S.Ct. Case No.: S259216

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

YAZMIN BROWN, *et al.*
Appellants/Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
Defendant/Respondent.

After Decision by the Court of Appeal
Second Appellate District, Div. Seven (B280550)
(Superior Court of Los Angeles County, Hon. Michael P. Vicencia
BC599321)

PETITIONERS' OPENING BRIEF ON THE MERITS

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BROWN, et al. v. USA TAEKWONDO, et al.
Supreme Court of the State of California
CA Supreme Court Case No.: S259216
Court of Appeal Case No.: B280550
Los Angeles County Superior Court Case No.: BC599321

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Supreme Court Case Number: S259216

Case Name: BROWN, *et al*. v. USA TAEKWONDO, *et al.*

Please check the applicable box:

X Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Brianna Bordon	Plaintiff/Petitioner
2. Yazmin Brown	Plaintiff/Petitioner
3. Kendra Gatt	Plaintiff/Petitioner

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Petitioners and Appellants, KENDRA GATT, BRIANNA BORDON, and YAZMIN BROWN (collectively "Petitioners"), hereby submit this Opening Brief on the Merits in proceedings before this Court reviewing the published decision of the Court of Appeal, Second Appellate District, Division Seven (per Justices Feuer, Perluss, Zelon) issued on October 8, 2019, affirming the trial court's Judgment in favor of Defendant/Respondent, UNITED STATES OLYMPIC COMMITTEE in the underlying sexual abuse dispute.[1]

I.

ISSUE PRESENTED

On January 2, 2020, the Court granted review in this matter to consider the following question:

1. 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?

[1] All factual citations in this Opening Brief are to the official citation of the Court of Appeal's Opinion, following modification (*Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077); and to the Appellant's Appendix, abbreviated as: ([volume] AA [page]).

II.

INTRODUCTION

In recent years, Defendant/Respondent, UNITED STATES OLMPIC COMMITTEE ("USOC"), has come under increasing scrutiny for its complicity in numerous sexual molestation cases involving USOC-sanctioned coaches and female swimmers, gymnasts, and soccer players. The underlying case is no different, and involves yet another USOC "National Governing Body" or "NGB," USA TAEKWONDO ("USAT"), through which a particular coach, Mark Gitelman ("Gitelman"), was allowed to repeatedly molest Petitioners, the minors he purported to coach to be Olympic athletes.

The issue now before this Court concerns the appropriate legal criteria to be applied in determining whether USOC owed a duty of care to those Olympic athletes to protect them from Gitelman's known sexual predation. In various contexts, two tests have evolved to answer that question: (1) the Restatement's "Special Relationship" test; and (2) the "*Rowland* factors" test, derived from this Court's seminal decision in *Rowland v. Christian* (1968) 69 Cal.2d 108. While some courts have employed *both* tests to determine the existence and scope of such a duty

of care, viewing them as *independent, alternative bases* on which such a duty could be established (see, *e.g., Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 293; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 400-411; *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 913-918), other courts have viewed the *Rowland* factors test only as a subsidiary mechanism to limit or qualify a duty if it is first established under the Restatement's Special Relationship test (see, *e.g., Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1129-1139*; Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 244-248).

In the Court's most recent consideration of that issue in *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 620-634, it found that a special relationship existed between a university and a student under the Restatement's Special Relationship test, and then further concluded that an examination of the *Rowland* factors did not require eliminating or otherwise limiting that special relationship duty. The Court in *Regents,* however, did not address the varying manner by which it, and the Courts of Appeal, have applied those two tests in the past, and whether *either* or *both* must be satisfied to establish a duty of care. Yet on the heels of *Regents,* at least one Court of Appeal cited the

Regents decision as requiring that plaintiffs must satisfy *both* the Special Relationship test *and* the *Rowland* factors test before such a duty of care can be established. (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 77.) Although this Court did not make that finding in *Regents* – and the *Barenborg* court's citation to *Regents* for that proposition is not supported by the cited page in the *Regents* decision – the confusion and conflict about which tests must be applied in similar circumstances persists.

The Court of Appeal's Opinion in this case throws that conflict into sharp relief. While the Court of Appeal applied the Special Relationship test *and* the *Rowland* factors test to conclude that USAT owed Petitioners a duty of care to protect them from the sexual abuse of their coach, Gitelman, it cited *Barenborg* for the proposition that Petitioners were required to satisfy *both* of those tests to establish that duty of care. (*Brown, supra,* 40 Cal.App.5th at 1092.) When it subsequently applied that same analysis to USOC, the Court of Appeal observed that because it first concluded that no special relationship existed between USOC and Petitioners under the Restatement's Special Relationship test, no duty of care could otherwise be established under the *Rowland* factors test. (*Id.*

at 1103.) In doing so, the Court of Appeal viewed the *Rowland* factors test as merely a *subsidiary qualifying test* which need only be examined if the Restatement's Special Relationship test is first satisfied, and thereby refused to apply the *Rowland* factors test to USOC at all. (*Ibid*.) Consequently, the Court of Appeal applied *two different legal criteria to USAT and USOC*, and perhaps not surprisingly, reached two different results concerning the duties each owed to protect the Petitioners from sexual abuse.

Petitioners now ask this Court to examine the separate underpinnings of the Restatement's Special Relationship test and the common law *Rowland* factors test, and to clarify that they represent *independent, alternative bases on which to establish a duty of care to protect minor plaintiffs from sexual abuse by third parties*. To be sure, victims of sexual abuse, like the minor Petitioners here, should not be required to clear unnecessary legal hurdles to properly plead and prove their claims, but rather should be able to proceed if they can satisfy *either* the Special Relationship *or* the *Rowland* factors tests, as both this Court and the Courts of Appeal have permitted in the past.

Petitioners then requests this Court to correctly apply *both* the Special Relationship test and the *Rowland* factors test to USOC, and in so doing, to conclude under *either* test that USOC owed Petitioners a cognizable duty of care and that their claims in the lower court can therefore proceed against both USAT and USOC.

III.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. Background.

USOC is the national organizing entity of all Olympic sports in the United States. (1 AA 40.)[2] In that capacity, USOC has the power and ability to control the actions of its 49 affiliate NGBs (including USAT) in the operation of their respective businesses and enterprises. In particular, in accordance with the mandates of the Ted Stevens Amateur Sports Act (36 U.S.C. § 220501, *et seq*.), USOC exclusively certifies organizations to be the NGB of all summer and winter Olympic Sports in

[2] Because this case came to the Court of Appeal – and comes to this Court now – after the trial court sustained USOC's demurrer without leave to amend, this Court admits as true all material facts properly pled in Petitioners' operative First Amended Complaint ("FAC"). (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439-440.)

the United States. (*Ibid.*) USOC also can take disciplinary actions against the NGBs it certifies, including decertifying an NGB, which terminates that NGB's relationship with the Olympic movement in the United States. (*Ibid.*) USOC can also place an NGB on probation and assume some or all of the governance functions of an NGB, as well as appoint an advisory board to oversee an NGB. (*Ibid.*)[3]

B. History and Notice of Sexual Predation in USOC's NGBs.

As Petitioners alleged in their operative FAC, since at least the 1980s, USOC has had actual knowledge that numerous minor female athletes were raped at the Olympic Training Centers in Marquette, Michigan; Colorado Springs, Colorado; and Lake Placid, New York. (1 AA 41.) Moreover, that same misconduct has also continued abroad, with USAT's delegation being kicked out of their rented house in Barcelona, Spain during the 1992 Summer Olympic Games because the Spanish landlord walked in on the National team coach, a middle-aged man, having sex with a young female Olympian. (*Ibid.*) USOC had actual knowledge of that Barcelona eviction of the USAT delegation. (*Ibid.*)

[3] As Petitioners alleged in their FAC, USOC placed USAT on probation from 2011 to 2013. (1 AA 40-42.)

