Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 7/15/2020 on 8:17:16 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/15/2020 by Celia Wong, Deputy Clerk

No. S259216

(2nd Civil No. B280550)
(Los Angeles Superior Court No. BC599321)

In The

Supreme Court

State of California

YAZMIN BROWN, et al.

Petitioners,

versus

USA TAEKWONDO, et al.,

Respondents.

RESPONDENT UNITED STATES OLYMPIC COMMITTEE'S ANSWER BRIEF ON THE MERITS

After Decision by the Court of Appeal
Second Appellate District, Division 7

DOUGLAS J. COLLODEL (State Bar No. 112797)
CLYDE & CO US LLP
355 S. Grand Avenue, Suite 1400
Los Angeles, CA 90071
Telephone: (562) 317–3344
Facsimile: (415) 365–9801
Email: Douglas.collodel@clydeco.com

MARGARET M. HOLM (State Bar No. 71252)
CLYDE & CO US LLP
2020 Main Street, Suite 1100
Irvine, CA 92614
Telephone: (949) 852–8200
Facsimile: (877) 546–3920
Email: Margaret.holm@clydeco.com

BETH S. BRINKMANN (State Bar No. 129937)
COVINGTON & BURLING LLP
One CityCenter, 850 10th Street NW
Washington, DC 20001
Telephone: (202) 662–5312
Facsimile: (202) 778–5312
Email: BBrinkmann@cov.com

MITCH A. KAMIN (State Bar No. 202788)
CAROLYN J. KUBOTA (State Bar No. 113600)
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067
Telephone: (424) 332–4800
Facsimile: (424) 332–4749
Email: MKamin@cov.com; CKubota@cov.com

Attorneys for Respondent,
United States Olympic Committee

Table of Contents

I. Issue Presented 7

II. Introduction 7

III. Background 11

A. Statutory Framework 11

B. Procedural History 14

IV. Argument 19

A. The Special Relationship Doctrine Is Appropriate to Determine Whether A Defendant Had a Duty to Protect Another From the Conduct of a Third Party. 21

B. The Special Relationship Doctrine Appropriately Accounts for the Vulnerability of Minor Plaintiffs in Cases Involving Sexual Abuse. 31

C. The Court of Appeal Correctly Affirmed the USOC's Dismissal Because Plaintiffs' Allegations Did Not Establish a Special Relationship with the USOC. 36

D. If a Court Were to Consider the *Rowland* Factors, They Would Weigh Against Imposing on the USOC a Duty to Protect Plaintiffs. 45

V. Conclusion 51

Certificate of Compliance 52

Proof of Service 53

Service List 54

Table of Authorities

Page(s)

Cases

Adams v. City of Fremont
(1998) 68 Cal.App.4th 243, ... 27

Barenborg v. Sigma Alpha Epsilon Fraternity
(2019) 33 Cal.App.5th 70 .... 24, 46

Brown v. USA Taekwondo
(2019) 40 Cal.App.5th 1077, ...passim

C.A. v. William S. Hart Union High Sch. Dist.
(2012) 53 Cal.4th 861 .... 31, 36

Castaneda v. Olsher
(2017) 41 Cal.4th 1205 25

Conti v. Watchtower Bible & Tract Society of New York, Inc.
(2015) 235 Cal.App.4th 12141222 28

Delgado v. Trax Bar & Grill
(2005) 36 Cal.4th 224 ....passim

Doe 1 v. City of Murrieta
(2002) 102 Cal.App.4th 899 28

Doe v. Superior Court
(2015) 237 Cal.App.4th 239 29

Doe v. United States Youth Soccer Assn., Inc.
(2017) 8 Cal.App.5th 1118 .... 28, 41

Garcia v. Superior Court
(1990) 50 Cal.3d 728.. 22

Giraldo v. Dep't of Corr. & Rehab.
(2008) 168 Cal.App.4th 231 31

Hanouchian v. Steele
(Cal. Ct. App. June 4, 2020) No. B291609, 2020 WL 2988839 29

J.L. v. Children's Institute, Inc.
(2009) 177 Cal.App.4th 388 25

Juarez v. Boy Scouts of America, Inc.
(2000) 81 Cal.App.4th 377 .... 27, 28

Kesner v. Superior Court
(2016) 1 Cal.5th 1132 .... 29, 30

Lopez v. S. Cal. Rapid Transit Dist.
(1985) 40 Cal.3d 780 32

Merrill v. Navegar, Inc.
(2001) 26 Cal.4th 465 .... 29, 30

Morris v. De La Torre
(2005) 36 Cal.4th 260 .... 23, 34

Nally v. Grace Community Church
(1988) 47 Cal.3d 278 27

Nipper v. California Auto. Assigned Risk Plan
(1977) 19 Cal.3d 35 37

People v. Gitelman
(2017) 2nd Civil No. B267825 [2017 WL 2628433] 15

Perez v. Golden Empire Transit Dist.
(2012) 209 Cal.App.4th 1228 39

Peterson v. Superior Court
(1995) 10 Cal.4th 1185 33

Regents of University of California v. Superior Court
(2018) 4 Cal.5th 607 .... passim

Rowland v. Christian
(1968) 69 Cal.2d 108 .... passim

S. California Gas Leak Cases
(2019) 7 Cal.5th 391 .... 36, 42

S.F. Arts & Athletics, Inc. v. U.S. Olympic Committee
(1987) 483 U.S. 522 .... 11, 12

T.H. v. Novartis Pharm. Corp.
(2017) 4 Cal.5th 145 36

Tarasoff v. Regents of Univ. of California
(1976) 17 Cal.3d 425 .... 22, 34

University of Southern California v. Superior Court
(2018) 30 Cal.App.5th 429 24

Verdugo v. Target Corp.
(2014) 59 Cal.4th 312 33

Weirum v. RKO Gen., Inc.
(1975) 15 Cal.3d 40 22

Williams v. State of California
(1983) 34 Cal.3d 18 23

Statutes

36 U.S.C. § 220501 *et seq.* 11

36 U.S.C. § 220505(c) 12

36 U.S.C. §§ 220521 *et seq.* 40

36 U.S.C. § 220521(d) 14

36 U.S.C. §§ 220522–220527 14

36 U.S.C. § 220522(a) 12

36 U.S.C. § 220522(a)(5) 14, 42, 44

36 U.S.C. § 220523(a) 13

36 U.S.C. § 220524 12

36 U.S.C. § 220524(1) 12

36 U.S.C. § 220525 12

36 U.S.C. § 220525(b)(4)(G) 12

36 U.S.C. § 220527 14

36 U.S.C. § 220527(d) 14

36 U.S.C. § 220528 14

36 U.S.C. § 220530 .... 12, 49

36 U.S.C. § 220541 13

36 U.S.C. §§ 220541–220543 49

Civil Code § 1714(a) 24

Other Authorities

Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, subd. (b)(1)–(2) 31

I. Issue Presented

What is the appropriate test that minor plaintiffs must satisfy to establish a duty by defendants to protect them from the sexual abuse of third parties?

II. Introduction

The appropriate test for a plaintiff to establish that a defendant has a duty to protect in these circumstances requires (1) a showing of a special relationship between the plaintiff and defendant based on considerations of control and dependency and (2) if a special relationship is found to exist, then a showing that the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, support imposition of a duty to protect. Plaintiffs' attempt to rely on the *Rowland* factors as an alternative basis for imposing a duty to protect when there is not a special relationship is contrary to fundamental tort doctrine and significant legal policy. The Court of Appeal correctly rejected that argument and this Court should do so as well.

