S259216

IN THE SUPREME COURT OF CALIFORNIA

YAZMIN BROWN et al.,
Plaintiffs and Appellants,

v.

USA TAEKWONDO et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN
CASE NO. B280550

COMBINED ANSWER TO AMICI CURIAE BRIEFS

HORVITZ & LEVY LLP
MITCHELL C. TILNER (BAR NO. 93023)
STEVEN S. FLEISCHMAN (BAR NO. 169990)
*YEN-SHYANG TSENG (BAR NO. 282349)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
mtilner@horvitzlevy.com
sfleischman@horvitzlevy.com
ytseng@horvitzlevy.com

KJAR, MCKENNA & STOCKALPER, LLP
PATRICK E. STOCKALPER (BAR NO. 156954)
MATTHEW A. SCHILLER (BAR NO. 306662)
841 APOLLO STREET, SUITE 100
EL SEGUNDO, CALIFORNIA 90245-4641
(424) 217-3026 • FAX: (424) 217-7534
pstockalper@kmslegal.com
mschiller@kmslegal.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
USA TAEKWONDO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Miscellaneous

COMBINED ANSWER TO AMICI CURIAE BRIEFS

INTRODUCTION

Amici curiae for plaintiffs advocate for a radical and unwarranted change in tort law. Manly, Stewart & Finaldi, a law firm that represents plaintiffs in cases alleging sexual abuse, argues this Court should apply a foreseeability-based test to determine when to create new tort duties to protect a plaintiff from third-party misconduct. The Consumer Attorneys of California go even further and argue for abolishing *all* existing no-duty presumptions in favor of a universal presumption of a tort duty in all but the "clearest of cases." (Consumer Attorneys ACB 34.)

Amici offer no persuasive legal or public policy rationale to support the sweeping change in law they propose. Their positions would wipe away more than half a century of existing law and create a general duty upon everyone to protect strangers from foreseeable harm by third parties. That would turn on its head this Court's carefully reasoned precedent and contravene public policy.

Amici contend that plaintiffs' claims stem from allegations of misfeasance rather than nonfeasance. But the very allegations amici rely on show that plaintiffs' claims are based not on some affirmative conduct by USAT that harmed plaintiffs, but on USAT's alleged failure to protect them from Gitelman's misconduct. That's the very essence of nonfeasance.

With no persuasive public policy or law supporting their position, amici make an emotional appeal to our society's desire

to protect children from sexual abuse. But that longstanding goal, shared by USAT, does not support recognizing a new tort duty to protect a minor plaintiff from a third party's misconduct absent a special relationship between the plaintiff and the defendant or between the defendant and the third party. Indeed, this Court has not changed its legal analysis based on the plaintiff's age or the type of harm caused by the third party.

As for the special relationship test, amici claim that USAT had a special relationship either with plaintiffs or with Gitelman. In doing so, they advance novel and unsupported theories such as a commercial relationship test, under which the parties to any commercial transaction would have a duty to protect each other from third-party misconduct. Amici fail to reconcile their legal arguments with the overwhelming weight of authority. The few cases they cite either apply a recognized special relationship such as a custodial relationship, or have nothing to do with the issues raised in this case.

The Consumer Attorneys also raise a new argument never presented before the trial court or the Court of Appeal—that the Ted Stevens Olympic and Amateur Sports Act creates a statutory duty. This Court should not reach this new issue, raised for the first time by an amicus curiae. In any event, the Consumer Attorneys are wrong. The Act expressly precludes a private right of action.

Finally, while the National Collegiate Athletic Association's (NCAA) amicus brief supporting USOC is generally correct, it is wrong to the extent that it suggests that a special relationship

can depend on whether one defendant is in a better position than another to protect a plaintiff from third-party misconduct. The special relationship test is not a comparative one applied to see which defendant in a multi-defendant case might be best suited to protect the plaintiff. Instead, courts independently examine each defendant's relationships with the plaintiff and with the third party. And here, USAT had no custodial or supervisory relationship with plaintiffs and no ability to control Gitelman's conduct. Thus, no special relationship existed that supports a finding of duty.

This Court should reject amici's arguments, apply the legal framework and special relationship test as explained in USAT's answer brief, and reverse the Court of Appeal's decision as to USAT.

LEGAL ARGUMENT

I. Public policy supports the existing special relationship analysis established by this Court and not the broad foreseeability-based test advocated by amici.

As USAT explained in its answer brief, this Court has long applied two different legal frameworks to determine the existence of a duty depending on whether the plaintiff alleges misfeasance (the defendant's affirmative acts harmed the plaintiff) or nonfeasance (the defendant failed to protect the plaintiff from harm caused by a third party). When the plaintiff alleges misfeasance, the defendant owes a general duty under Civil Code section 1714 and courts apply the factors established in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) to determine

whether to recognize an exception. (See USAT ABOM 16-19.) But when the plaintiff alleges nonfeasance, the defendant owes no duty unless an exception such as the special relationship test applies. (See USAT ABOM 20-26.)