Sexual molestation of minor athletes in USOC's certified NGBs by credentialed coaches was so rampant that USOC required all NGBs to have specific insurance coverage to cover that sexual abuse. (1 AA 41.) NGBs that did not meet that requirement had their access to the Olympic Training Centers restricted or completely denied by USOC. (*Ibid.*) By 1999, all NGBs had purchased the USOC required sexual abuse insurance coverage except United States Swimming. (*Ibid.*)

Given the pervasive nature of that history of molestations, in 2010, USOC appointed a task force to study sexual abuse of minor athletes by adult coaches in Olympic Sports. (1 AA 41.) That task force mandated that all NGBs adopt a "Safe Sport Program" to protect athletes from sexual abuse. As a result, USOC required that each of its NGBs implement a USOC-approved Safe Sport program by 2013. (1 AA 42.) Further, between 2013 and 2016, USOC required that each NGB contribute money towards the funding of a "US Center for Safe Sport" ("Safe Sport Center") that would purportedly handle allegations of sexual abuse of athletes in Olympic Sports. (*Ibid.*)

Despite those USOC requirements, Petitioners alleged that USAT failed to implement a USOC-approved Safe Sport Program by 2013. As

a result of that failure, coupled with "numerous instances of self-dealing among [USAT] board members," USOC placed USAT on probation. (1 AA 40-42.) However, sometime after USAT eventually adopted a "Code of Ethics" prohibiting sexual relationships between coaches and athletes (regardless of the age of the athlete), which ostensibly complied with the requirements of USOC's Safe Sport Program, USOC terminated USAT's probation status. (1 AA 42.)

C. Gitelman's Sexual Abuse of Petitioners.

Beginning in 2007 and continuing until his arrest in Los Angeles, California in August 2014, Gitelman sexually abused and repeatedly molested Petitioners. (1 AA 44.) Petitioners further alleged that Gitelman similarly molested numerous other female athletes during that same time period. (*Ibid*.) Those molestations and abuse began at events sponsored and promoted by USAT and USOC, both in California and throughout the country. (*Ibid*.)

During the period of 2007 through his arrest in 2014, Gitelman did not attempt to hide his relationships with Petitioners. Instead, he openly carried on inappropriate relationships with each Petitioner, and those relationships with each Petitioner were "common knowledge" throughout

the sport of taekwondo. (1 AA 44.) Given the brazen openness of Gitelman's actions directed at Petitioners – behaviors displayed in public and at competitions USAT and USOC sanctioned and sponsored – Petitioners further alleged that USAT and USOC knew, or in the exercise of reasonable diligence should have known, that Gitelman was violating their Code of Ethics and was carrying on improper sexual relationships with Petitioners. (*Ibid.*)

Yet at that time, USAT and USOC amazingly did not have any policies in place prohibiting coaches from traveling alone to competitions with minor athletes, and did not have policies prohibiting coaches from staying in hotel rooms with minor athletes. (*Ibid.*) This was so despite the fact that at least by 2007, sexual abuse of minors by figures of authority (like priests, coaches, and scout leaders) was a widely known risk in youth organizations. Indeed, Petitioners alleged that USAT and USOC were, in fact, aware that female taekwondo athletes, and Olympic level athletes in general, were frequently victims of sexual molestation by their coaches, yet did nothing to protect those athletes from such abuse, failing to have any policies, procedures, or oversight for ensuring

that minor female athletes, including Petitioners, were not easy victims of molestation by their coaches. (1 AA 45.)

For its part, by early 2014, USOC had actual knowledge that Gitelman was still coaching despite the recommendation of USAT's Ethics Committee that his membership be terminated. (1 AA 43-44.) Specifically, in March of 2014, USOC Board members circulated an e-mail to three USOC executives about Gitelman, demanding action, especially since USAT's President refused to take action on the suspension of Gitelman recommended by its Ethics Committee. But instead of acting on that e-mail and USAT's Ethic's Panel recommendation, USOC did nothing, allowing Gitelman to continue coaching for another year alongside Petitioners and other minor, female athletes. (1 AA 42-45.)

It was not until September 2015, when Gitelman was convicted of sexually abusing Petitioners, that USAT banned him from coaching. In the interim, USOC – the organization entrusted by Congress under federal law to oversee Olympic sports in America and the activities of all of its NGBs – stood idle. (1 AA 44.)

D. Proceedings in the Trial Court.

Petitioners filed their original action against Gitelman, USOC, USAT, and other defendants on October 29, 2015. (1 AA 6-31.) USOC and USAT responded by bringing demurrers to that original Complaint, which were sustained with leave to amend by the trial court. (1 AA 32-36.)

Petitioners then filed their operative FAC. (1 AA 37-62.) That amended pleading was again met with a similar onslaught of challenges by USOC and USAT, with both again filing demurrers and motions to strike. (1 AA 63-158.) Petitioners opposed those motions (1 AA 159-198), and both USOC and USAT replied (1 AA 199-232). Ultimately, the trial court granted both USOC's and USAT's demurrers to all causes of action Petitioners' alleged against them – this time *without* any further leave to amend – denying their companion motions to strike as moot. (1 AA 233-243.) After judgment of dismissals were entered in favor of both USOC and USAT (1 AA 254-274), Petitioners' timely appeal then followed (1 AA 275-278.)

E. The Court of Appeal's Opinion.

As previewed above, the Court of Appeal reversed the lower court's Judgment as to USAT only, affirming it as to USOC.

Specifically, the Court of Appeal applied the Special Relationship test to USAT, concluding that Petitioners had properly pled that USAT owed a special relationship to protect them from the years of sexual abuse they suffered at the hands of USAT's certified coach, Gitelman. (*Brown, supra,* 40 Cal.App.5th at 1094-1095.) Upon doing so, the Court of Appeal concluded that relationship existed because, among other things, "USAT was in a unique position to protect youth athletes against the risk of sexual abuse by their coaches." (*Ibid.*)

The Court of Appeal then applied the *Rowland* factors test to USAT – not as an independent basis to establish a duty of care – but to determine whether the special relationship duty it previously found under the Restatement test needed to be limited or altogether eliminated. (*Id.* at 1095-1101.) Nevertheless, even utilizing the *Rowland* factors test in that subsidiary manner and examining each element of that multi-factor test, the Court of Appeal ultimately (and correctly) concluded that "the *Rowland* factors support recognition of USAT's duty to use

reasonable care to protect taekwondo youth athletes from foreseeable sexual abuse by their coaches." (*Ibid.*) In short, after applying both the Restatement's Special Relationship test and the *Rowland* factors test, the Court of Appeal ultimately concluded that Petitioners claims could proceed against USAT. (*Ibid.*)

With respect to USOC, the Court of Appeal again first employed the Restatement's Special Relationship test but reached a different conclusion, finding that USOC did not owe a special relationship to Petitioners under that particular test. (*Id.* at 1101-1103.) Notably, in doing so the Court of Appeal attempted to distinguish its analysis from that undertaken by other Courts of Appeal which reached a contrary result after they applied *both* the Special Relationship test and the *Rowland* factors test in determining the existence of a duty of care. (See *ibid.* [discussing *Juarez, supra,* 81 Cal.App.4th 377; *Doe 1 v. City of Murrieta, supra,* 102 Cal.App.4th 899; and *Conti v. Watchtower Bible & Tract Society of New York* (2015) 235 Cal.App.4th 1214].) Yet even acknowledging the approach taken by the Courts of Appeal in those other cases, the Court of Appeal in this case not only found that no special relationship existed between USOC and Petitioners under the

Restatement, but on that same basis then further declined to apply the *Rowland* factors test at all to USOC. (*Ibid.* ["Because USOC does not have a special relationship with Gitelman or plaintiffs, it does not have a duty to protect plaintiffs. Therefore, we do not consider the *Rowland* factors as to USOC"].) After reaching that conclusion and refusing to apply the *Rowland* factors test to USOC, the Court of Appeal affirmed the lower court's Judgment in favor of USOC. (*Id.* at 1109.)