A tort law duty generally is imposed to induce a person to act reasonably and is not imposed to require a person to protect others from, or prevent the actions of, a third party. An exception

has evolved in which a defendant may have a duty to protect a plaintiff who was in a "special relationship" with the defendant because the defendant had control of the plaintiff's welfare, and the plaintiff depended on the defendant for protection.

Through these elements of control and dependency, the special relationship doctrine takes into consideration the vulnerability of a minor plaintiff to sexual abuse and the ability of a defendant to protect against the third–party offender. The doctrine requires a determination of whether the defendant controlled a plaintiff's welfare, including interactions with third parties, a plaintiff's environment, and the means of protection within that environment, along with a determination of whether a plaintiff depended on that particular defendant for protection from abuse by others. The doctrine is, thus, structured around the issues that make cases involving sexual abuse of minors matters of great concern. In cases of sexual abuse, particularly those involving minors, there may be an inclination to extend tort remedies beyond their underlying policy justifications. But by centering on the issues of control and dependency, the special relationship doctrine is appropriately self–limiting in this respect.

Further extension of tort liability would upend fundamental tort principles without effectively addressing the problem of sexual abuse. 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. The special relationship doctrine therefore properly considers the imperative of imposing a duty upon defendants who reasonably could and should have protected vulnerable plaintiffs, against the adverse effects of imposing a duty to protect on defendants who reasonably could not. In particular, Plaintiffs' attempt to impose a duty to protect based on efforts by the United States Olympic Committee (USOC)[1] to prompt others to prevent sexual abuse of minors would undermine legal policy considerations.

Here, the Court of Appeal correctly applied the special relationship doctrine to determine whether the minor Plaintiffs adequately alleged a duty for the Defendants to protect them from the sexual abuse of a third party. After concluding that the allegations did not demonstrate that the USOC had a special

---

[1] This brief refers to respondent as the United States Olympic Committee (USOC) throughout because that was the name in place at the time suit was initiated. In June 2019, the name was changed to the United States Olympic and Paralympic Committee.

relationship with the third party or Plaintiffs, the Court of Appeal upheld the dismissal of the claims against the USOC. By contrast, the Court of Appeal concluded that the allegations did demonstrate that there was a special relationship with defendant USA Taekwondo (USAT), which is the National Governing Body (NGB) that oversees and manages amateur taekwondo teams and competitions. That special relationship placed USAT in a unique position to protect minor athletes from Mark Gitelman, the taekwondo coach who sexually abused Plaintiffs. Because the Court of Appeal determined the allegations did demonstrate that there was a special relationship with USAT, it proceeded to the second step of the analysis to consider whether the factors required under *Rowland*, 69 Cal.2d 108, indicate that, notwithstanding that special relationship, no duty to prevent or protect against acts of a third party should be imposed. The Court of Appeal concluded that, with respect to USAT, the *Rowland* factors supported recognition of a duty to protect Plaintiffs.

The Court of Appeal properly rejected Plaintiffs' attempt to misuse the *Rowland* factors as a means to establish a duty. The Court of Appeal correctly applied the special relationship doctrine

to uphold the dismissal of the claims against the USOC. This Court should affirm the Court of Appeal's judgment.

III. Background

A. Statutory Framework

The United States Olympic Committee (USOC) is a non–profit organization defined by federal charter under the Ted Stevens Amateur Sports Act of 1978 (36 U.S.C. §§ 220501, *et seq.*). Before enactment of that statute, amateur sports organizations vied with each other to send US athletes to the Olympic Games with no single process or entity to coordinate the selection. Congress enacted the statute "to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States." (*S.F. Arts & Athletics, Inc. v. U.S. Olympic Committee* (1987) 483 U.S. 522, 544 (internal quotations marks omitted).) Congress did not, however, create a federal organization to comprehensively manage and operate amateur sports teams. Instead, it left in place the existing network of independent amateur sports organizations and created a non–profit entity, the USOC, to "serve as the coordinating body for amateur athletic activity in

the United States directly related to international amateur athletic competition" and to represent the United States as its Olympic committee in relation to certain international committees. (36 U.S.C. § 220505(c).) Congress maintained 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*, 483 U.S. at 544–545.)

Congress authorized the USOC to recognize one eligible private amateur sports organization to serve as the national governing body (NGB) for each Olympic sport. (36 U.S.C. §§ 220505(c), 220522(a), 220524, 220525.) Plaintiffs alleged that USAT is one of 49 NGBs. (AA at 40 ¶ 14.) Congress provided that an NGB "shall . . . develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents." (36 U.S.C. § 220524(1).)[2] For

[2] In 2018, Congress amended the statute to provide, *inter alia*, that, when an NGB authorizes an amateur sports organization to hold an amateur athletic competition, that organization must demonstrate to the NGB that it "will implement and abide by the policies and procedures to prevent the abuse, including emotional, physical, and child abuse, of amateur athletes participating in amateur athletic activities application to such national governing body." (36 U.S.C. § 220525(b)(4)(G); *see also* 36 U.S.C. § 220530 (2018 amendment requiring applicable amateur sports organizations to comply with federal statutory child abuse reporting

"the sport that it governs," USAT is authorized to "serve as the coordinating body for amateur athletic activity in the United States;" "exercise jurisdiction over international amateur athletic activities and sanction international amateur athletic competition held in the United States and sanction the sponsorship of international amateur athletic competition held outside the United States;" "conduct amateur athletic competition, including national championships, and international amateur athletic competition in the United States;" and enforce policies for NGB members, such as coaches and athletes, to be eligible to compete in those events. (36 U.S.C. § 220523(a).)

Congress directed that, to be eligible to serve as an NGB, an amateur sports organization must "demonstrate[] that it is autonomous in the governance of its sport," meaning that the organization "independently decides and controls all matters central to governance," "does not delegate decision–making and

---

requirements, establish reasonable procedures regarding one-on-one interactions between amateur minor athletes and adults, and provide related training); 36 U.S.C. § 220541 (designating independent United States Center for SafeSport to exercise jurisdiction with regard to safeguarding amateur athletes from abuse in sports).)

control of matters central to governance," and "is free from outside restraint." (36 U.S.C. § 220522(a)(5).)

Congress provided that the USOC could withdraw recognition, 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, duties as an NGB, and NGB authorization (termed "sanction[ing]") of an amateur sports organization to hold a competition. (36 U.S.C. §§ 220522–220527.) If after a hearing, such a complaint is found to have merit, the USOC is authorized to either place the NGB on probation or revoke recognition. (36 U.S.C. § 220527(d); AA at 40 ¶ 14.)

B. <u>Procedural History</u>

Plaintiffs' first amended complaint alleged claims, including negligence, rooted in the sexual abuse and molestation of each Plaintiff by former taekwondo coach Mark Gitelman. (AA at 44–49 ¶¶ 38–67.) Plaintiffs alleged Gitelman, who was affiliated through ownership or employment with defendant NV Taekwondo Training and Fitness (AA at 39 ¶ 9), trained or

supervised Plaintiffs. (AA at 48, 49, 51, 52.) Gitelman was convicted of crimes arising out of his sexual abuse of two of the Plaintiffs. (*People v. Gitelman* (2017) 2nd Civil No. B267825 [2017 WL 2628433].)