This Court affirmed this framework recently in *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607 (*Regents*). This Court also reiterated just four years ago that it "rel[ies] on [the *Rowland*] factors not to determine 'whether a *new duty* should be created, but whether an *exception* to Civil Code section 1714 . . . should be created.' " (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143 (*Kesner*); *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 783 (*Cabral*) [same].) And appellate decisions stretching back 18 years, including the Court of Appeal's decision below and two more decisions this year, consistently follow this framework. (See USAT ABOM 31-32 [collecting cases]; *Dix v. Live Nation Entertainment, Inc.* (Oct. 26, 2020, B289596) __ Cal.App.5th __ [2020 WL 6268307, at p. *10]; *Hanouchian v. Steele* (2020) 51 Cal.App.5th 99, 107-108.)

Amici ask this Court to ignore all this longstanding authority in favor of a brand new foreseeability-based *Rowland* test that would allow courts to recognize an affirmative duty to rescue strangers from foreseeable third-party harm. (See Manly ACB 15; Consumer Attorneys ACB 37-38.) The Consumer Attorneys go even further and propose a categorical presumption of a legal duty in all but "the rarest of circumstances." (Consumer Attorneys ACB 34 ["At the pleading stage, only in the rarest of circumstances should a court conclude 'no-duty.' Rather,

the starting point should be, in all but the clearest of cases, a finding of at least a presumption of duty."]; see Consumer Attorneys ACB 14.) But amici offer no persuasive justification for this Court to depart from 60 years of existing precedent.

Amici argue that whether a defendant owes a duty to a plaintiff is ultimately a question of public policy. (Manly ACB 9-13; see Consumer Attorneys ACB 31.) True. As this Court has explained, "[t]he determination whether a particular relationship supports a duty of care rests on policy." (*Regents*, *supra*, 4 Cal.5th at p. 620.) "The conclusion that a duty exists in a particular case ' "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' " (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164.) Public policy supports the existing framework and not amici's proposed radical change to tort law.

One of the most important public policies behind the concept of duty is to " 'limit generally "the otherwise potentially infinite liability which would follow from every negligent act." ' " (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 (*Bily*).) The existing presumption that this Court and many other jurisdictions have adopted against finding a duty absent a special relationship embodies that public policy and serves the important line-drawing functions at the heart of the concept of duty. (*Ibid.*; see USAT ABOM 23, fn. 6 [citing the Restatements and another treatise].) It reflects the policy that everyone should be responsible for their own conduct that harms another but not for

simply failing to protect another from harm caused by a third party. (See Rest.2d Torts, §§ 314, 315.) It also reflects the reality that holding persons liable for a failure to protect strangers from foreseeable third-party misconduct absent a special relationship would create the potential for limitless tort liability. (See *Regents*, *supra*, 4 Cal.5th at p. 621 ["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"].)

In *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 408-414 (*Southern California Gas Leak Cases*), this Court explained that the inability to draw lines across space and time supported continued application of the economic loss doctrine, under which a defendant owes no duty to protect a plaintiff from purely economic losses. The general no-duty rule and special relationship test here also serve a similar line-drawing function. The special relationship test's focus on dependency and control, as well as its defined boundaries, ensure that only a defendant who *should have* protected a plaintiff from a third party's foreseeable misconduct faces potential liability for not doing so. (See *Regents*, *supra*, 4 Cal.5th at pp. 620-621.)

The foreseeability-based *Rowland* analysis advocated for by amici makes sense where it currently applies—to find an exception to the general duty established by Civil Code section 1714 when the plaintiff alleges harm arising from the defendant's affirmative acts. Indeed, that is the very origin of the analysis. (See *Rowland*, *supra*, 69 Cal.2d at pp. 110-114; see also *Kesner*,

supra, 1 Cal.5th at p. 1143; *Cabral*, *supra*, 51 Cal.4th at p. 783.) But courts should not use this analysis to establish a duty where none exists, particularly when plaintiffs allege defendants failed to protect them from harm caused by a third party. As this Court has explained, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 668; see *Southern California Gas Leak Cases*, *supra*, 7 Cal.5th at p. 401 ["After all, on ' "clear judicial days" ' courts ' "can foresee forever" ' "].) Moreover, public policy simply does not support recognizing a tort duty to protect strangers from third-party harm no matter how foreseeable that harm might have been.

Amici do not address the public policies favoring the existing legal framework. Instead, they appeal to emotion and our societal instinct to protect our children, especially from sexual abuse. (See, e.g., Manly ACB 13-16, 21; Consumer Attorneys ACB 15 ["Protection of all children, including our minor Olympic athletes, is paramount"].) According to amici, this Court should find a duty because sexual abuse of minors must always be foreseeable whenever minors are left alone with adults. (See Manly ACB 16, 23-24.)