IV.

DISCUSSION

A. The Nature of the Conflict Now Before This Court.

1. Decisions Treating the Restatement's Special Relationship Test and the *Rowland* Factors Test as Independent Paths to Find a Duty of Care.

As previewed above, this Court and the Courts of Appeal have developed widely varying approaches for determining whether a duty of care to protect against the sexual abuse of third parties can be established. One line of authority looks to *both* the Special Relationship test and the *Rowland* factors test as *independent bases* on which such a duty of care can be established, and therefore *examines both alternative*

*th*eories to properly conduct that analysis. This Court's early decision in *Nally, supra,* 47 Cal.3d at 293, analyzed both the special relationship doctrine and the *Rowland* factors test in deciding whether church pastors had a duty to prevent a foreseeable suicide, proceeding with that *Rowland* analysis even after finding no special relationship. (See also *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203-209 [decided by this Court before *Nally,* in which the Court also applied *both* the Special Relationship test and the *Rowland* factors to analyze the existence of a duty].) Subsequently, in *Juarez, supra,* 81 Cal.App.4th at 400-411, the First District applied the *Rowland* factors test first to find a duty of care owed by the Boy Scouts of America national organization to a scout molested by his Scout Master, and then only reluctantly applied the Special Relationship test as "an alternative analysis" to further support its prior duty finding under *Rowland*. In doing so, *Juarez* questioned the utility of the Restatement's Special Relationship test, noting how it was not relying on that test "as the analytical underpinning for our conclusion that a duty of care was owed by the Scouts to Juarez." (*Juarez, supra,* 81 Cal.App.4th at 410-411.) Nevertheless, although *Juarez* found a duty of care to exist on the *Rowland* factors test alone, it

concluded that the Special Relationship test could alternatively support its finding of a duty because of the compelling nature of the "special relationship" between child participants and youth organizations. (*Id.* at 411 [agreeing with the observation that "[t]he mission of youth organizations to educate children, the naivete of children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and the members such that the youth organizations are required to exercise reasonable care to protect their members from the foreseeable conduct of third persons"].)

Other cases followed the lead of *Nally* and *Juarez* in viewing the Special Relationship test and the *Rowland* factors tests as *independent tests* which should both be analyzed to determine if *either* established a duty of care. (See, *e.g., Doe 1 v. City of Murrieta, supra,* 102 Cal.App.4th at 913-918 [like *Juarez*, first using the *Rowland* factors test to find a duty of care, and then further supporting that conclusion through the alternative Special Relationship test]; *Conti, supra,* 235 Cal.App.4th 1227-1231 [applying both the Special Relationship test and the *Rowland* factors test to find that church elders had no duty to warn their

congregation about one member's past child sexual abuse]; *University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 447-448, 451-455 [considering both the Special Relationship test and the *Rowland* factors tests to conclude that a university owed no duty of care to protect an attendee at an off-campus fraternity party from a dangerous condition at that party].)

2. Decisions Treating the *Rowland* Factors Test as Subsidiary to a Predicate Finding of Duty Under the Restatement's Special Relationship Test.

An entirely different line of authority treats the Special Relationship and the *Rowland* factors tests as *interdependent*, meaning that if the first test is not satisfied, the other cannot be used to provide an alternative rationale for establishing a duty. In doing so, that line of cases (including the Court of Appeal's Opinion in this case), holds that a plaintiff must pass *both* the Restatement's Special Relationship test *and* the *Rowland* factors test before a duty of care can be found. (See, *e.g., Doe v. United States Youth Soccer Assn., supra,* 8 Cal.App.5th at 1129-1139 [finding a duty first under the Special Relationship test to conduct background checks, but then concluding under the subsidiary *Rowland* factors test that such a duty did not similarly require the defendants to

warn or educate her parents about the risks of sexual abuse]; *Doe v. Superior Court, supra,* 237 Cal.App.4th at 244-248 [finding a special relationship existed between a camp and its minor attendees, as well as a camp counselor accused of molesting one of those attendees, but then next using the *Rowland* factors test, clarified that the scope of the duty owed by the camp included the obligation to disclose that suspected molestation to the minor's parents].)

Under that approach, the *Rowland* factors test is relegated to the role of a *secondary, subsidiary test*, with its well-developed duty analysis only relevant if a court first finds that a special relationship exists under the Restatement's formulation.

3. This Court's Recent Decision in *Regents.*

This Court's most recent decision in *Regents, supra,* 4 Cal.5th at 620-634, did not undertake any analysis of whether *either* or *both* of those tests could properly be employed to establish a duty of care. Instead, the Court simply found after applying the Special Relationship test that a special relationship existed between the university and its students, and then further concluded that the policy considerations embodied in the *Rowland* factors test did not require eliminating or otherwise limiting

that special relationship duty. (*Ibid.*) In doing so, this Court did not demonstrate favor for one test over the other, but appeared to view them as complementary, alternative analytical paths for reaching the same conclusion. (*Id.* at 627-629.)

More specifically, the Court in *Regents* expressed that the Special Relationship test provided a rationale for a departure from the general rule of no duty to protect a certain class of plaintiffs from harm caused by third parties. (*Regents, supra,* 4 Cal.5th at 627 ["As discussed, there is generally no duty to protect others from the conduct of third parties. The 'special relationship' doctrine is an exception to this general rule"].) It next analyzed the *Rowland* factors to determine whether the policy factors embodied in that test required a departure "from the general rule of duty." (*Id.* at 628.) In other words, *Regent* first concluded that application of the Special Relationship test allowed for an exception to "the general rule of no duty" to protect others, and then used *Rowland's* policy considerations to further determine whether there was a compelling reason to depart from the "general rule of duty." (*Ibid.*) Again, while expressing preference for neither test and undoubtedly utilizing *both*, the order and manner the *Regents* court followed for

applying those two tests only created more confusion, with its ultimate holding an amalgam of the central rationales animating *both* tests: "Accordingly, an examination of the *Rowland* factors does not persuade us to depart from our decision to recognize a tort duty arising from the special relationship between colleges and their enrolled students. Specifically, we hold that colleges have a duty to use reasonable care to protect their students from foreseeable violence during curricular activities." (*Id.* at 633-634.)