Plaintiffs broadly stated that Gitelman sexually abused them from 2007 to 2014. (AA 44 ¶ 38.) Plaintiffs' specific factual allegations of incidents of their abuse, however, fall between 2007 and 2013. And Plaintiffs did not allege facts that the USOC had actual knowledge of Gitelman's abuse of Plaintiffs at the time it occurred. (*See* AA at 43 ¶ 27–35.). (AA at 45–49.) One Plaintiff alleged that Gitelman sexually abused her on at least three occasions between 2007 and 2010 (AA at 45–47 ¶¶ 45–54); another Plaintiff alleged that Gitelman sexually abused her on at least one occasion in 2010 (AA at 47–48 ¶¶ 55–59); and the third Plaintiff alleged that Gitelman sexually abused her on at least two occasions between 2010 and 2013 (AA at 48–49 ¶¶ 60–67). (*See also* AA at 47 ¶ 54 (one Plaintiff alleging she left the sport of taekwondo in 2010); AA at 49 ¶ 66 (another Plaintiff alleging she ceased contact with Gitelman in 2013).)

In addition to Gitelman, Plaintiffs sued USAT and other taekwondo sports organizations, including NV Taekwondo

Training and Fitness (alleged as the fitness center that employed or was owned by Gitelman), the Latin American International Taekwondo Federation Ltd. (alleged as the USA Taekwondo State Association for Nevada), the California Unified Taekwondo Association (alleged as the USA Taekwondo State Association for California). (AA at 7–8; 38–39 ¶¶ 4–7.) Plaintiffs alleged that, "[i]n order for a taekwondo athlete to compete at the Olympic Games, the athlete must be a member of [USAT] and train under USAT registered coaches." (AA at 40 ¶ 12). Plaintiffs alleged that USAT "formulates the rules and implements the policies and procedures for local taekwondo studios throughout the United States and is further responsible for overseeing and enforcing the Code of Ethics for the sport of taekwondo." (AA at 41 ¶ 16.)

Plaintiffs also named the USOC as a defendant. (AA at 8 ¶ 8; 39 ¶ 8.) They alleged the USOC had knowledge since the 1980s that minor female athletes had been sexually assaulted, that a USAT delegation was evicted from a rental house during the 1992 Summer Olympics, that by 1999 the USOC required NGBs to obtain insurance covering sexual abuse by coaches, and that the USOC required each NGB to implement by 2013 a SafeSport program to protect athletes from sexual abuse. (AA at

41–43 ¶¶ 17–20, 28.) Plaintiffs alleged that USAT's failure to implement a program by 2013 was one of the reasons the USOC placed USAT on probation. (AA at 40–42 ¶¶ 14, 22.) USAT's probation ended at some point after it adopted the required code of conduct. (AA at 42 ¶ 24.)

Plaintiffs alleged that the USOC's director of Ethics and SafeSport knew of Plaintiffs' allegations against Gitelman by September 2013. (AA at 43 ¶ 29.) As noted above, although Plaintiffs broadly stated that Gitelman sexually abused them from 2007 to 2014, (AA 44 ¶ 38), their specific factual allegations of incidents of their abuse by Gitelman fall between 2007 and 2013 and there is no factual allegation of an incident of abuse of Plaintiffs by Gitelman after September 2013. Plaintiffs alleged that in October 2013, USAT's ethics committee chair and CEO voted to suspend Gitelman pending a hearing, which resulted in a recommendation for termination of Gitelman's USAT membership, and that the USOC knew Gitelman was coaching until his 2014 arrest. (AA at 43 ¶¶ 30–35, 38.)

The USOC and USAT each separately demurred to Plaintiffs' First Amended Complaint. (AA at 74–103, 118–158.) The trial court sustained the demurrers (see AA at 233–240) and,

thereafter, entered judgment dismissing the claims against the USOC and against USAT. (AA at 254–255, 259–260.) Plaintiffs timely appealed. (AA at 275–276.)

The Court of Appeal affirmed the dismissal of the claims against the USOC. (*Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077, 1109.) The Court of Appeal held that Plaintiffs' allegations that the USOC had authority to decertify NGBs, that it required NGBs to have a SafeSport program by 2013, and that the abuse of Plaintiffs occurred at sanctioned competitions did not establish that the USOC had a special relationship with Plaintiffs or Gitelman. (*Id*. at 1101–1102). The Court accordingly ruled that Plaintiffs could not establish that the USOC had a duty to protect them from Gitelman's criminal conduct. (*Id.* at 1102–1103.) Plaintiffs asserted the *Rowland* factors as an alternative basis of a duty to protect, even in the absence of a special relationship, but the Court of Appeal disagreed, explaining that, "[b]ecause USOC does not have a special relationship with Gitelman or [P]laintiffs, it does not have a duty to protect [P]laintiffs. Therefore, [the court] do[es] not consider the *Rowland* factors as to USOC." (*Ibid.*)

As to USAT, however, the Court of Appeal reversed the dismissal and remanded the case to the Superior Court. The Court concluded that Plaintiffs adequately alleged facts showing USAT had a special relationship with Gitelman, and that the *Rowland* factors did not excuse or limit its duty of care but, instead, supported recognition of a duty to protect Plaintiffs from sexual abuse. (*Id.* at 1094–1102.)

Plaintiffs petitioned this Court for review to determine the appropriate test minor plaintiffs must satisfy to establish a duty by defendants to protect them from the sexual abuse of third parties. USAT did not petition for review of the reversal of its dismissal and remand.

IV. Argument

This Court and lower courts have applied the special relationship doctrine to decide the sufficiency of a plaintiff's allegations that a defendant had a duty to protect minors or other vulnerable plaintiffs against criminal and tortious conduct of third parties. This doctrine has proved to be sufficiently flexible to recognize a duty when a defendant controlled the plaintiff's welfare and minor victims depended on the defendant for

protection. It also has been sufficiently flexible to recognize that a duty to protect against the conduct of a third party does not exist in the absence of those elements and that such a duty does not arise from a defendant's voluntary efforts to prompt others to prevent sexual abuse.

Plaintiffs agree that the special relationship doctrine applies here and they do not argue that the doctrine is insufficient to address the circumstances of this case. (Petitioners' Opening Br. at 10–14, 52–64.) They argue, however, that application of the special relationship doctrine should give rise to a duty to protect Plaintiffs (Petitioners' Opening Br. at 52–64), even though the USOC lacked proximity to the actors and events at issue, authority over them, or a direct relationship with team members or NGB team coaches. Plaintiffs also argue that the *Rowland* factors constitute a second basis for imposition of a duty and tort liability against the USOC, even when there is no special relationship. (Petitioners' Opening Br. at 10–14, 23–36, 65.)

Plaintiffs' arguments miss the mark. They have not properly alleged a special relationship that gave rise to a duty for the USOC to protect Plaintiffs in these circumstances. And

Plaintiffs' argument that the *Rowland* factors can establish a duty to protect in the absence of a special relationship is not supportable. As the Court of Appeal recognized, like many courts before and since, the existence of a special relationship is a threshold assessment. Courts appropriately consider the *Rowland* factors only to determine whether, as a matter of legal policy, they should recognize an *exception* to a duty if one is found to exist under the special relationship doctrine. Because the Court of Appeal properly applied the special relationship doctrine here to conclude that Plaintiffs did not allege a special relationship with the USOC, assessment of the *Rowland* factors was not warranted.

A. The Special Relationship Doctrine Is Appropriate to Determine Whether A Defendant Had a Duty to Protect Another From the Conduct of a Third Party.

It is "well established that, as a general matter, there is no duty to act to protect others from the conduct of third parties." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235.) The general rule derives from the common law's distinction between misfeasance (an affirmative harmful act) and nonfeasance (a failure to act). "Misfeasance exists when the defendant is

responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention." (*Weirum v. RKO Gen., Inc.* (1975) 15 Cal.3d 40, 49.) The common law has been reluctant to impose liability on a person for nonfeasance. (*See Delgado*, 36 Cal.4th at 235 fn. 12; *Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 435 fn. 5.)