USAT shares the laudable goal of protecting children—especially minor Olympic taekwondo athletes. But this Court, as well as lower courts, have rejected the "unduly pessimistic view of human nature" that suggests "sexual misconduct is foreseeable

any time a minor and an adult are alone in a room together, at least if not constrained by the possibility of being interrupted." (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 450, fn. 9; see *Steven F. v. Anaheim Union High School Dist.* (2003) 112 Cal.App.4th 904, 917.) This Court should reject amici's invitation to create a categorical duty to protect minors from third-party sexual abuse.

Recent decisions also confirm that the existing legal analysis does not change regardless of the plaintiff's age or the type of misconduct alleged. (See *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 865 [case involving sexual abuse of minor]; *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1127-1128 [same]; *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1227-1228 [same].) A general desire to protect our children from harm is no reason to assume the worst about our society and upend existing law.

The Consumer Attorneys also try to justify the radical change they propose by arguing that the duty analysis might be "complicated" at the demurrer stage. (Consumer Attorneys ACB 34-36.) The solution, they contend, is to force every case into years of costly discovery, summary judgment proceedings, and trial. (See *ibid.*) But they fail to explain how discovery might reveal facts supporting a special relationship that could not have been discovered during a thorough pre-litigation investigation. Indeed, courts can easily resolve—and have correctly resolved—many cases at the demurrer stage based on a plaintiff's

allegations. The Consumer Attorneys' thirst for litigation and increased court costs is no reason to do away with important legal principles, supported by public policy, that this Court has upheld time and time again.

Not only does public policy support the existing framework, it also cautions *against* adopting amici's proposed foreseeability-based test. Doing so would open the floodgates and promote litigation by allowing plaintiffs to drag defendants, even those with whom plaintiffs have no prior relationship, into court for no reason besides failing to protect them from a third party. This would exacerbate already-existing problems of litigation abuse, such as complaints brought not to seek justice but to coerce settlements. (See, e.g., *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350 [131 S.Ct. 1740, 179 L.Ed.2d 742] [noting the "risk of 'in terrorem' settlements that class actions entail"].) The broad proposed expansion of tort liability would also unjustifiably increase the costs to society. (See *S.E.C. v. Tambone* (1st Cir. 2010) 597 F.3d 436, 452 ["No one sophisticated about markets believes that multiplying liability is free of cost"] (conc. opn. of Boudin, J.).) And the creation of a new category of previously unrecognized claims would impose an intolerable burden on our already overworked and underbudgeted judicial system. All this with no corresponding benefit.

The extreme position taken by the Consumer Attorneys would also have sweeping implications far beyond cases involving sexual abuse of minors. Creating a presumption of a duty in all tort cases would wipe away not only the special relationship test

here, but also the negligent undertaking doctrine (see *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249), the economic loss doctrine (see *Southern California Gas Leak Cases*, *supra*, 7 Cal.5th at 414), the primary assumption of risk doctrine (see *Knight v. Jewett* (1992) 3 Cal.4th 296, 315-316), and many other existing authorities under which this Court begins with a general presumption that the defendant owes no duty to the plaintiff.

Finally, the Consumer Attorneys suggest that plaintiffs would be denied any remedy for the wrongs done to them if this Court finds that USAT and USOC owed no duty to plaintiffs. (Consumer Attorneys ACB 47.) Not so. Plaintiffs, like all persons injured at the hands of another, have a tort remedy against the person or entity that actually inflicted the injury.

As the Consumer Attorneys acknowledge, "[t]he overall policy of preventing future harm is ordinarily served, in tort law, by allocating the costs of negligent conduct to those responsible." (Consumer Attorneys ACB 49.) A finding that USAT and USOC owed no duty to plaintiffs reflects that they are not responsible for plaintiffs' harm. Gitelman—the individual responsible for abusing plaintiffs—has been convicted and sentenced to a long prison term. (See AA 50, 52-53; *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077, 1087 (*Brown*), review granted Jan. 2, 2020, S259216.) It is no secret that the Consumer Attorneys seek a remedy against not only the actual wrongdoer but also against national organizations such as USAT because they perceive that these organizations have "deep pockets." Public policy does not support forcing entities into litigation for years and exposing

them to multi-million-dollar judgments for harms for which they were not responsible just because the plaintiffs believe they have more resources than the individual who actually injured the plaintiffs.

In sum, this Court should follow more than 60 years of well-reasoned precedent and continue to apply the general no-duty presumption and the special relationship test. This Court should reject amici's proposal to upend its long-settled duty analysis. Not only is such a sweeping change unwarranted, it is also a decision best made by our Legislature, which can determine whether any potential benefit that might be gained by creating a brand-new category of tort claims outweighs the massive economic and societal costs of doing so.