In light of that confusion, the Second District in at least two decisions issued after *Regents – Barenborg, supra,* 33 Cal.App.5th at 77, and now in the Court of Appeal's Opinion in this case – has taken the position that plaintiffs must satisfy *both* the Special Relationship test *and* the *Rowland* factors test before a duty of care can be established, citing *Regents* as authority for that proposition. (See *Barenborg, supra,* 33 Cal.App.5th at 77 ["Thus, plaintiffs alleging a defendant had a duty to protect them must establish: (1) that an exception to the general no-duty-to-protect rule applies; *and* (2) that the *Rowland* factors support imposition of the duty"] [emph. in orig.], citing *Regents, supra,* 4 Cal.5th at 628; *Brown, supra,* 40 Cal.App.5th at 1092 [same], citing *Barenborg,*

supra, 33 Cal.App.5th at 77; but see *University of Southern California v. Superior Court, supra,* 30 Cal.App.5th at 452 [considering the *Rowland* factors despite concluding that there was no special relationship and no duty, with that *Rowland* analysis supporting the conclusion of no duty].) But nowhere in *Regents* did this Court provide the analysis or conclusion *Barenborg* (and indirectly, the Court of Appeal in this case) has attributed to it, thus only further clouding the question of which of those two tests this Court believes should be employed, and in what manner, to properly analyze the existence of a duty of care.

The extent of that misperception is plainly illustrated in the Court of Appeal's duty analysis in this case. Indeed, the Court of Appeal first applied *both* the Special Relationship Test and the *Rowland* factors test to USAT to correctly find it owed Petitioners a duty of care under *both* tests. (*Brown, supra,* 40 Cal.App.5th at 1094-1101.) Yet in contrast, it subsequently applied only the Special Relationship test to USOC – arguably in an erroneous fashion – further compounding that error by also refusing to apply the *Rowland* factors test, believing that test to be a subsidiary, dependent test to the Special Relationship test. (*Id.* at 1101-1103.) Consequently, the inconsistencies identified above

concerning how different courts (and sometimes, even the same court) have applied the Restatement's Special Relationship test and the *Rowland* factors test in conflicting ways – and the varying results which flow from those different approaches – is singularly illustrated by the Court of Appeal's Opinion itself.

But, again, that conflict is hardly new. Indeed, the internal conflict between the application of the Restatement's Special Relationship test and the *Rowland* factors test was presaged over 20 years ago in the First District's prior decision in *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243. The issue in *Adams* was whether police officers responding to a crisis involving a person threatening suicide with a loaded firearm have a legal duty under tort law that would expose them to liability if their conduct failed to prevent the threatened suicide from being carried out. (*Id.* at 248.) The plaintiffs, as the proponents of the establishment of such a duty, argued that it could be established under either the *Rowland* factors test *or* the Restatement's Special Relationship test. (Id. at 266-267.) While recognizing that this Court has previously "engaged in a duty analysis under both standards" (citing *Davidson, supra,* 32 Cal.3d at 203-209; and *Nally, supra*, 47 Cal.3d at 293-300), the

Adams majority ultimately used only the "traditional" *Rowland* factors test to conclude that the officers owed no duty in that case. (*Id.* at 267-276.)

Notably, in reaching that conclusion, the *Adams* majority criticized the utility of the Restatement's Special Relationship test, decrying that the "pedantic use of the Restatement (Second) of Torts to establish the parameters of tort duty, while eschewing public policy concerns, is contrary to modern jurisprudential duty analysis." (*Id.* at 286-287.) The *Adams* majority further reasoned that "[a]lthough the evolution of 'duty' is still in progress, it is now fair to say that an overwhelming majority of American jurisdictions treat questions of duty in negligence law substantially in terms which I will refer to as the Prosser (Green) approach." (*Ibid.*) It then explained that the so-called "Prosser (Green) approach" to duty appears in American decision law via the policy-based, multi-factor balancing tests made popular largely through several California Supreme Court decisions, including *Rowland.* (*Ibid.*) The *Adams* majority further concluded that "American courts have had little use for the relevant sections of the Restatement (Second) of Torts when dealing with general or abstract questions of duty; American courts

basically prefer Prosser's professed approach," and that "this is precisely the analytical course charted by our Supreme Court in recent years, and the one which we follow." (*Ibid,* citing to Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations* (1997) 34 San Diego L.Rev. 1503, 1505, fns. omitted.)

The majority's decision in *Adams* was greeted be an extensive and robust dissent in which Justice Kline defended the utility and expansion of the Restatement's Special Relationship test, and argued that it should have been applied in lieu of the *Rowland* factors test to determine duty in that particular case. (*Adams, supra,* 68 Cal.App.4th at 290-308 (dis. opn. of Kline, J.) That intra-district debate apparently continued the following year in the First District's decision in *Merrill v. Navegar, Inc.* (1999) 75 Cal.App.4th 500, in which this time Justice Kline wrote for the majority, finding a duty of care existed under the *Rowland* factors test, and with Justice Haerle strongly dissenting and disputing the majority's imposition of such a duty in the absence of a cognizable "special relationship." (*Id.* at 574-578 (dis. opn., Haerle, J.)

While this Court later granted review of that case, its majority decision in *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465 did not quell that debate, but instead narrowly held that the public policies engendered in Civil Code section 1714.4 prohibited the establishment of a duty of care in that case. (*Merrill, supra,* 26 Cal.4th at 491.) A lengthy dissent by Justice Werdegar then followed, explaining how a duty could be established (notwithstanding the provisions of section 1714.4) under the *Rowland* factors test, even in the absence of a "special relationship" duty to prevent the harm in question. (*Merrill, supra,* 26 Cal.4th at 501-511 (dis. opn. of Werdegar, J.)

Thus, over the span of more than 30 years – from this Court's *Nally* decision in 1988 to its most recent *Regents* decision in 2018 – the long-standing debate regarding the appropriate test (or *tests*) to be applied to determine duty remains unresolved. This Court had the opportunity to address that issue in *Merrill,* but instead decided the duty issue in that case narrowly, based upon a specific statutory provision. In the interim, the Courts of Appeal have grappled with whether to use the Special Relationship test, the *Rowland* factors test, or *both* in a variety of contexts, all with conflicting analyses and outcomes. Unfortunately, the

Court's more recent decision in *Regents* did not resolve that conflict either because it did not directly address it, but applied those two tests in a manner that has only further been misconstrued since. The Court of Appeal's decision in this case exemplifies that remaining conflict and confusion, as it applied *two different testing regimens to two different defendants*, and unsurprisingly, reached *two different results*.

But as Petitioners explain next, had the Court of Appeal correctly applied *both* the Restatement's Special Relationship test *and* the *Rowland* factors test to USOC, it would have found *two independent bases* on which to establish a duty of care against USOC. The analytical path this Court should now follow was first exemplified in its early decision in *Nally, supra,* 47 Cal.3d at 293, and later echoed in the First District's decision in *Juarez, supra,* 81 Cal.App.4th at 400-411 and the Fourth District's decision in *Doe 1 v. City of Murrieta, supra,* 102 Cal.App.4th at 913-918. All of those cases applied the Special Relationship test and the *Rowland* factors test *independently,* viewing them as alternative mechanisms which could be used to establish a duty of care in the same circumstances.

Accordingly, Petitioners ask this Court not only to apply the *Rowland* factors test to USOC (which the Court of Appeal refused to do in the first instance), but also to separately apply the Special Relationship test to USOC. If it does so, Petitioners contend the Court will find that either test (or both) provide independent bases for liability against USOC, consistent with settled precedent and the properly pled facts in this case. Those facts establish at the pleading stage (among other things) that USOC retained a significant degree of control over USAT and Gitelman, with the minor Petitioners dependent upon USOC reasonably exercising that oversight and control for their protection and benefit in the various activities and events USOC sanctioned and sponsored.

B. As Petitioners Need Only Satisfy *Either* the *Rowland* Factors Test *or* the Restatement's Special Relationship Test, They Have Properly Pled a Duty of Care Owed By USOC.