A narrow exception to the general rule against imposing tort liability for nonfeasance exists under the "special relationship" doctrine. That doctrine provides that when a defendant sufficiently controls the plaintiff's welfare (by being able to control interactions with third parties, a plaintiff's environment, and the means of protection within that environment) and the plaintiff sufficiently depends on the defendant for protection, the defendant has a duty to protect the plaintiff from a third–party tortfeasor. In those narrow circumstances, liability may exist for the defendant's nonfeasance. (*See Garcia v. Superior Court* (1990) 50 Cal.3d 728, 734 ("A special relationship is a prerequisite for liability based on a defendant's failure to act." (emphasis omitted)); *Weirum*, 15

Cal.3d at 48 ("[A]bsent a special relationship, an actor is under no duty to control the conduct of third parties.").) Thus, a defendant "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." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.) A defendant "*may* owe an affirmative duty to protect another from the conduct of third parties, or to assist another who has been attacked by third parties, if he or she has a 'special relationship' with the other person." (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 269 (emphasis added).)

This Court confirmed the special relationship doctrine analysis in *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607. The Court explained that a duty to protect "depends first on whether [the defendant] has a special relationship with [the plaintiff]," explaining that such a relationship exists when the plaintiff "relies on the [defendant] for protection," and the defendant "has superior control over the means of protection." (*Id.* at 620–621.) If there is no special relationship, that ends the analysis, and the defendant is not under a duty to protect the plaintiff. (*Barenborg v. Sigma Alpha*

Epsilon Fraternity (2019) 33 Cal.App.5th 70, 77 (declining to address the *Rowland* factors because there was no special relationship upon which to base a duty); *see also University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 451 (observing that it was not necessary to consider the *Rowland* factors because there was no special relationship, but doing so to reinforce the conclusion that there was no duty).)

Even the existence of a special relationship, however, does not automatically establish a duty to protect another. Rather, if a court finds a special relationship, then it applies the *Rowland* factors to determine if such a duty would be inappropriate under the circumstances. (*Delgado*, 36 Cal.4th at 244–246 (after concluding that there was a special relationship, court applied the *Rowland* factors to determine if and what "special–relationship–based duty" should attach under the circumstances); *see Rowland*, 69 Cal.2d 108.) In *Rowland*, this Court identified seven factors that a court should consider to determine whether an "exception" should apply to the general duty of reasonable care under Civil Code section 1714(a). A similar analysis applies to determine whether an exception should apply to a duty that could be based on a special relationship. When a court finds that

there is a special relationship between a plaintiff and a defendant based on the elements of control and dependence, and that a corresponding duty may arise to protect another from the acts of a third party, the court must then apply the *Rowland* factors to determine whether an exception exists that prevents the application of a duty. (*See, e.g.*, *Castaneda v. Olsher* (2017) 41 Cal.4th 1205, 1213 (considering the *Rowland* factors to determine the "existence and scope" of the duty after determining the presence of a special relationship); *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 396 (same).)

Ignoring the Court's precedent, Plaintiffs argue that either the special relationship doctrine or the *Rowland* factors can independently establish a duty for a defendant to protect a plaintiff from a third party's conduct. They suggest that *Regents* was unclear and insist that the Court should look to certain discussions of the special relationship doctrine and *Rowland* factors in opinions that predated *Regents*. Plaintiffs ask the Court to construe those opinions to establish that the special relationship doctrine and the *Rowland* factors are independent and alternative bases for recognizing a duty to protect. (Petitioners' Opening Br. at 23–36.)

But no language in *Regents* suggests that the *Rowland* factors serve as an independent basis for recognizing such a duty, or that the special relationship doctrine imposes a duty without consideration of whether the *Rowland* factors indicate to the contrary. Plaintiffs' proposed interpretation of *Rowland*—a case that decided whether an *exception* existed to a duty that would otherwise have attached—would turn *Rowland* on its head. Plaintiffs have identified no case of nonfeasance that has recognized a duty based *only* on the *Rowland* factors in the absence of a special relationship. The isolated language Plaintiffs pluck from the case law and recite out of context is imprecise. In none of the cases on which Plaintiffs rely were the *Rowland* factors dispositive and in none of them did the court rely on those factors as independent grounds to find a duty. Rather, courts have either applied *Rowland* to establish an exception to a duty of care, or they have analyzed the *Rowland* factors in addition to determining the existence or absence of a duty under the special relationship doctrine. Although some of these decisions may not represent models of doctrinal clarity, their import regarding a duty to protect in nonfeasance cases is consistent, with the core

rationale being that such a duty can arise only if there is a special relationship.

For example, in *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, the Court considered whether there was a special relationship, *id.* at 293–296, and concluded that the courts' analysis in a series of earlier cases "weigh[ed] against creating such a duty," *id.* at 296. The Court then discussed the *Rowland* factors to "explain further" why a duty should not be imposed on the defendant, *id.* at 296–299. In *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, the Court of Appeal indicated some confusion over the appropriate analysis and considered whether a duty existed based on both the special relationship doctrine and the *Rowland* factors, but it ultimately concluded that there was no duty under either analysis, *id.* at 267–88. In *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, the Court of Appeal viewed the *Rowland* factors as justifying a duty, *id.* at 401–402, and discussed those factors first. But the Court of Appeal then applied the special relationship doctrine and characterized it as a "means of avoiding imposing a duty to take protective action for the benefit of a potential victim when there is no relationship to the person needing protection," *id.* at 410. The *Juarez* court

ultimately concluded that the special relationship would give rise to a duty. And in *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, the Court of Appeal applied *Juarez* to analyze the *Rowland* factors first, *id.* at 914, but then concluded that there was a duty after finding the existence of a special relationship, *id.* at 918.

The more recent cases on which Plaintiffs rely clarify that the *Rowland* factors cannot serve as an alternative basis for the creation of a duty. These cases either analyzed the *Rowland* factors after finding a special relationship or to reaffirm the conclusion that a duty should not attach in the absence of a special relationship. (*See, e.g.*, *Doe v. United States Youth Soccer Assn.*, Inc. (2017) 8 Cal.App.5th 1118, 1128 (finding that a special relationship existed and then that the *Rowland* factors supported that determination, explaining that "[i]n cases involving nonfeasance and a special relationship between a plaintiff and a defendant, courts have balanced the policy factors in *Rowland* to assist in their determination of the existence and scope of a defendant's duty in a particular case"); *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1222, 1227–1228, 1235 (in one circumstance, finding a special relationship and that the *Rowland* factors "point[ed] to the same

conclusion," but that, in another circumstance, finding there was no special relationship and the *Rowland* factors would not create a duty; also noting that "[a] number of cases have held that, where the issue is whether the defendant had a duty to protect the plaintiff from harm caused by a third party, the absence of a special relationship is dispositive and there is no reason to conduct the analysis prescribed in [*Rowland*] to determine whether a duty nevertheless existed"); *Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 246–247 (applying the *Rowland* factors to determine the scope of duty after finding a special relationship); *see also Hanouchian v. Steele* (Cal. Ct. App. June 4, 2020) No. B291609, 2020 WL 2988839, *3–*7 (after finding the existence of a special relationship, applying the *Rowland* factors to conclude there was no duty).)