II. This case arises from nonfeasance, not misfeasance, because plaintiffs allege that USAT failed to protect them from Gitelman's misconduct. Thus, the presumption is that USAT owed no duty to plaintiffs absent a special relationship.

Manly argues that this case arises from misfeasance rather than nonfeasance. (See Manly ACB 24-32.) The Consumer Attorneys again go even further and ask this Court to abolish the distinction between misfeasance and nonfeasance because "the difference between misfeasance and nonfeasance can appear to be only semantic." (Consumer Attorneys ACB 45-48.) Amici are wrong.

To begin with, the Consumer Attorneys' best attempt to rewrite a hypothetical automobile collision case based on misfeasance as one arising from nonfeasance shows the ease by

which a court can simply look at the allegations in a plaintiff's complaint to distinguish the two. (Consumer Attorneys ACB 45-48 ["For example, an automobile collision can be described as misfeasance (the driver actively drove into the rear-end of another car) or nonfeasance (the driver merely failed to apply the brakes)"].) The Consumer Attorneys' hypothetical case arises from misfeasance because the allegations would stem from the driver's negligence in driving his car into another car; whether that negligence arose from a failure to apply the brakes or otherwise is immaterial. The case does not arise from nonfeasance because there would be no allegation that the driver was negligent by failing to protect the people in the car in front from a third party's misconduct.

Likewise, amici's attempt to repackage plaintiffs' complaint here as one alleging misfeasance fails. (See Manly ACB 24-32; Consumer Attorneys ACB 45-48.) In fact, the allegations highlighted by Manly's brief show that plaintiffs' claims arise from nonfeasance (USAT's and USOC's alleged failure to protect them from Gitelman's misconduct), not from misfeasance (affirmative acts by USAT and USOC that harmed plaintiffs).[1] (See Manly ACB 26 ["USOC and USAT did nothing to take reasonable steps to protect against such abuse"]; *ibid.* ["As alleged, neither USOC nor USAT had any policies in place . . ."]; see also Manly ACB 27 ["As alleged in the complaint, USOC and

---

[1] The Consumer Attorneys barely discuss the allegations in plaintiffs' complaint; instead, they rely on a third-party report that no party discussed in either the trial court or the Court of Appeal. (See Consumer Attorneys ACB 18-22.)

USAT not only failed to have policies and procedures to protect minor athletes from sexual abuse by their coaches, but also 'failed to have any policies, procedures or oversight for ensuring that the Code [of Ethics that did exist] was being *adhered to*' "].)

Amici also contend that USAT has a duty under Civil Code section 1714 "toward those foreseeably affected by [their] business activities," including plaintiffs. (Manly ACB 24; see Manly ACB 26 [arguing USAT and USOC owed plaintiffs a duty because they engaged in the "ongoing business activity of organizing, sanctioning[,] and regulating sports competitions where minors participated"].) Amici argue that USAT and USOC created or increased a risk of harm to plaintiffs. (See Manly ACB 25 [arguing that defendants "created the very platform for elite minor athletes to compete and as such had a duty to act reasonably in fostering a safe environment for its minor athletes" (emphasis omitted)]; Consumer Attorneys ACB 47 [arguing distinction between "a defendant whose conduct created or increased a risk of harm to the plaintiffs" and "a defendant who merely failed to benefit the plaintiff by coming to his aid"].)

The leading case amici cite does not support these arguments. (See Manly ACB 28-29, citing *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703 (*Lugtu*).) In *Lugtu*, this Court concluded that a police officer has a duty to exercise reasonable care for the safety of persons stopped by the officer, including a duty not to expose them to unreasonable risk of injury by third parties. (*Lugtu*, at p. 718.) In reaching that conclusion, this Court applied longstanding precedent "uniformly

hold[ing] that a police officer who exercises his or her authority to direct another person to proceed to—or stop at—a particular location, owes such a person a duty to use reasonable care in giving that direction, so as not to place the person in danger or to expose the person to an unreasonable risk of harm." (*Id.* at p. 717.)

Lugtu's analysis is unique to the law enforcement context and simply follows one of the recognized special relationships that creates a duty—custodians with those in their custody. (See Rest.2d Torts, § 320 ["Duty of Person Having Custody of Another to Control Conduct of Third Persons"].) No such exception applies here.

Amici also misplace their reliance on *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206 (*Pamela L.*). (See Manly ACB 30-31.) There, the wife invited the minor plaintiffs to her home, assured their parents that it would be safe, and left the plaintiffs alone with her husband despite knowing her husband had a history of sexual abuse. (*Pamela L.*, at pp. 208-209.) Under those circumstances, the Court of Appeal concluded that the wife's affirmative acts made the plaintiffs' position worse and created the foreseeable risk of abuse by her husband. (*Id.* at p. 209.)