1. The *Rowland* Factors Test Applied to USOC.

For over half a century, this Court's decision in *Rowland*, *supra*, 69 Cal.2d 108 "has stood as the gold standard against which the imposition of common law tort liability in California is weighed by the courts in this state." (*Juarez*, *supra*, 81 Cal.App.4th at 401.) As a testament to both its adaptability and utility, *Rowland's* multi-faceted test has been applied in a variety of circumstances as an *independent mechanism* to analyze the presence of a legal duty of care. (See, *e.g., Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143-1165 [discussing at length both the history and application of *Rowland* in numerous cases, as well as its utility in finding the defendants in that particular case had a duty of ordinary care to prevent "take-home" asbestos exposure].) Yet the Court of Appeal's Opinion – as well as the host of other decisions identified in this brief which view the *Rowland* factors test as merely a subsidiary analysis appropriate only if the Special Relationship test is satisfied *first* – subjugates *Rowland* to a role it should never occupy. Given the history

and broad application of *Rowland* in California, this Court should be concerned that one of its most prolific and useful decisions is now being unduly limited, without any apparent justification. This Court should now confirm the correct role the *Rowland* factors test occupies as an *independent test* for analyzing the existence of a duty of care by applying it here to USOC.

As this Court knows well, the *Rowland* factors fall into two primary categories. Three factors – foreseeability, certainty, and the connection between the plaintiff and the defendant – address the foreseeability of the relevant injury, while the other four – moral blame, preventing future harm, burden, and availability of insurance – take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief. (*Kesner, supra,* 1 Cal.5th at 1145.)

a. Foreseeability.

Often labelled by this Court as "the most important factor" in *Rowland's* formulation of duty, foreseeability measures not whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but more generally whether *the category of negligent conduct at issue* is sufficiently likely to result in the kind of

harm experienced so that liability may appropriately be imposed. (*Kesner, supra,* 1 Cal.5th at 1145 [internal citations omitted].) Consequently, for purposes of duty analysis, "foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct." (*Ibid.* [internal quotes omitted].) In other words, all that is required to be "foreseeable" is the general character of the event or harm – *e.g.,* being struck by a car while standing in a phone booth – not its precise nature or manner of occurrence. (*Ibid.,* quoting *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58.)

Consequently, for purposes of this Court's foreseeability analysis, the general character of the event or harm in question – minor Olympic athletes being sexually abused by their accredited coaches – was clearly foreseeable to USOC. Indeed, as Petitioners pled in their operative FAC, since at least the 1980s, USOC has had actual knowledge that numerous minor female athletes were sexually abused by their coaches at the Olympic Training Centers in Marquette, Michigan; Colorado Springs, Colorado; and Lake Placid, New York. (1 AA 41.) Moreover, that same

misconduct also continued abroad, with USAT's delegation being kicked out of their rented house in Barcelona, Spain during the 1992 Summer Olympic Games because the Spanish landlord walked in on the National Team coach, a middle-aged man, having sex with a young female Olympian. (*Ibid.*) USOC had actual knowledge of that Barcelona eviction of the USAT delegation. (*Ibid.*)

Sexual molestation of minor athletes in USOC's NGBs by certified, credentialed coaches was so rampant that USOC specifically required all NGBs to have liability insurance to cover that sexual abuse. (1 AA 41.) NGBs that did not meet that requirement had their access to the Olympic Training Centers restricted or completely denied by USOC. (*Ibid.*) By 1999, all NGBs had purchased the USOC required sexual abuse insurance coverage except United States Swimming. (*Ibid.*)

Given the pervasive nature of that history of molestations, in 2010, USOC further appointed a "task force" to study sexual abuse of minor athletes by adult coaches in Olympic Sports. (1 AA 41.) That task force mandated that all NGBs adopt a "Safe Sport Program" to protect athletes from sexual abuse. As a result, USOC required that each of its NGBs implement a USOC-approved Safe Sport program by 2013. (1 AA 42.)

Further, between 2013 and 2016, USOC required that each NGB contribute money towards the funding of a "US Center for Safe Sport" ("Safe Sport Center") that would purportedly handle allegations of sexual abuse of athletes in Olympic Sports. (*Ibid.*)

In this case, allegations raised by Petitioners in their operative FAC further demonstrate that USOC's own Director of Ethics and Safe Sport, Malia Arrington, was aware as early as September of 2013 that allegations of sexual abuse had been leveled against Gitelman. (1 AA 43.) Petitioners also pled that Gitelman was nevertheless permitted to continue coaching because USAT – in complete violation of the Safe Sport regulations USOC required USAT to adopt and implement – after USAT rebuffed the recommendation of its own Ethics Panel which had concluded that Gitelman should be expelled and lose his accreditation. (*Ibid.*) USOC was aware of USAT's inaction on Gitelman, yet took no action to compel USAT to act or to sanction USAT, even though USOC clearly had the power to do so. (*Ibid.*)

Of course, if it was not foreseeable to USOC that minor athletes in its sanctioned programs and tournaments were easy victims for sexual predation, USOC would never have developed its own Safe Sport Policies

and Procedures in 2010, nor required its NGBs to adopt their own Safe Sport compliant programs in conformity with those "model" policies and procedures. (1 AA 41-42.) Neither would USOC have previously required all of its NGBs to have insurance in place to cover sexual abuse by coaches if such incidents were not reasonably foreseeable. (1 AA 41.)

In sum, judging by its own actions and the mandates it imposed on its NGBs, it was clearly foreseeable to USOC that minor Olympic athletes were the easy victims of sexual abuse by accredited coaches. That category of harm was known to, and anticipated by, USOC.

b. Degree of Certainty of Harm.

At the demurrer phase, the degree of certainty of Petitioners' injuries is not germane, as it is enough that they have pled that they were injured by the conduct of Gitelman, USAT, and USOC. (See, *e.g.,* 1 AA 55, 56.) Suffice it to say, however, that USOC's own Safe Sport guidelines strongly suggest that it believed that injuries to minor Olympic athletes like the Petitioners were certain to occur absent adequate preventative and enforcement measures. Beginning in 2007, Petitioners were repeatedly sexually molested by Gitelman, crimes for which he was subsequently convicted only in 2015. (1 AA 44.) Their injuries are

certain and compensable under the law. (*Kesner, supra,* 5 Cal.5th at 1148*;* see also *Juarez, supra,* 81 Cal.App.4th at 405 [finding that the "significant emotional trauma caused by childhood sexual abuse" is enough to satisfy this *Rowland* factor]; and *Doe 1 v. City of Murrieta, supra,* 102 Cal.App.4th at 916 [noting how it is "well documented that sexual abuse of minors causes significant emotional trauma to minors, with its related societal costs, and, no doubt, for this reason, such conduct constitutes a felony"].)

c. Closeness of Connection Between USOC's Conduct and Petitioner's Injuries.

With respect to the connection between USOC's conduct and the injuries suffered, as long as Petitioners pled that causal connection (which they did), that causation question is one for the trier of fact. (See *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 Cal.3d 508, 520 [where this Court previously reversed a demurrer granted in the defendants' favor, confirming that causation "is generally a question of fact for the jury," and explaining how, on the basis of the causation allegations raised in the operative complaint, the trial court erred when

it concluded as a matter of law that defendant's conduct in question did not proximately cause the plaintiff's harm].)