Finally, Plaintiffs cite *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, and *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, (Petitioners' Opening Br. at 37). But in *Merrill* and *Kesner*, this Court viewed the defendants' actions as misfeasance—the manufacturing and sale of assault weapons in *Merrill*, and the negligent use of asbestos in *Kesner*—not as nonfeasance. In *Merrill*, the Court concluded that there was no duty because

section 1714.4 barred the plaintiff's negligence claim. (*Merrill*, 26 Cal.4th at 481–83.) In *Kesner*, the Court recognized that "the general duty to take ordinary care in the conduct of one's activities applies to the use of asbestos on an owner's premises or in an employer's manufacturing processes," and applied the *Rowland* factors to consider "whether a categorical exception" to the defendants' duty of reasonable care was warranted. (*Kesner*, 1 Cal.5th at 1144.) At no point did this Court in *Merrill* or *Kesner* consider or analyze the special relationship doctrine, nor did it recognize the *Rowland* factors as an independent basis for a duty.

The rulings in these cases support and are consistent with the Court's analysis in *Regents*, which the Court of Appeal correctly followed in this case. The Court should reject Plaintiffs' argument and affirm the Court of Appeal's ruling that "[b]ecause USOC does not have a special relationship with Gitelman or [P]laintiffs, it does not have a duty to protect [P]laintiffs. Therefore, [the court] do[es] not consider the *Rowland* factors as to USOC." (*Brown,* 40 Cal.App.5th at 1103.)

B. **The Special Relationship Doctrine Appropriately Accounts for the Vulnerability of Minor Plaintiffs in Cases Involving Sexual Abuse.**

The special relationship doctrine grew out of decades of case law involving nonfeasance in dependent relationships, such as jailers and prisoners, in which a defendant took custody of a plaintiff either as required by law or voluntarily, and the defendant had a superior ability to protect the plaintiff. (*See, e.g.*, *Giraldo v. Dep't of Corr. & Rehab.* (2008) 168 Cal.App.4th 231, 247–250 (summarizing history and development of the special relationship doctrine); Rest.3d Torts, Liability for Physical and Emotional Harm, § 40, subd. (b)(1)–(2) (providing list of special relationships).) The "epitome of a special relationship" is one that "is protective by nature, such that the [defendant] has control over the [plaintiff], who is deprived of the normal opportunity to protect himself from harm inflicted by others." (*Giraldo*, 168 Cal.App.4th at 250–251.) A high school, for example, has a special relationship with its pupils "arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel." (*C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 869.) In these

custodial or quasi–custodial circumstances, the courts reason, recognition of a special relationship is warranted because the defendant controls the plaintiff's welfare in the environment in which he or she was injured and the plaintiff was dependent on those custodians for protection from others.

At the same time, the courts developed the special relationship doctrine with the understanding that "[s]pecial relationships also have defined boundaries. They create a duty of care owed to a limited community, not the public at large." (*Regents*, 4 Cal.5th at 621.) Therefore, even someone who is entrusted to protect the general public is not in a special relationship with every member of that public, nor does a government entity owe a duty to every individual that uses its facilities. (*Ibid.*) "Because a special relationship is limited to specific individuals, the defendant's duty is less burdensome and more justifiable than a broad–ranging duty would be." (*Ibid.*) Special relationships, and the corresponding duties, are therefore directed only at certain defendants and certain plaintiffs, not to parties or circumstances outside such relationships. (*See, e.g.*, *Lopez v. S. Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 789 ("[T]he special relationship between a carrier and its passengers

is even greater than that between other types of businesses and their customers who come on to the 'premises' for business purposes.").)

As courts have explained, the existence of a special relationship does not signify a boundless duty or strict liability. For instance, businesses may have a special relationship with their patrons while on the premises of that business; consequently, the business has a duty "to take reasonable action to protect or aid patrons who sustain an injury or suffer an illness while on the business's premises." (*Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 335.) But that special relationship does not require a business to provide a particular medical device that could have saved a patron's life. (*Ibid.*) "A hotel guest reasonably can expect that the hotel owner diligently will inspect the hotel room for defects and will correct any defects discovered. But the guest cannot reasonably expect that the owner will correct defects of which the owner is unaware and that cannot be discerned by a reasonable inspection." (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206.)

The existence of a special relationship also is not dispositive of the exact nature or scope of a duty, which depends

on the circumstances of the case. (*See, e.g.*, *Regents*, 4 Cal.5th at 613 ("Considering the unique features of the collegiate environment, we hold that universities have a special relationship with their students and a duty to protect them from foreseeable violence *during curricular activities*.") (emphasis added)); *Delgado*, 36 Cal.4th at 250 (holding that the special–relationship–based duty included steps to avert danger of an impending assault involving the attacker and the particular bar patron of which the defendant bar owner had actual notice); *Morris*, 36 Cal.4th at 277 (holding that a special–relationship–based duty required employees to call for help after witnessing a parking lot fight in front of their restaurant that included an attacker entering the restaurant to obtain a large knife to assault others).)

The special relationship doctrine has proved to be an effective means of assessing whether a duty to protect may be appropriate across a variety of contexts. (*See Tarasoff*, 17 Cal.3d at 435 fn. 5 (explaining that a nonfeasance duty in a new context is to be recognized not by "direct rejection of the common law rule" against such a duty, but by considering whether there is a "special relationship" to "justify departure from that rule").) The

specific context presented by this case, the sexual abuse of minors, does not require a departure from this doctrine. A case involving injury to minors is more likely to give rise to a special relationship because of the victims' vulnerability, meaning their relative lack of capacity to anticipate risks and free themselves from danger. This reasoning applies with particular force in the context of sexual abuse because the victims' possible concerns about reprisal, blame, or further abuse, combined with potential confusion and intimidation, may make the victims reticent to report abusers. The special relationship doctrine appropriately takes these aspects of child sexual abuse cases into consideration.

At the same time, a legal duty that imposes tort liability, as opposed to an ethical or moral commitment, must be sufficiently tailored to the circumstances to be effective and fair regarding both defendants that have or do not have the requisite control for a special relationship. The special relationship doctrine provides the necessary flexibility to achieve this and to distinguish among defendants, as the analysis and ruling by the Court of Appeal demonstrates. There is no reason, and Plaintiffs have offered none, suggesting the need to adopt a different test for cases involving sexual abuse of minors.

C. <u>The Court of Appeal Correctly Affirmed the USOC's Dismissal Because Plaintiffs' Allegations Did Not Establish a Special Relationship with the USOC.</u>

An appeal of an order sustaining a demurrer is reviewed de novo to determine whether the complaint "alleges facts sufficient to state a cause of action under any legal theory." (*T.H. v. Novartis Pharm. Corp.* (2017) 4 Cal.5th 145, 162.) At the demurrer stage, the court must accept as true material facts that are properly pleaded in the complaint, but not conclusions of fact or law. (*S. California Gas Leak Cases* (2019) 7 Cal.5th 391, 395.) The review is limited to "the allegations of the operative complaint." (*William S. Hart Union High Sch. Dist.,* 53 Cal. 4th at 866.)

The Court of Appeal recognized that minors are a vulnerable population and that the risk of sexual abuse is both real and significant. (*Brown*, 40 Cal.App.5th at 1092–1095.) The Court of Appeal thus carefully examined the allegations of the first amended complaint and applied the special relationship doctrine to conclude, contrary to Plaintiffs' arguments here (Petitioners' Opening Br. at 52–64), that the complaint did not allege facts that would establish that the USOC controlled

Plaintiffs' welfare, including against criminal acts by Gitelman, or that Plaintiffs depended on the USOC for protection from him. (*Brown*, 40 Cal.App.5th at 1101–1104.) As the Court of Appeal observed, the "allegations show USOC had the ability to regulate USAT's conduct, but they do not establish that USOC had the ability to control Gitelman's conduct, or USOC was in the best position to protect [P]laintiffs from Gitelman's sexual abuse." (*Brown*, 40 Cal.App.5th at 1102; *see also id*. at 1083 (the USOC had ability to require USAT to adopt policies to protect youth athletes, but it "did not have direct control over the conduct of coaches").)