Pamela L. does not apply here for two reasons. First, *Pamela L.* applied the special relationship that exists between an adult who invites a minor into their home. (See *Pamela L.*, *supra*, 112 Cal.App.3d at pp. 211-212; *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1080-1081 ["an 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"].) This is just an offshoot of the recognized special relationship "between a possessor of land and members of the public who enter in response to the landowner's invitation." (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 806.) The reasoning is that an adult who invites a minor into her home satisfies the elements of dependency and control needed for a special relationship. No such reasoning or relationship exists here.

Second, the plaintiffs in *Pamela L.* did not base their allegations on the wife's failure to protect them from the husband's abuse, but on the wife's affirmative acts that created the risk of harm. (See *Pamela L.*, *supra*, 112 Cal.App.3d at p. 210.) By contrast, plaintiffs here base their allegations on USAT's and USOC's alleged failure to protect them by implementing policies and procedures, such as a code of ethics, that might have prevented Gitelman from abusing them. (See AA 45-49.) The entire case turns on USAT's and USOC's alleged *inaction*—that is, nonfeasance.

III. *Southern California Gas Leak Cases* and *Biakanja* do not support applying amici's proposed foreseeability-based tests to cases in which a plaintiff alleges a defendant failed to protect the plaintiff from third-party misconduct.

Amici argue that *Southern California Gas Leak Cases*, *supra*, 7 Cal.5th 391 and *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) support adoption of a foreseeability-based analysis

here. (See Manly ACB 11; Consumer Attorneys ACB 28-30, 50-53.) They are wrong.

Southern California Gas Leak Cases and *Biakanja* address a separate concept of duty not at issue here—whether a defendant has a duty to protect a plaintiff from purely economic losses caused by the defendant's conduct. In those cases, this Court does not apply the general duty rule under Civil Code section 1714; instead, it applies the longstanding economic loss doctrine, a general no-duty rule under which the law presumes the defendant owes no duty to the plaintiff. (See, e.g., *Southern California Gas Leak Cases*, *supra*, 7 Cal.5th at p. 414; *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1013-1014; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58; *Bily*, *supra*, 3 Cal.4th at pp. 396-399; *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804; *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18; *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636-637.)

In *Biakanja*, *supra*, 49 Cal.2d at page 650, this Court established a multi-factor test to determine when to apply an exception to the general no-duty rule. This test generally requires a plaintiff to show that he "was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." (*Southern California Gas Leak Cases*, *supra*, 7 Cal.5th at p. 400.) *Southern California Gas Leak Cases* merely represents the latest in a long line of cases applying that framework, which is irrelevant to cases like this in which a third party caused the plaintiff's harm. Thus, neither *Southern*

California Gas Leak Cases nor *Biakanja* supports a foreseeability-based analysis here.

IV. The special relationship test requires a custodial or supervisory relationship between the defendant and the plaintiff or the ability of the defendant to control the third party. A mere commercial relationship is not a special relationship.

USAT explained in its answer brief that the special relationship test turns on whether the defendant has a custodial or supervisory relationship with the plaintiff or the ability to control the third party's conduct on a contemporaneous, day-to-day basis. (USAT ABOM 43-48; see *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 79-81 (*Barenborg*).)

The Consumer Attorneys contend that this Court should find that a "commercial relationship" between a defendant and a plaintiff by itself creates a special relationship and a tort duty. (Consumer Attorneys ACB 42-44.) But the Consumer Attorneys cite no authority, and USAT is unaware of any, finding that a mere commercial relationship between two parties is enough to support a special relationship. The Consumer Attorneys cite *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 297 and the Restatement Third of Torts, Liability for Physical and Emotional Harm, section 40, comment h, page 43. (Consumer Attorneys ACB 43.) But neither *Nally* nor the Restatement states that a commercial relationship by itself creates a special relationship.

Of course, special relationships might have a commercial component. (See, e.g., *Regents*, *supra*, 4 Cal.5th at p. 621 ["Retail

stores or hotels could not successfully operate, for example, without visits from their customers and guests"].) But those special relationships do not depend on the commercial nature of the relationship. Instead, as this Court has repeatedly affirmed, the test depends on dependency and control. (See *id.* at pp. 620-621.) For example, a common carrier has "a duty to protect passengers from onboard violence" not because the carrier has a commercial relationship with its passengers, but because "passengers are sealed together in a moving vehicle, with the means of entry and exit under the exclusive control of the driver." (*Id.* at p. 621.)