In any event, as the *Juarez* court also demonstrated, it is reasonable to assume that the implementation of USOC's Safe Sport guidelines, as well as its mandates that all of its NGBs adopt and enforce conforming guidelines to protect minor athletes, were intended to address and rectify sexual abuse of athletes in Olympic sports. (*Juarez, supra,* 81 Cal.App.4th at 406 [recognizing that while reasonable prevention methods will not prove sufficient to halt sexual abuse in each and every case, they nevertheless represent "the best line of defense to protect children from sexual exploitation"].) As such, USOC's alleged indifference to implementing and enforcing those preventative measures played a substantial role in Gitelman's ability to sexually abuse Petitioners continuously over the course of nearly *seven years*.

d. Moral Blame.

The moral blame factor also does not favor USOC. As pled by Petitioners in their FAC, USOC was long aware of the prevalence of sexual abuse in Olympic sports in general, and in the sport of taekwondo in particular. (1 AA 41-49.) USOC promulgated its own Safe Sport rules

and programs ostensibly to address those very issues, and even suspended USAT for its failure to adopt similar conforming rules, demonstrating the power it had to control and regulate the actions of its NGBs. (1 AA 40-42.) Yet even after receiving notice that USAT's Ethics Panel had investigated Gitelman and concluded that he had committed multiple acts of sexual abuse against Petitioners – but that USAT's Board nevertheless refused to sanction or suspend Gitelman – USOC did nothing. (1 AA 40-45.) The fact that USOC had specific rules in place to address sexual abuse of athletes, had the power to sanction both USAT and Gitelman, but failed to do either and instead abandoned its own self-proclaimed duty to protect minor Olympic athletes from sexual abuse allowed Gitelman to continue his molestation of Petitioners unabated. Such bureaucratic indifference by USOC cannot be morally justified. Unfortunately, USOC callously decided not to exercise the plenary power it clearly was given by Congress to regulate Olympic sports under the Ted Stevens Amateur Sports Act (36 U.S.C. § 220501, *et seq*.), including setting and enforcing standards for unacceptable interactions between coaches and minor athletes. It did so out of misguided notions of self-preservation only, and not to serve or protect Olympic athletes.

Moreover, when pressed by Congressional overseers looking into the cause of the scourge of sexual abuse in Olympic sports, USOC is on record as saying it was "sorry" and admitting it had the power to do more than it did to protect Olympic athletes from that widespread and continuing abuse. Specifically, during a Congressional hearing held in May of 2018, in which Congress, as part of its oversight power under the Ted Stevens Amateur Sports Act examined USOC's role in several prominent sexual abuse scandals plaguing Olympic sports in the United States (including United States Taekwondo), the acting CEO of USOC, Susanne Lyons, was forced to admit that *USOC had the power and authority to take affirmative action to protect Olympic athletes from sexual abuse but simply failed to do so*. Lyon's testimony confirmed that not only did USOC have the power to promulgate rules and standards concerning critical aspects of the athlete-coach relationship in order to prevent sexual abuse, at the very least, USOC should have enforced what rules and standards it did have to prevent the very abuse Petitioners suffered. Lyon's testimony demonstrates how despite having both the power and the obligation to do so, USOC "regrettably" failed to exercise that authority to protect Olympic athletes from ongoing sexual abuse,

admitting it "should have done better" in numerous instances to prevent or to stop that abuse.[4] With its funding from Congress on the line at that hearing, Lyon's apologia on behalf of USOC can reasonably be viewed as a candid admission of its moral culpability for the sexual abuse suffered by Petitioners.

e. The Policy of Preventing Future Harm.

On this next *Rowland* factor, the analysis provided by the *Juarez* court is again instructive. There, the First District aptly explained how "[o]ur greatest responsibility as members of a civilized society is our common goal of safeguarding our children, our chief legacy, so they may grow to their full potential and can, in time, take our places in the community at large. The achievement of this objective is gravely threatened by sexual predators who prey on young children. The

[4] That hearing can be viewed at: https://energycommerce.house.gov/committee-activity/hearings/hearing-on-examining-the-olympic-community-s-ability-to-protect-athletes. (See Evid. Code § 452, subd. (c) [approving judicial notice of "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States"]; and § 459; see *Honchariw v. County of Stanislaus* (2013) 218 Cal.App.4th 1019, 1031 & fn. 9 [taking judicial notice of legislative materials located on the Legislative Counsel's official website]; *California Teachers' Assoc. v. Governing Board of Hilmar Unified School District* (2002) 95 Cal.App.4th 183, 192, fn. 7 [also citing to the Legislature's official website].)

legislative judgment, which reflects a widely shared value of our society, is that the use of children as sexual objects is extremely harmful to their well-being. Its long-lasting injury often lies hidden in a victim's psyche until it works its insidious harm by impairing subsequent emotional development, if not by also crushing the victim's spirit." (*Juarez, supra,* 81 Cal.App.4th at 407.)

The *Juarez* court further noted how "[p]ublic policy against the victimization of children is most evident in our criminal laws" (citing to Pen. Code §§ 288, subd. (a), 288.5, subd. (a)), and explained how "[t]he interests of the state in protecting the health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest in safeguarding the future of society as a whole, weigh strongly in favor of imposing a duty in this case." (*Ibid.*; see also *Doe 1 v. City of Murrieta, supra,* 102 Cal.App.4th at 916; *Conti, supra,* 235 Cal.App.4th at 1235.) This *Rowland* factor has been established against USOC in this case.

f. The Extent of the Burden on USOC and Consequences to the Community of Imposing a Duty to Exercise Care with Resulting Liability for Its Breach.

While the availability, cost, and prevalence of insurance for the risk involved is not a factor typically required to be discussed at the pleading stage, "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach" was a *Rowland* factor that was also properly pled by Petitioners in their FAC. Specifically, Petitioners pled that USOC has already assumed the responsibility to set standards for conduct in the Olympic sport of taekwondo, and has purported to create an environment where minor athletes can be safe from sexual predation from their coaches. (1 AA 40-45.) They also alleged that USOC has already required its NGBs, like USAT, to develop their own Safe Sport compliant rules, and has taken disciplinary action (such as probation) against those NGBs who did not do so. (*Ibid*.) And Petitioners have pled that USAT finally complied with USOC's mandates and has promulgated its own Code of Ethics. (*Ibid*.) From those allegations, it is clear that USOC has already assumed the duty and burden of establishing standards for protecting minor athletes from sexual abuse, and for taking action against the

perpetrators of that abuse, irrespective of whether USOC has actually adhered to those assumed duties. The relevant taekwondo community (and Olympic sports in general) would certainly benefit if USOC actually enforced its avowed Safe Sport rules and fully operated and supported its Safe Sport Center, as USOC is not only in the best position to do so, *it is the only entity that can*. (See *Doe v. United States Youth Soccer, supra*, 8 Cal.App.5th at 1135-1136 [imposing a duty to implement criminal background checks for coaches was not burdensome for national and local soccer associations]; *Conti*, *supra*, 235 Cal.App.4th at 1235 ["Defendants will not be heavily burdened by a duty to take reasonable care to ensure that molesters are accompanied by another adult, and no children, in the field"]; *Doe 1 v. City of Murrieta, supra*, 102 Cal.App.4th at 916 [implementation of protective measures stated in the explorer handbook and enforcement of defendant's own ride-along restrictions were not "unduly burdensome or costly"]; *Juarez*, *supra*, 81 Cal.App.4th at 407-409 [burden on Boy Scouts was not onerous where delivery system was "already in place to see that vital information needed to combat child sexual abuse is communicated at every level of scouting"].)

g. The Availability, Cost, and Prevalence of Insurance for the Risk Involved.