Plaintiffs essentially argue that the USOC had a duty to protect Plaintiffs because it had the ability to revoke the NGB status of a second entity, USAT, which could in turn take action against a third party, Gitelman, to prevent him from harming a fourth party, Plaintiffs. The alleged action the USOC could take and the alleged dependence are too attenuated to give rise to a special relationship. (*See Nipper v. California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 40 (rejecting a theory of liability based on the defendant's failure to take actions that would

compel a third party to take actions that would prevent a fourth party from ultimately causing harm to the plaintiff).)

Many of the general allegations in the first amended complaint are directed to all Defendants and not supported by specific factual allegations. For example, Plaintiffs asserted in a conclusory manner that all Defendants "knew or reasonably should have known that female athletes were being sexually assaulted" by their coaches during national and Olympic level training and events (AA at 46–47 ¶ 53), and that they "knew or should have known that Gitelman was carrying on improper relationships with Plaintiffs." (AA at 44 ¶ 41, 54 ¶ 96.) They also alleged that Defendants "had the authority and ability to end the sexual abuse of Plaintiffs," but did not "elect[] to take any action," and that they "failed to have any policies, procedures or oversight for ensuring that the Code [of Ethics] was being adhered to and to ensure that female athletes, including [P]laintiffs, were not sexually abused/molested by their coaches." (AA at 44 ¶37; 45 ¶ 44.)

As to the USOC itself, as explained above (*see* pages 14–17, *ante*), Plaintiffs did not allege facts to support actual knowledge by the USOC of Gitelman's sexual abuse until September 2013,

and did not allege facts of an incident of Gitelman's abuse of Plaintiffs after that date. (*See Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1236 ("specific allegations in a complaint control over an inconsistent general allegation").) Plaintiffs' argument that the USOC should have taken some action against USAT at that time (Petitioners' Opening Br. at 62) does not demonstrate a special relationship between the USOC and Plaintiffs, or the USOC and Gitelman.

Plaintiffs alleged in a conclusory manner that the USOC had "the power and ability to control" other defendants because it could certify, decertify, place on probation, and "assume some or all governance functions" of NGBs. (AA at 40–41 ¶ 14.) Plaintiffs alleged that the USOC required NGBs to have insurance to cover sexual abuse by coaches and required NGBs to implement a SafeSport Program by 2013. (AA at 41–42 ¶ 20.). They alleged that the USOC placed USAT on NGB probation based in part for failing to adopt the required code of conduct, required USAT to have an advisory board between 2011 and September 2013 that included a USOC official, and terminated probation at some point thereafter. (AA at 40–42 ¶¶ 14–24.) These alleged facts do not

support finding a special relationship between Plaintiffs and the USOC or Gitelman and the USOC.

The Court of Appeal found, by contrast, that Plaintiffs' allegations did demonstrate a special relationship with Defendant USAT. The Court observed that "[t]o compete at the Olympic games, taekwondo athletes must be members of USAT and train under USAT–registered coaches. USAT registered Gitelman as a coach, and he remained registered until USAT banned him from coaching. USAT had control over Gitelman's conduct through its policies and procedures. As the national governing body of taekwondo, 'USAT is responsible for the conduct and administration of taekwondo in the United States.' Further, USAT formulates the rules, implements the policies and procedures, and enforces the code of ethics for taekwondo in the United States." (*Brown*, 40 Cal.App.5th at 1077, 1094; AA at 41.)

The USOC did not have comparable authority here. Rather, it coordinated among the NGBs, including USAT, as provided by Congress. (*See* 36 U.S.C. §§ 220521 *et seq.*; *see* pages 11–14*, ante* (discussing federal statutory framework for the USOC's federal charter and NGBs' role).) Notably, Congress did not create the

USOC as a federal organization to manage the operations of USAT.

Thus, the USOC's relationship with USAT is unlike the organizational relationships of some other youth sports organizations, such as the U.S. Youth Soccer Association in the *Doe* case on which Plaintiffs rely (Petitioners' Opening Br. at 63). In *Doe v. United States Youth Soccer Assn. Inc.*, 8 Cal.App.5th 1118, for example, U.S. Youth Soccer Association had local affiliates in different states and retained authority and control over them, including establishing the standards for hiring coaches and determining who "had custody and supervision of children involved in its programs," *id.* at 1131. The USOC had none of these forms of authority. Finding a special relationship here would be analogous to finding in *Regents* that, not just UCLA and the Board of Regents had a duty to protect students in the university's curricular activities, but also that the association that accredited the university had such a duty based on its ability to terminate accreditation if the university did not have a policy against student assaults during its curricular activities.

Plaintiffs' arguments about the USOC's authority are contrary to the federal statutory framework. Plaintiffs assert that

the USOC has "plenary power" under the federal statute; that it "retains the ultimate authority to regulate and control intimate aspects of the coach–athlete relationship, and to mandate that its subsidiary NGBs adopt rules which conform to those specific mandates"; and that it "uniquely shapes the context in which minor athletes interact with their coaches in order to participate in Olympic caliber training and competition," and therefore "exercised *all necessary operational control* over setting the rules by which coaches like Gitelman were permitted to interact with minor athletes like Petitioners." (Petitioners' Opening Br. at 45, 59, 61.)

Those arguments are premised on an incorrect statement of the law regarding the USOC's authority. Such legal assertions are not accepted as true even on demurrer. (*See S. Cal. Gas Leak Cases*, 7 Cal.5th at 395.)

Federal statute requires that for an amateur sports organization to be eligible to be recognized as an NGB, it must be "autonomous," meaning that it "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).)

The USOC's authority with respect to an amateur sports organization that it recognizes as an NGB derives from the USOC's ability under the statute to confer or remove such recognition. By recognizing an organization as an NGB, however, the USOC does not assume control over the organization's existence or management. Nothing in the statute provides for the USOC to implement or enforce at an operational level the policies of an amateur sports organization recognized as an NGB. Rather, the statute provides that if an NGB does not satisfy the conditions for NGB recognition, the USOC is statutorily authorized to place the NGB on probation or to revoke recognition. (*See* pages 11–14, *ante*.)

Organizations within the sport of taekwondo, not the USOC, had the legal authority to conduct taekwondo competitions, organize taekwondo teams, and establish the rules with which taekwondo coaches and athletes had to comply to be eligible to compete in USAT competitions. Those rules include provisions governing interactions between USAT coaches and minor athletes. And as the Court of Appeal held, USAT alone had the legal power to enforce those rules against coaches. (*Brown*, 40 Cal.App.5th at 1094–1095.)

Consistent with the statutory relationship between the USOC and the NGBs, athletes who participated on the USAT teams did not depend on the USOC for protection. Plaintiffs did not allege facts to demonstrate that the USOC interacted with USAT athletes in any relevant manner. Again, Plaintiffs ignore the framework established by Congress which provides that to be eligible to serve as an NGB, USAT must be an autonomous entity free from outside restraint. (36 U.S.C. § 220522 (a)(5).) Contrary to Plaintiffs' argument (Petitioners' Opening Br. at 61), the statute does not allow the USOC to "exercise[] all necessary operational control" over USAT's rules governing coaches, much less to supervise the actions of individual USAT coaches or athletes.