The Consumer Attorneys' proposed commercial relationship test would mean that any two parties who enter a commercial transaction would have a legal duty to protect each other from third-party misconduct. This Court should reject such a test.[2]

Amici also repeat many of plaintiffs' arguments about whether USAT or USOC had a special relationship either with plaintiffs or with Gitelman. (See, e.g., Manly ACB 32-42.) Manly's brief goes even further and suggests that organizations should *always* have a duty to protect minors from sexual abuse perpetrated by third parties. (See *ibid.*) USAT has already explained why no special relationship exists (see USAT ABOM

---

[2] A commercial relationship test would fail here in any event because plaintiffs do not allege they had a commercial relationship with USAT. The Consumer Attorneys simply contend that USAT (and USOC) "commercially benefit[ ]" from the participation of Olympic athletes. (Consumer Attorneys ACB 13, 48.)

43-48) and why, without a special relationship, a defendant has no duty regardless of whether the plaintiff is a minor or the allegations involve sexual abuse (see USAT ABOM 39-43). In short, USAT lacked a custodial or supervisory relationship with plaintiffs, and it could not control Gitelman's conduct on a day-to-day basis from its headquarters in Colorado.

V. The special relationship test must be analyzed separately for each defendant and depends on each defendant's relationship with plaintiffs or with Gitelman, not each defendant's position relative to the other.

USAT agrees with most of the NCAA's amicus brief supporting USOC. But the NCAA's brief is mistaken when it suggests that the special relationship analysis can turn on whether USAT was "better situated" than USOC to protect plaintiffs from Gitelman's misconduct. (See NCAA ACB 40 [suggesting that USAT was in a better position than USOC to control Gitelman's actions].) So too was the Court of Appeal's suggestion that USAT had a special relationship with Gitelman because it was in "the best position" *compared to USOC* to protect plaintiffs from Gitelman. (*Brown*, *supra*, 40 Cal.App.5th at pp. 1094, 1100, 1102-1103.)

No authority supports a test that compares the relative positions of two or more parties who happen to be named as defendants to protect a plaintiff from harm caused by a third party. The special relationship test depends on each defendant's own relationship with either the plaintiff or with the third party who caused the harm. (See *Regents*, *supra*, 4 Cal.5th at pp. 620-

621.) Thus, if neither USAT nor USOC had a custodial or supervisory relationship with plaintiffs or the ability to control Gitelman's conduct, then neither defendant owed plaintiffs a duty regardless of whether one defendant might theoretically have been in a better position than the other to prevent the harm.

Indeed, the Court of Appeal below cited *Barenborg*, *supra*, 33 Cal.App.5th at page 78, in which the court noted that the key to a special relationship between a defendant and the third party " ' "is that the defendant's relationship with . . . *the tortfeasor* . . . places the defendant in the best position [vis-à-vis the tortfeasor] to protect against the risk of harm." ' " (Emphasis added.) The question is not whether USAT was in a better position than USOC to protect plaintiffs from Gitelman; it is whether USAT was in a better position than Gitelman to protect against the risk of harm. And the answer is no.

VI. This Court should not consider the Consumer Attorneys' argument that the Ted Stevens Olympic and Amateur Sports Act creates a statutory duty, an argument no party has raised. In any event, the Act does not create a statutory duty.

The Consumer Attorneys argue that the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 et seq., gives rise to a statutory duty. (Consumer Attorneys ACB 22-28.) Plaintiffs did not present this argument in the trial court or on appeal, and amici may not raise new issues. (See *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511 [stating the "general rule that an amicus curiae accepts the case as he finds it and may not 'launch out upon a juridical expedition

of its own unrelated to the actual appellate record' "]; *California Ass'n for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274-1275 ["California courts refuse to consider arguments raised by amicus curiae when those arguments are not presented in the trial court, and are not urged by the parties on appeal"]; accord, *United States v. Sineneng-Smith* (2020) 590 U.S. __ [140 S.Ct. 1575, 1581, 206 L.Ed.2d 866] [holding Ninth Circuit erred in relying on arguments advanced only by amici on appeal and not by the parties].)

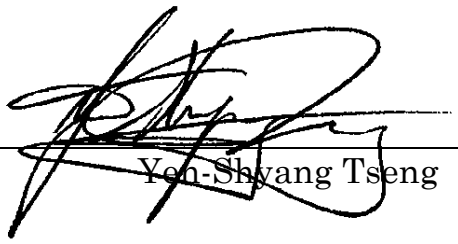
In any event, the Consumer Attorneys are wrong—and practically admit as much. (See Consumer Attorneys ACB 28 ["the Ted Stevens Act is not a model of clarity as to the extent to which the USOC owed a duty to the minor Olympic athletes . . . ."].) Among other reasons, the statute specifically precludes a private right of action. (36 U.S.C. § 220505(b)(9) ["neither this paragraph nor any other provision of this chapter shall create a private right of action under this chapter"]; see *Michels v. United States Olympic Committee* (7th Cir. 1984) 741 F.2d 155, 157 ["The [Ted Stevens] Act contains no express private cause of action. . . . [¶] The legislative history of the Act clearly reveals that Congress intended not to create a private cause of action under the Act."].) Thus, it does not create a statutory duty. But if this Court is inclined to consider the Consumer Attorneys' argument, USAT requests the opportunity to file a supplemental brief addressing this issue.