In their FAC, Petitioners pled that sexual molestation of minor athletes in USOC's certified NGBs by certified, credentialed coaches, was so rampant that USOC specifically required all NGBs to have specific insurance to cover that sexual abuse. (1 AA 41.) NGBs that did not meet that insurance requirement had their access to Olympic Training Centers restricted or completely denied by USOC. (*Ibid*.) By 1999, all NGBs had purchased the USOC required sexual abuse insurance coverage except United States Swimming. (*Ibid*.)

Accordingly, a properly pled by Petitioners, insurance for the risk involved is not only available, but was mandated by USOC. (1 AA 41.)

In summary – as was the case in *Juarez, Doe 1 v. City of Murrieta,* and *Conti* – proper consideration of the *Rowland* factors test *independently supports* the imposition of a duty of care on USOC to take reasonable protective measures to protect Petitioners from the known risk of sexual abuse by their credentialed coach, including taking reasonable action to enforce the Safe Sport measures it already had in place. Irrespective of the existence of a special relationship, those *Rowland* factors are appropriately applied to this case to establish that

duty of care. As such, the Court of Appeal fundamentally erred when it refused to analyze those factors and affirmed the trial court's dismissal of Petitioners' claims for lack of a duty owed by USOC.

2. The Special Relationship Test Applied to USOC.

As this Court recently summarized in *Regents,* "[a] duty to control, warn, or protect may be based on the defendant's relationship with either the person whose conduct needs to be controlled or [with] the foreseeable victim of that conduct." (*Regents, supra,* 4 Cal.5th at 619 [internal quotes and citations omitted].) Specifically, a duty to control may arise if the defendant has a special relationship with the foreseeably dangerous person that entails an ability to control that person's conduct. (*Ibid.*) Similarly, a duty to warn or protect may be found if the defendant has a special relationship with the potential victim that gives the victim a right to expect protection. (*Ibid.*)

In addition to incorrectly requiring that the Restatement's Special Relationship test must first be satisfied before the *Rowland* factors test could even be considered, the Court of Appeal's analysis of USOC's special relationship duty falls short for other important reasons. That analysis focused almost exclusively on the relationship between USOC

and Gitelman. (See *Brown, supra,* 40 Cal.App.5th at 1101-1103.) In so doing, the Court of Appeal critically failed to analyze the special relationship between USOC and Petitioners as an alternative basis for imposing a special relationship duty on USOC. With respect to Gitelman, the Court of Appeal also misconstrued the power USOC retained to regulate Gitelman's conduct by requiring his immediate expulsion once USAT's Ethics Panel concluded Gitelman had sexually molested Petitioners. Either avenue was sufficient to establish a special relationship duty with USOC.

a. The Nature of USOC's Relationship with Petitioners.

The Court's decision in *Regents* is again instructive, as this Court decided that case focusing exclusively on the relationship between a university and its students, and not upon the relationship the university enjoyed with the alleged assailant. (*Regents, supra,* 4 Cal.5th at 620.) In so doing, *Regents* recognized that "special relationships" share a few common features which are relevant here: "Generally, the relationship has an aspect of *dependency* in which one party relies to some degree on the other for protection. The Restatement authors observed over 50 years

ago that the law has been working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence. The corollary of dependence in a special relationship is *control*. Whereas one party is dependent, the other has superior control over the means of protection. A typical setting for the recognition of a special relationship is where the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare." (*Id.* at 620-621 [internal quotes and citations omitted; emphasis added].)

In examining the particularities of the college environment, this Court in *Regents* further explained how college students are "dependent on their college communities to provide structure, guidance, and a safe learning environment." (*Id.* at 625.) Relatedly, it also found that "[c]olleges, in turn, have superior control over the environment and the ability to protect students," by imposing "a variety of rules and restrictions" to maintain a safe and orderly environment, and can monitor and discipline students when necessary. (*Ibid.*) Thus, *Regents* opined that "[t]he college-student relationship [] fits within the paradigm of a special relationship" because "[s]tudents are comparatively

vulnerable and dependent on their colleges for a safe environment," and "[c]olleges have a superior ability to provide that safety with respect to activities they sponsor or facilities they control." (*Ibid*.)

That same balance of *vulnerability* and *control* is also present in this case. As alleged, Petitioners were 15 and 16 year-old female taekwondo athletes coached by an adult male, Gitelman. (1 AA 38.) Gitelman openly carried on sexual relationships with all of the Petitioners, using the authority and control he held over them as their taekwondo "Master" and coach. (1 AA 44-53.) Indeed, no one can reasonably dispute that the culture of the sport of taekwondo is tremendously hierarchal and authoritarian, in which teenaged female students are required to refer to their adult male coaches as their "Master," and are expected to regularly bow to them. It is also a sport which requires close physical contact between coach and athlete. That culture of supplication and the close physical nature of the sport of taekwondo unfortunately provides the opportunity for even certified coaches to exploit that authority for their own sexual gratification.

In addition to those cultural issues inherent in the sport of taekwondo, Petitioners have also alleged that working conditions (adult coaches alone with underage athletes in hotel and dorm rooms far from home at USOC sponsored tournaments) make the sexual abuse in question a foreseeable yet unfortunate "outgrowth" of the authority both USAT and USOC imparted to Gitelman. (1 AA 44-49.) If Petitioners did not travel with Gitelman to those tournaments, they would miss the exposure and experience required to develop into Olympic caliber athletes and consequently, would not curry favor with their coach. If Petitioners participated in those tournaments as Gitelman directed, they were often placed in conditions of particular vulnerability (hotel rooms and dorms, away from parents), where Gitelman could further groom them and require their participation in underaged drinking and illegal sexual activity all to win his approval and favor, which is precisely what Gitelman did from 2007 to 2014. (1 AA 44-49.) Again, as the *Juarez* court aptly summarized: "The mission of youth organizations to educate children, the naivete children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and the members such that the youth organizations

are required to exercise reasonable care to protect their members from the foreseeable conduct of third persons." (*Juarez, supra,* 81 Cal.App.4th at 411.)

Similarly, with respect to USOC's related ability to regulate and control the coach-athlete relationship, the Court need look no further than USOC's own Safe Sport guidelines, which it further required all of its NGBs to adopt. Those guidelines represent "model policies" meant to assist NGBs in adopting and implementing their own required policies, and specifically prohibit or limit: (1) one-on-one interactions between coaches and minor athletes; (2) close physical contact between coaches and minor athletes (athletic training, messages, rubdowns); (3) locker room and changing privacy protocols; (4) social media and electronic communications between coaches and minor athletes; (5) one-on-one local travel between coaches and minor athletes; and (6) one-on-one overnight travel and hotel or other lodging accommodations between coaches and minor athletes.

Consistent with USOC's model guidelines – and as required specifically by USOC on penalty of probation – USAT adopted its Code of Ethics, similarly prohibiting the following conduct by its adult coaches:

- Any act of sexual harassment including but not limited to requests for sexual favors, physical conduct of a sexual nature by and between persons participating in the affairs or activities of USAT directed towards any other member or person participating in such events/activities;

- The providing of alcohol to an athlete by a coach, official, or trainer, etc., where the athlete is under the legal age to consume alcohol;

- The abuse of alcohol in the presence of an athlete under the age of 18, by a coach;

- Physical abuse of an athlete under the age of 18, by a coach or person who in the context of taekwondo, is in a position of authority over the athlete; any non-consensual physical contact;

- Inappropriate touching between an athlete and a coach, including but not limited to excessive touching, hugging, kissing;

- Sexual-oriented behavior;

- Sexually stimulating or otherwise inappropriate games;

- Rubdowns or massages performed on an athlete by any adult member or non-participating member unless such adult is a licensed massage therapist. (1 AA 42-43.)