Plaintiffs nonetheless cite the fact that the USOC took steps to prompt NGBs to adopt and implement policies against sexual abuse of athletes. Those actions, Plaintiffs argue, somehow demonstrate authority and control on the part of the USOC that, in turn, establish a duty to protect Plaintiffs from Gitelman. (AA at 41–42 ¶¶ 20–22; Petitioners' Opening Br. at 57, 61–62.) Specifically, Plaintiffs point to the USOC's measures to prompt NGBs, including USAT, to adopt and enforce model

SafeSport guidelines. (Petitioners' Opening Br. at 59–60.) According to Plaintiffs, these measures establish that the USOC had authority to control athlete–coach relationships on USAT teams. (*Id*. at 59, 61). But the USOC's alleged ability to prompt amateur sports organizations to adopt and implement policies in conjunction with their recognition as NGBs, "do[es] not establish that the USOC had the ability to control Gitelman's conduct, or the USOC was in the best position to protect [P]laintiffs from Gitelman's sexual abuse." (*Brown*, 40 Cal.App.5th at 1102; *see also id*. at 1083 (USOC "did not have direct control over the conduct of coaches").)

For the above reasons, the Court should affirm the judgment of the Court of Appeal sustaining the USOC's demurrer and dismissing the claims against the USOC because of the absence of allegations demonstrating a special relationship.

D. If a Court Were to Consider the *Rowland* Factors, They Would Weigh Against Imposing on the USOC a Duty to Protect Plaintiffs.

If this Court affirms the Court of Appeal's conclusion that there was no special relationship with the USOC, the legal

analysis ends there. (*Barenborg*, 33 Cal.App.5th at 77; *Brown*, 40 Cal.App.5th at 1103.)

If the Court were somehow to conclude that the allegations establish a special relationship, however, then the *Rowland* factors would need to be considered to determine whether an exception to the imposition of a duty is warranted. Those factors include: foreseeability of harm to the plaintiff; degree of certainty of injury; closeness of defendant's conduct and plaintiff's injury; moral blame attached to defendant's conduct; policy of preventing future harm; burden on defendant and community of imposing duty and liability; and availability of insurance for the risk involved. The *Rowland* factors weigh against imposition here of a duty on the USOC.

The first and second *Rowland* factors address foreseeability and certainty of injury. The allegations in cases of sexual abuse of minors typically support the certainty of injury and may often support the factor of foreseeability. Here, the factor of foreseeability as to the USOC is unsupported because Plaintiffs did not allege facts to support actual knowledge by the USOC of Gitelman's sexual abuse until September 2013, and Plaintiffs did

not allege facts supporting an incident of their abuse by Gitelman after that date. (*Cf. Delgado*, 36 Cal.4th at 244–245, 250.)

The other *Rowland* factors do not weigh in favor of imposing a duty to protect on the USOC. The third factor concerns the closeness of the connection between the USOC's conduct and Plaintiffs' injuries. That factor weighs strongly against imposing a duty to protect on the USOC. As discussed above, Plaintiffs' allegations do not support a close connection because the USOC did not control the circumstances under which Plaintiffs and Gitelman interacted. And contrary to Plaintiffs' argument, the USOC's prompting of NGBs to adopt and implement SafeSport guidelines is consistent with that conclusion. Athlete safety is a top priority of the USOC and it has taken measures of many kinds to promote that goal. But the fact remains that the USOC is not authorized to control USAT coaches or the interactions those coaches have with a given athlete.

In terms of moral blame, the USOC took reasonable steps to support prevention of sexual abuse in amateur sports. Based on Plaintiffs' allegations alone, the USOC conditioned its recognition of amateur sports organizations as NGBs on their

adoption of a code of ethics, implementation of a SafeSport program, and support of the US Center for SafeSport, all to counter sexual abuse in amateur sports. The USOC's statutorily–established organizational separation from the events and circumstances that caused Plaintiffs' injuries weigh against a determination that the USOC is morally responsible for Plaintiffs' injuries, especially when the Plaintiffs' allegations identify other entities with direct supervision of the wrongdoer.

Plaintiffs attempt to rely on a post–judgment congressional hearing at which the USOC indicated that it should have done more to help prevent sexual abuse of minors in sport. (Petitioners' Opening Br. at 47.) That is not an admission of tort liability as Plaintiffs argue. Instead, that statement illustrates the point, discussed above, that entities can support efforts to prompt others to prevent sexual abuse without thereby creating tort liability for themselves in circumstances where the requisite control and dependency of a special relationship do not exist. The USOC fully acknowledges the problem of sexual abuse in amateur sports and wholeheartedly supports efforts to prevent it. But that is a different issue from whether the USOC owed a legal duty to prevent abuse by an individual USAT coach who was

directly supervised by others. Creating a legal duty based on a defendant's expression of concern about, and efforts to support prevention of, significant misconduct by third parties would only discourage entities from doing more to address the issue.

As for preventing future harm, the USOC agrees with Plaintiffs that minors must be safeguarded and that sexual abuse of minors is patently unacceptable and damaging to society. (*See* Petitioners' Opening Br. at 47–48.) These efforts included working for the congressional enactment of the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115–126, which authorized and confirmed the Center for SafeSport's jurisdiction, and also specified actions that NGBs and other amateur sports organizations must take concerning athlete safety. (*See* 36 U.S.C. §§ 220530, 220541–220543 (providing, *inter alia*, that the United States Center for SafeSport is designated as the national independent safe sport organization, including to safeguard amateur athletes against abuse, and to be recognized worldwide as such.)

With respect to the burden to the defendant and the community of imposing a duty and liability on defendant, Plaintiffs argue that the USOC already has assumed the burden

of establishing standards for protecting minor athletes from sexual abuse. (Petitioners' Opening Br. at 49–50.) Formulating model standards for the prevention of sexual abuse as part of an effort to prompt others to adopt them, however, is far different from imposing tort liability on the USOC for its failure to meet a duty to protect based on its alleged failure to implement and enforce standards at an operational level at USAT. Such a duty would undermine the legal framework Congress created by imposing on the USOC an impracticable legal obligation to manage the dozens of amateur sports organizations that are recognized as NGBs and their millions of member coaches and athletes. That obligation would preclude the USOC from functioning in its current form. The deleterious effect of such a duty would not be limited to the USOC. It could also lead to liability among large accrediting or governing organizations, such as educational accreditation associations, sports leagues, conferences, or associations, that do not directly operate or manage other entities or affiliates, but identify model standards or other means to incentivize prevention of misconduct. With regard to insurance availability, Plaintiffs alleged that the USOC

required NGBs to carry insurance for claims of sexual abuse (AA at 41 ¶ 19).

Therefore, even if a court were to somehow find that there was a special relationship with the USOC here, consideration of the *Rowland* factors would, on balance, weigh against recognizing a duty for the USOC to protect Plaintiffs from the actions of Gitelman.

V. Conclusion

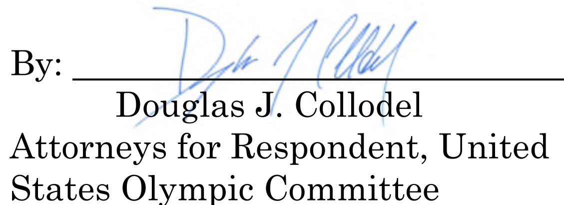
For the reasons set forth above, this Court should affirm the USOC's dismissal.

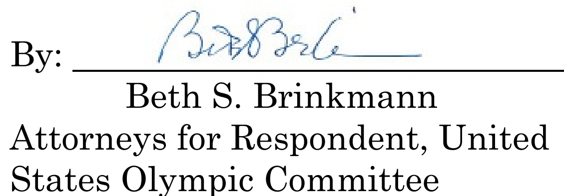
DATED: July 15, 2020

Respectfully submitted,

CLYDE & CO US LLP
DOUGLAS J. COLLODEL
MARGARET M. HOLM

COVINGTON & BURLING LLP
BETH S. BRINKMANN
MITCH A. KAMIN
CAROLYN J. KUBOTA

By: 
Douglas J. Collodel
Attorneys for Respondent, United States Olympic Committee

By: 
Beth S. Brinkmann
Attorneys for Respondent, United States Olympic Committee

Certificate of Compliance

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, Respondent United States Olympic Committee's Answer Brief on the Merits was produced on a computer, using the word processing program Microsoft Word 2010, and the Font is 13 point Century Schoolbook.