CONCLUSION

This Court should reject amici's arguments, apply its existing framework, find that USAT owed no duty to plaintiffs, and reverse the Court of Appeal's decision as to USAT.

November 12, 2020

HORVITZ & LEVY LLP
MITCHELL C. TILNER
STEVEN S. FLEISCHMAN
YEN-SHYANG TSENG
KJAR, McKENNA & STOCKALPER, LLP
PATRICK E. STOCKALPER
MATTHEW A. SCHILLER

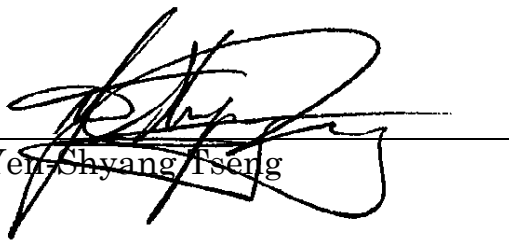
By: 
Yen-Shyang Tseng

Attorneys for Defendant and Respondent
USA TAEKWONDO

CERTIFICATE OF WORD COUNT

The text of this brief consists of 5,418 words as counted by the program used to generate the brief.

Dated: November 12, 2020



Yen-Shyang Tseng

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

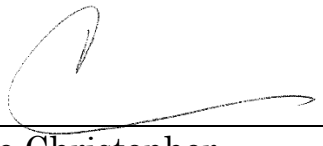
On November 12, 2020, I served true copies of the following document(s) described as **COMBINED ANSWER TO AMICI CURIAE BRIEFS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on November 12, 2020, at Burbank, California.



Connie Christopher

SERVICE LIST
BROWN v. USA TAEKWONDO et al.
Case No. S259216

Stephen J. Estey Estey & Bomberger LLP 2869 India Street San Diego, CA 92103	Attorneys for Plaintiffs and Appellants KENDRA GATT BRIANNA BORDON YAZMIN BROWN
B. Robert Allard Corsiglia McMahon & Allard, LLP 96 North 3rd Street, Suite 620 San Jose, CA 95112-1733	Attorneys for Plaintiffs and Appellants KENDRA GATT BRIANNA BORDON YAZMIN BROWN
Jon R. Williams Williams Iagmin LLP 666 State Street San Diego, CA 92101	Attorneys for Plaintiffs and Appellants KENDRA GATT BRIANNA BORDON YAZMIN BROWN
Kenneth C. Turek Turek Law P.C. 603 North Highway 101 Suite C Solana Beach, CA 9207	Attorneys for Plaintiffs and Appellants KENDRA GATT BRIANNA BORDON YAZMIN BROWN
Patrick E. Stockalper Matthew A. Schiller Kjar, McKenna & Stockalper, LLP 841 Apollo Street, Suite 100 El Segundo, CA 90245-4641	Co-Counsel for Defendant and Respondent USA TAEKWONDO
Margaret M. Holm M. Christopher Hall Clyde & Co US LLP 2020 Main Street, Suite 1100 Irvine, CA 92614-8234	Attorneys for Defendant and Respondent UNITED STATES OLYMPIC COMMITTEE

Douglas J. Collodel Clyde & Co US LLP 355 South Grand Avenue Suite 1400 Los Angeles, CA 90017	Attorneys for Defendant and Respondent UNITED STATES OLYMPIC COMMITTEE
Beth S. Brinkmann Covington & Burling LLP One City Center 850 10th Street NW Washington, DC 20001	Attorneys for Defendant and Respondent UNITED STATES OLYMPIC COMMITTEE
Mitch A. Kamin Carolyn J. Kubota Covington & Burling LLP 1999 Avenue of the Stars Suite 3500 Los Angeles, CA 90067	Attorneys for Defendant and Respondent UNITED STATES OLYMPIC COMMITTEE
Holly Noelle Boyer Shea S. Murphy Esner Chang & Boyer 234 East Pasadena, Suite 975 Pasadena, CA 91101	Attorneys for Amici Curiae MANLY STEWART & FINALDI NATIONAL CRIME VICTIM BAR ASSOCIATION
Hailyn J. Chen John Blackston Major Munger Tolles & Olson LLP 350 South Grand Ave.,, 50th Floor Los Angeles, CA 90071 Donald B. Verrilli Munger Tolles & Olson, LLP 1155 F Street NW Washington, DC 20004	Attorneys for Amicus Curiae NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