Those guidelines intimately regulate interactions between coaches and minor athletes, and are mandated by USOC with "top-down" authority by which USOC suspends any NGB (like USAT) that does not adopt its own rules consistent with USOC's "model" rules. (1 AA 40-42.)

Consequently, like the university in *Regents,* the national soccer governing body in *United States Youth Soccer,* and the Boy Scouts in *Juarez*, USOC 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. This is the type of control upon which vulnerable minor athletes (and their parents) reasonably rely in order to keep them safe from sexual abuse and related predatory behavior by their coaches.

In short, USOC uniquely shapes the *context* in which minor athletes interact with their coaches in order to participate in Olympic caliber training and competition. It closely directs not only the conduct of its NGBs, but their implementation and enforcement of USOC's own promulgated "model rules" and guidelines for coach-athlete interactions, and has the ability to suspend (or even replace) NGBs where they fail to carry out its rules and guidelines to its satisfaction. (1 AA 40-42.) USOC derives that plenary power from the Ted Stevens Act, and as such, is the only entity authorized by law to take such actions to protect minor athletes within the Olympic movement. With that almost unlimited control comes the commensurate duty to take reasonable actions to

protect vulnerable minor athletes with whom it undoubtedly enjoys a special relationship.

b. The Nature of USOC's Relationship with Gitelman.

In *United States Youth Soccer,* the Sixth District also found that a national soccer organization (U.S. Youth) enjoyed a special relationship with a local soccer coach (Fabrizio) who had molested several minor athletes, sufficient to impose a duty of care. (*United States Youth Soccer, supra,* 8 Cal.App.5th at 1131.) It did so reasoning that because the national organization promulgated rules and guidelines that it then required its state and local affiliates to follow in the screening, hiring, and firing of coaches, it therefore had a sufficient relationship of control over the offending coach. (*Id.* ["Since U.S. Youth established the standards under which coaches were hired, U.S. Youth determined which individuals, including Fabrizio, had custody and supervision of children involved in its programs"].)

The Court of Appeal attempted to distinguish the relationship U.S. Youth had with the soccer coach in that case from the relationship USOC had with Gitelman here. (See *Brown, supra,* 40 Cal.App.5th at 1102-

1103.) In particular, it reasoned that unlike U.S. Youth, USOC did not have the power to regulate Gitelman's conduct directly, or to call for his suspension. (*Ibid*.) The Court of Appeal is wrong on both accounts.

First, as explained above, USOC both retained and exercised the power to promulgate specific and detailed guidelines regarding coach-athlete interactions, and to require its NGBs to adopt and enforce those same rules at the local level. (1 AA 40-42.) Those Safe Sport rules and "model" guidelines were not created first by USAT; instead, USAT was suspended by USOC precisely because it had not complied and adopted rules which sufficiently conformed to USOC own "model" rules and guidelines. (*Ibid*.) Thus, USOC exercised *all necessary operational control* over setting the rules by which coaches like Gitelman were permitted to interact with minor athletes like Petitioners, even as it required its rules to be implemented by its NGBs at the local level. That delegation by USOC to its NGBs was *not* a means of encouraging local autonomy. Instead, it was USOC specifically exercising its plenary power to direct which of its subsidiary organs would be required to adopt and ultimately enforce the rules and guidelines it originally promulgated. (1 AA 40-42.)

Second, as Petitioners alleged in their FAC – and as even the Court of Appeal acknowledged in its recitation of the factual record before it (*Brown, supra,* 40 Cal.App.5th at 1087) – in 2013 USOC had actual knowledge of Gitelman's sexual assault of Petitioners when USOC's own Director of Ethics and Safe Sport, Malia Arrington, was informed of USAT's Ethics Panel decision, charging Gitelman with that conduct and recommending his immediate termination. (1 AA 43%.) But when USAT's President, Devin Johnson, refused to present that Ethics Panel recommendation to the USAT Board, Gitelman was allowed to continue coaching unabated. (*Ibid*.) At that juncture, USOC (which had previously placed USAT on probation for failure to timely adopt rules conforming with USOC's Safe Sport guidelines – see 1 AA 42) clearly had the power to again compel USAT to act against Gitelman for violating those rules, or to replace USAT and take that action itself. (1 AA 40-42.) The Court of Appeal erred when it concluded otherwise.

Indeed, the Court of Appeal appeared to incorrectly define USOC's relationship with Gitelman (and its concomitant duty to act) not by the scope of the power and authority Congress granted to USOC to protect Olympic athletes from sexual abuse, but by the limited and inadequate

power and authority USOC decided to exercise in that regard. Whether the reasons behind USOC's reticence was bureaucratic incompetence, political indifference, or litigation-adverse policies, USOC's approach has always been to mandate specific regulations of the athlete-coach relationship, while enforcing from afar its directives through its NGBs.

But it is the power and authority USOC retains which should define the contours of its duties owed to Olympic athletes (like Petitioners), not the limited authority USOC ultimately decided to exercise. If this were not so, USOC would be encouraged *not* to exercise any meaningful control it clearly retained to protect minor Olympic athletes solely out of the self-serving impulse to minimize its legal liability. Notably, when USOC's CEO, Lyons, was grilled by members of Congress about why USOC did not exercise more of the power Congress believed it had clearly given USOC to protect Olympic athletes from sexual abuse, all Lyons could do was sheepishly admit that USOC "should have done more."[5]

At bottom, what truly distinguishes the national association in *United States Youth Soccer* from USOC in this case is *not* that they both lack power and control (and a corresponding duty) to directly regulate the

[5] See footnote 4, ante.

athlete-coach relationship to prevent sexual abuse, but rather that *USOC has simply failed to exercise that power*, all to the detriment of those athletes. Again, this Court should avoid the trap which ensnared the Court of Appeal – defining USOC's duty owed to Petitioners by the limited and inadequate power and authority USOC decided to exercise – and should instead look to the power and authority USOC retained to take affirmative action to protect Olympic athletes, like Petitioners, from sexual abuse.

Where this Court does so, it should conclude that in addition to the independent basis for the establishment of a duty compelled by the *Rowland* factors test, a proper application of the Restatement's Special Relationship test also demonstrates yet another independent rationale for the establishment of a duty owed to Petitioners by USOC. Accordingly, Petitioners respectfully request this Court to reverse the Court of Appeal's decision with respect to its duty analysis of USOC, and to otherwise affirm that decision as it relates to USAT.

V.

CONCLUSION

Minors who are victims of sexual abuse should know with certainty the criteria they must plead and prove to establish a duty of care for those charged with protecting them. The Court of Appeal improperly conflated the Restatement's Special Relationship test and the *Rowland* factors test, when either test provided an independently valid path to finding a duty of care owed by both USAT and USOC.

Properly applying those independent tests, this Court should now affirm the Court of Appeal's decision as to USAT, and reverse that decision as to USOC, thereby permitting Petitioners' claims against both USAT and USOC to proceed on their merits.

Respectfully submitted,

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Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2015), contains 12,042 words.

DATED: May 15, 2020

Jon R. Williams

BROWN, et al. v. USA TAEKWONDO, et al.
Supreme Court of the State of California
CA Supreme Court Case No.: S259216
Court of Appeal Case No.: B280550
Los Angeles County Superior Court Case No.: BC599321

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