpleaded contention that the USOC enjoys "hundreds of millions of dollars in revenue . . . from the medals obtained by these athletes," through what Amicus characterizes as "indentured servitude." (CAOC Br. at 43–44.) Amicus falsely claims that "athletes are expected to pick up the tab for official excesses and stay silent for fear of losing funding." (CAOC Br. at 24.) These allegations are wholly specious and absent from the complaint.

The USOC's audited financial statements and detailed tax disclosures (Form-990s) are a matter of public record. They are available on its website, and describe in detail the USOC's revenues and expenditures.[3] These financial documents show that the USOC does not collect dues from athletes and does not share in the revenues that athletes earn from their own

[3] The USOC's website is accessible at https://www.teamusa.org/footer/finance.

sponsorship agreements. Rather, as shown in the 2019 financial statements for the 2016 through 2019 quadrennial cycle, the USOC earned revenue almost entirely through sponsorship and licensing of the Olympic mark, broadcast rights for the Olympic Games, and donations. The USOC devotes nearly all of these resources to athlete support programs, as well as programs dedicated to helping athletes secure sponsorship deals.

4. Amicus' reliance on extra-record material distorts that information, disregards highly relevant distinctions, and ignores the complaint allegations.

Amicus refers repeatedly to a 2018 report conducted by Ropes & Gray LLP at the request of the USOC. The Ropes & Gray report was issued well after the allegations of the amended complaint and does not directly address any of the claims in Plaintiffs' amended complaint. (CAOC Br. at 13, 17–22 (contending that the report indicates that the USOC failed to implement effective measures against sexual abuse).) Plaintiffs did not refer to the report in the complaint and neither Plaintiffs nor Defendant has cited to it in any briefing. This Court need not consider an allegation of an amicus which is, as here, not subject to judicial notice. (Evid. Code § 452.)

In any event, the report does not support Amicus' conclusions. The USOC retained Ropes & Gray LLP to conduct an independent investigation into the circumstances that contributed to and allowed for a USA Gymnastics team doctor to abuse athletes. The USOC undertook the investigation at its own initiative and conducted it outside of the attorney-client privilege so that the process and findings would be transparent to the public.

In its attempt to transplant the report's findings into this case, Amicus ignores the fact that the report makes no mention of the USOC's relationship with USAT, or any relationship with Gitelman. Much less does the report make findings or establish a duty in this case. When evaluating potential tort liability in a case, courts look to the relationship between the defendant and either "the foreseeably dangerous person" whose conduct the defendant can control or "the foreseeable victim of that conduct." (*Regents*, *supra*, 4 Cal.5th at p. 619.) The Ropes & Gray report addresses the USOC's general knowledge of "the threat of sexual misconduct in elite sports" and of actual misconduct by a USA Gymnastics doctor, but the report does not address sexual misconduct in taekwondo, abuse directed at Plaintiffs, or

Gitelman's conduct. (*See, e.g.*, *Castaneda*, *supra*, 41 Cal.4th at p. 1210 ("To establish a duty to evict [third party tortfeasor], plaintiff must show that violence *by them* or their guests was highly foreseeable.").) Similarly, Amicus cites to report passages discussing the USOC's ability to exert authority over NGBs (CAOC Br. at 21–22), but those observations do not support a conclusion that the USOC could exercise authority over Gitelman.

III. The Court of Appeal Correctly Analyzed the Relevant Law and Record of this Case.

None of Amici's arguments casts doubt on the Court of Appeal's analysis or decision in this case. The Court of Appeal carefully considered the complaint allegations, analyzed the applicable law, and concluded that the USOC did not have a special relationship due to the lack of dependence and control. (*Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077, 1090–1103.)

In doing so, the Court of Appeal correctly relied on this Court's recent analysis in *Regents*. In that case, the Court of Appeal applied the special relationship doctrine to determine whether a relationship existed that could give rise to a duty to

protect. Consistent with *Regents,* the Court of Appeal focused here, with regard to both the USOC and USAT, on whether Plaintiffs were dependent on the defendant for protection and whether the defendant had control over Gitelman and other circumstances in which the injury occurred as the key factors for the existence or non-existence of a special relationship. When the Court of Appeal concluded that USAT had a special relationship, the court then applied the *Rowland* factors to determine that a duty to protect existed because there was no basis for an exception. (*Brown*, *supra*, 40 Cal.App.5th at pp. 1095–01.) And the Court of Appeal held that, under *Regents,* the USOC had no special relationship; thus, it did not proceed to a *Rowland* analysis. (*Id.* at p. 1103.)

Amici focus on the fact that, as minors, Plaintiffs depended on others for protection and argue that the USOC had "some control" over their welfare. But they ignore the complaint allegations that Plaintiffs' dependence was on USAT, not the USOC. (*See* Manly Br. at 35–42.) And they ignore the element of control, including the Court of Appeal's finding that USAT had the ability to control Gitelman and the lack of such a finding for the USOC. (*Brown*, *supra*, 40 Cal.App.5th at pp. 1094, 1102.)

Apart from disagreeing with the outcome, Amici have not presented any reason to question the soundness of the Court of Appeal's decision affirming dismissal of the action against the USOC.

IV. Conclusion

For the reasons set forth above, and in the USOC's Answer Brief on the Merits, this Court should affirm the USOC's dismissal.

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DATED: November 13, 2020

By: _____
Beth S. Brinkmann

Attorneys for Respondent
UNITED STATES OLYMPIC COMMITTEE

CERTIFICATE OF COMPLIANCE
(California Rules of Court, Rule 8.520(c))

I certify that this Combined Answer Brief to Amici Curiae Briefs Filed in Support of Plaintiffs contains 8,434 words, as counted by Microsoft Word, the software program within which the brief was generated.

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Supreme Court of California

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