According to the word count feature of the program, this document contains 8,835 words, including footnotes, but not including the table of contents, table of authorities, verification and this certification.

DATED: July 15, 2020 /s/ *Douglas J. Collodel*

Proof of Service

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 355 S. Grand Avenue, Suite 1400, Los Angeles, CA 90071.

On July 15, 2020, I served true copies of the following document(s) described as

RESPONDENT UNITED STATES OLYMPIC COMMITTEE'S ANSWER BRIEF ON THE MERITS

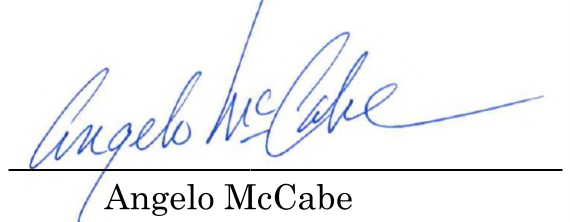
on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E–MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e–mail address *angelo.mccabe@clydeco.us* to the persons at the e–mail addresses listed in the Service List via TrueFiling. The document(s) were transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on July 15, 2020, at Pasadena, California.



Angelo McCabe

Service List

ESTEY & BOMBERGER, LLP Stephen J. Estey, Esq. 2869 India Street San Diego, CA 92103 (619) 295–0035 steve@estey–bomberger.com	Attorneys for Appellants YAZMIN BROWN VIA TRUEFILING
CORSIGLIA MCMAHON & ALLARD, LLP B. Robert Allard, Esq. 96 N. 3rd Street, Suite 620 San Jose, CA 95112 (408) 289–1417 rallard@cmalaw.net	
WILLIAMS IAGMIN LLP Jon R. Williams, Esq. 666 State Street San Diego, CA 92101 (619) 238–0370 williams@williamsiagmin.com Turek Law P.C. Kenneth C. Turek 603 North Highway 101, Suite C Solana Beach, CA 9207 ken@kenturek.com	

<table>
<tr><td>REBACK, MCANDREWS, KJAR,
WARFORD & STOCKALPER, LLP
Evan Naoyoshi Okamura
1230 Rosecrans Avenue, Suite 450
Manhattan Beach, CA 90266
eokamura@rmblawyer.com</td><td rowspan="2">Attorneys for
Defendant and
Respondent
USA TAEKWONDO

VIA TRUEFILING</td></tr>
<tr><td>Patrick E. Stockalper
Matthew Aaron Schiller
KJAR, MCKENNA. STOCKALPER
840 Apollo Street, Suite 100
Los Angeles, CA 90071–3226
pstockalper@kmslegal.com
mschiller@kmslegal.com

Mitchell Tilner
Steven Fleischman
Yen–Shyang Tseng
Horvitz & Levy LLP
3601 West Olive Avenue, 8th Floor
Burbank, CA 91505–4681
mtilner@horvitzlevy.com
sfleischman@horvitzlevy.com
ytseng@horvitzlevy.com</td></tr>
<tr><td>Holly Noelle Boyer
Esner Chang & Boyer
234 East Pasadena, Suite 975
Pasadena, CA 91101
hboyer@ecbappeal.com</td><td>Pub/Depub Requestor

VIA TRUEFILING</td></tr>
<tr><td>Hon. Michael P. Vicencia Los Angeles
Superior Court
Governor George Deukmejian
Courthouse
275 Magnolia Avenue, Dept. S26
Long Beach, CA 90802
(562) 256–2222</td><td>Trial Judge:
Case No. BC599321

VIA U.S. MAIL</td></tr>
</table>

California Court of Appeal 2nd Appellate District, Division 7 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	Case No. B280550 Service Copy VIA TRUEFILING

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/15/2020 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BROWN v. USA TAEKWONDO**
Case Number: **S259216**
Lower Court Case Number: **B280550**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **douglas.collodel@clydeco.us**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	USOC Answer Brief on the Merits - 07.15.2020 - Final

Service Recipients:

Person Served	Email Address	Type	Date / Time
Douglas Collodel Clyde & Co US LLP 112797	douglas.collodel@clydeco.us	e-Serve	7/15/2020 8:17:16 PM
Margaret Holm Clyde & Co US LLPP 071252	margaret.holm@clydeco.us	e-Serve	7/15/2020 8:17:16 PM
Mitchell Tilner Horvitz & Levy LLP 93023	mtilner@horvitzlevy.com	e-Serve	7/15/2020 8:17:16 PM
B. Allard Corsiglia McMahon & Allard, LLP 175592	rallard@cmalaw.net	e-Serve	7/15/2020 8:17:16 PM
M. Hall Clyde & Co US LLP	christopher.hall@clydeco.us	e-Serve	7/15/2020 8:17:16 PM
Connie Christopher Horvitz & Levy LLP	cchristopher@horvitzlevy.com	e-Serve	7/15/2020 8:17:16 PM
Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	7/15/2020 8:17:16 PM
Angelo McCabe Clyde & Co US LLP	angelo.mccabe@clydeco.us	e-Serve	7/15/2020 8:17:16 PM
Jon Williams Williams Iagmin LLP 162818	williams@williamsiagmin.com	e-Serve	7/15/2020 8:17:16 PM
Evan Okamura Reback, McAndrews, Kjar, Warford & Stockalper, LLP	eokamura@rmkws.com	e-Serve	7/15/2020 8:17:16 PM
Kenneth Turek Turek Law P.C.	ken@kenturek.com	e-Serve	7/15/2020 8:17:16 PM
Holly Boyer Esner, Chang & Boyer	hboyer@ecbappeal.com	e-Serve	7/15/2020 8:17:16 PM

221788			
Yen-Shyang Tseng Horvitz & Levy LLP 282349	ytseng@horvitzlevy.com	e-Serve	7/15/2020 8:17:16 PM
Stephen Estey Estey & Bomberger LLP 163093	steve@estey-bomberger.com	e-Serve	7/15/2020 8:17:16 PM
Patrick Stockalper Kjar McKenna Stockalper, LLP 156954	pstockalper@kmslegal.com	e-Serve	7/15/2020 8:17:16 PM
Matthew Schiller Kjar, McKenna Stockalper 306662	mschiller@kmslegal.com	e-Serve	7/15/2020 8:17:16 PM
Chenin Andreoli Williams Iagmin LLP	andreoli@williamsiagmin.com	e-Serve	7/15/2020 8:17:16 PM
Steven Fleischman Horvitz & Levy LLP 169990	sfleischman@horvitzlevy.com	e-Serve	7/15/2020 8:17:16 PM
Beth S. Brinkmann 129937	BBrinkmann@cov.com	e-Serve	7/15/2020 8:17:16 PM
Mitch A. Kamin	MKamin@cov.com	e-Serve	7/15/2020 8:17:16 PM
Carolyn J. Kubota	CKubota@cov.com	e-Serve	7/15/2020 8:17:16 PM
Melissa Uribe (Court of Appeal, Second Appellate District)	Melissa.Uribe@jud.ca.gov	e-Serve	7/15/2020 8:17:16 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

7/15/2020

Date

/s/Douglas Collodel

Signature

Collodel, Douglas (112797)

Last Name, First Name (PNum)

Clyde & Co US LLP

Law Firm