David M. Arbogast Arbogast Law 7777 Fay Avenue, Suite 202 La Jolla, CA 92037-4324 Benjamin I. Siminou Siminou Appeals 2305 Historic Decatur Road Suite 100 San Diego, CA 92106 Ian I. Herzog Herzog Yuhas Ehrlich & Ardell, APC 11400 West Olympic Boulevard, Suite 1150 Santa Monica, CA 90401 Steven M. Bronson The Bronson Firm APC 7777 Fay Avenue, Suite 202 La Jolla, CA 92037-4324	Attorneys for Amicus Curiae CONSUMER ATTORNEYS OF CALIFORNIA
Hon. Michael P. Vicencia Los Angeles Superior Court Governor George Deukmejian Courthouse, dept. S26 275 Magnolia Avenue Long Beach, CA 90802 (562) 256-2222	Trial Judge: Case No. BC599321 via: US Mail
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

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: **ytseng@horvitzlevy.com**

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	Combined Answer to Amici Curiae Briefs

Service Recipients:

Person Served	Email Address	Type	Date / Time
Douglas Collodel Clyde & Co US LLP 112797	douglas.collodel@clydeco.us	e-Serve	11/12/2020 11:51:18 AM
Margaret Holm Clyde & Co US LLPP 071252	margaret.holm@clydeco.us	e-Serve	11/12/2020 11:51:18 AM
Mitchell Tilner Horvitz & Levy LLP 93023	mtilner@horvitzlevy.com	e-Serve	11/12/2020 11:51:18 AM
B. Allard Corsiglia McMahon & Allard, LLP 175592	rallard@cmalaw.net	e-Serve	11/12/2020 11:51:18 AM
M. Hall Clyde & Co US LLP	christopher.hall@clydeco.us	e-Serve	11/12/2020 11:51:18 AM
Connie Christopher Horvitz & Levy LLP	cchristopher@horvitzlevy.com	e-Serve	11/12/2020 11:51:18 AM
Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	11/12/2020 11:51:18 AM
Angelo McCabe Clyde & Co US LLP	angelo.mccabe@clydeco.us	e-Serve	11/12/2020 11:51:18 AM
Beth Brinkmann Convington Burling, LLP 129937	bbrinkmann@cov.com	e-Serve	11/12/2020 11:51:18 AM
Ian Herzog Herzog Yuhas Ehrlich & Ardell, APC	herog@ix.netcom.com	e-Serve	11/12/2020 11:51:18 AM
Jon Williams Williams Iagmin LLP 162818	williams@williamsiagmin.com	e-Serve	11/12/2020 11:51:18 AM
Evan Okamura	eokamura@rmkws.com	e-	11/12/2020

Reback, McAndrews, Kjar, Warford & Stockalper, LLP		Serve	11:51:18 AM
David Arbogast Arbogast Law 167571	david@arbogastlaw.com	e-Serve	11/12/2020 11:51:18 AM
Hailyn Chen Munger Tolles & Olson LLP 237436	hailyn.chen@mto.com	e-Serve	11/12/2020 11:51:18 AM
Kenneth Turek Turek Law P.C.	ken@kenturek.com	e-Serve	11/12/2020 11:51:18 AM
Steven Bronson The Bronson Firm APC	sbronson@thebronsonfirm.com	e-Serve	11/12/2020 11:51:18 AM
Holly Boyer Esner, Chang & Boyer 221788	hboyer@ecbappeal.com	e-Serve	11/12/2020 11:51:18 AM
Yen-Shyang Tseng Horvitz & Levy, LLP 282349	ytseng@horvitzlevy.com	e-Serve	11/12/2020 11:51:18 AM
Stephen Estey Estey & Bomberger LLP 163093	steve@estey-bomberger.com	e-Serve	11/12/2020 11:51:18 AM
William Jarboe Covington & Burling LLP	wjarboe@cov.com	e-Serve	11/12/2020 11:51:18 AM
Benjamin Siminou Siminou Appeals 254815	ben@siminouappeals.com	e-Serve	11/12/2020 11:51:18 AM
Patrick Stockalper Kjar, McKenna & Stockalper, LLP 156954	pstockalper@kmslegal.com	e-Serve	11/12/2020 11:51:18 AM
Matthew Schiller Kjar, McKenna Stockalper 306662	mschiller@kmslegal.com	e-Serve	11/12/2020 11:51:18 AM
Chenin Andreoli Williams Iagmin LLP	andreoli@williamsiagmin.com	e-Serve	11/12/2020 11:51:18 AM
Steven Fleischman Horvitz & Levy LLP 169990	sfleischman@horvitzlevy.com	e-Serve	11/12/2020 11:51:18 AM

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.

11/12/2020

Date

/s/Yen-Shyang Tseng

Signature

Tseng, Yen-Shyang (282349)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm