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

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

This case is one of many across the country in which minor athletes who were sexually abused by their coaches allege that others should have protected the athletes from the coaches' crimes. Here, plaintiffs Brianna Bordon, Kendra Gatt, and Yazmin Brown allege that defendants USA Taekwondo (USAT) and the United States Olympic Committee (USOC) should have protected them from former taekwondo coach Marc Gitelman's sexual abuse.

This Court granted review to determine the appropriate test a plaintiff must satisfy to establish a duty by a defendant to protect the plaintiff from sexual abuse by a third party. This Court should hold that courts must apply the longstanding framework it developed to determine when to recognize a duty to protect a plaintiff from a third party. Under this framework, the plaintiff must first show the defendant had a special relationship either with the plaintiff or with the third party. If the plaintiff fails to show a special relationship, no duty exists, and the inquiry ends. If the plaintiff shows a special relationship supporting a duty, then the court analyzes the *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) factors to determine the scope of the duty and whether public policy justifies an exception to the duty.

Every opinion by this Court that analyzes a defendant's duty to protect a plaintiff from a third party's conduct follows the existing framework, which recognizes the historical distinction between misfeasance and nonfeasance and the different duty analyses that apply. This analysis also tracks the origins of the

Rowland factors, which this Court developed not to create new duties but to determine when to create exceptions to existing duties. Finally, this framework accords with the rationale behind the special relationship test to ensure that only a defendant who should have protected a plaintiff from a third party faces liability for not doing so. Thus, this Court's precedent and public policy support the existing framework.

Plaintiffs argue this Court should view the special relationship test and the *Rowland* factors as independent, alternative bases to create a duty. But this Court has never done so, and there is no reason to start now. Plaintiffs' proposed extension of the *Rowland* analysis would eviscerate the special relationship test as well as the related negligent undertaking doctrine and would allow a tort action against any bystander who could have, but did not, protect a plaintiff from a third party's foreseeable conduct—even if the bystander was a complete stranger to both the plaintiff and the third party. Plaintiffs offer no reason for this Court to depart from its longstanding precedent and adopt such a sweeping change in tort law.

The Court of Appeal below applied the correct framework. It began the duty analysis with the general no-duty rule, applied the special relationship test to determine whether USAT and USOC owed a duty to plaintiffs, and then applied the *Rowland* factors not as an independent, alternative basis for creating a duty, but to analyze whether to find an exception to an existing duty.

But the Court of Appeal failed to correctly apply the special relationship test when it found that USAT had a special

relationship with Gitelman just because USAT could establish policies and procedures and could discipline Gitelman for misconduct. Thus, along with clarifying the existing duty analysis, this Court should also clarify that a special relationship between a defendant and a third party supporting a duty to protect a plaintiff from the third party's conduct requires the plaintiff to show that the defendant is in a position to control the third party by monitoring the third party's conduct on a contemporaneous, day-to-day basis. Applied here, USAT had no special relationship with Gitelman and owed no duty to plaintiffs. This Court should therefore reverse the Court of Appeal's decision as to USAT.

STATEMENT OF THE CASE

A. Plaintiffs' allegations regarding Marc Gitelman[1]

Between 2007 and 2013, taekwondo coach Gitelman sexually molested then-minor taekwondo athletes Bordon, Gatt, and Brown.[2] (AA 45-49.) Gitelman molested Bordon between 2007 and

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[1] USAT takes this background from the first amended complaint and the Court of Appeal's opinion. Because this appeal comes from an order sustaining USAT's and USOC's demurrers, this Court assumes the truth of facts as alleged in the first amended complaint, but not contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

[2] At one point, plaintiffs alleged Gitelman molested "plaintiffs" until 2014. (AA 44.) But plaintiffs also alleged that none of them had contact with Gitelman after 2013, and the final incident specifically identified by any plaintiff occurred in November 2011. (See AA 45-49.) As the Court of Appeal held, specific allegations control over inconsistent general allegations. (*Brown v. USA* (continued...)

2010, including at a hotel room during a national qualifier in Fresno in 2007, on the drive to and at a hotel room during a taekwondo festival in the City of Industry in 2008, and at the Olympic Training Center dormitories owned by USOC in Colorado in 2009. (AA 45-46.) Gitelman molested Gatt in 2010 at a hotel room during an event in the City of Industry and on the premises of a taekwondo training and fitness center in Las Vegas that Gitelman owned or that employed him. (AA 47-48; see AA 38-39.) Gitelman molested Brown between 2010 and 2013, including at a hotel room during an event in the City of Industry in 2010 and at the Olympic Training Center dormitories in Colorado during an event in 2011. (AA 48-49.)

Gitelman has been convicted of multiple felonies for his sexual abuse of plaintiffs. (AA 50, 52-53; see *Brown*, *supra*, 40 Cal.App.5th at p. 1087.)

B. Plaintiffs' allegations regarding USA Taekwondo and the United States Olympic Committee

USOC certifies organizations to be national governing bodies (NGBs) for Olympic sports in the United States under the Ted Stevens Amateur Sports Act. (AA 40.) USOC can take disciplinary actions against NGBs, including decertifying an NGB or placing an NGB on probation and appointing an advisory board to oversee the NGB. (AA 40-41.)

Taekwondo (2019) 40 Cal.App.5th 1077, 1086, fn. 6 (*Brown*), review granted Jan. 2, 2020, S259216.)

USAT, which has its headquarters and principal place of business in Colorado, is one of the 49 NGBs certified by USOC. (AA 38, 40.) USAT is responsible for the conduct and administration of the sport of taekwondo in the United States. (AA 41.) USAT establishes rules and implements policies and procedures for local taekwondo studios, and it oversees and enforces the code of ethics it established in 2013 for the sport. (AA 41-42.) USAT also sponsors and promotes taekwondo events. (AA 44.) To compete at the Olympic games, a taekwondo athlete must be a member of USAT and train under coaches registered with USAT. (AA 40.) Plaintiffs allege that USOC and USAT lacked policies or procedures, such as a code of ethics, that would have prevented Gitelman from molesting them between 2007 and 2013. (See AA 45-49).[3]

Plaintiffs allege that USOC and USAT should have known about sexual abuse of Olympic athletes generally, in part because of an incident in Spain involving USAT and another incident at the Olympic Training Center involving a USAT athlete. (AA 41, 46-47.) Plaintiffs further allege that USOC required NGBs to buy "sexual abuse insurance" in the 1990s (AA 41) and later to adopt a " 'Safe Sport Program' " by 2013 that would include policy and

[3] Plaintiffs also allege that USOC and USAT lacked policies or procedures to enforce a code of ethics during the time Gitelman molested plaintiffs between 2007 and 2013. (AA 45, 47, 49.) But plaintiffs have not alleged the existence of any such code before USAT enacted a code of ethics in 2013. (AA 42.) Thus, their allegations are appropriately viewed as claiming that USAT failed to enact a code of ethics, not that USAT failed to enforce a code of ethics that did not exist.

procedures to protect athletes from sexual abuse (AA 41-42). In 2011, USOC placed USAT on probation for alleged self-dealing among USAT's board members. USOC then kept USAT on probation until 2013, when USAT adopted a code of conduct and code of ethics that complied with USOC's requirements. (See AA 42; *Brown*, *supra*, 40 Cal.App.5th at p. 1085.)

USAT suspended Gitelman in October 2013. (AA 43.) After holding a hearing, USAT ultimately terminated and banned Gitelman in September 2015. (AA 43-44.)

C. Plaintiffs allege that USAT and USOC are both vicariously liable for Gitelman's crimes and directly liable for not protecting them from Gitelman's crimes.

Plaintiffs filed their original complaint in 2015 (AA 6-31) and their operative first amended complaint a year later (AA 37-60). As to USAT and USOC, plaintiffs alleged claims for negligence (fourth and fifth causes of action), negligent hiring and retention (sixth cause of action), intentional infliction of emotional distress (seventh cause of action), and negligent infliction of emotional distress (eighth cause of action). (AA 53-59.) Plaintiffs based the fifth cause of action of direct negligence on an alleged "duty of reasonable care to enforce or enact a Code of Ethics for the sport of taekwondo and to enact policies and procedures both to enforce the Code and to protect female athletes from sexual assault and molestation by coaches and persons in authority." (AA 55-56; see *Brown*, *supra*, 40 Cal.App.5th at p. 1088.) Plaintiffs based the fourth, sixth, seventh, and eighth causes of action on vicarious liability theories. (AA 53-55, 57-59; see *Brown*, at pp. 1087-1088.)

D. The trial court sustains USAT's and USOC's demurrers. The Court of Appeal affirms on vicarious liability. As for direct negligence, the court analyzes the special relationship test and *Rowland* factors, reverses as to USAT, and affirms as to USOC.

USAT and USOC demurred to plaintiffs' first amended complaint. (AA 74-102, 118-157.) As for plaintiffs' vicarious liability theories, USAT and USOC argued Gitelman was not their employee or agent, Gitelman did not sexually abuse plaintiffs within the course and scope of any employment or agency, and USAT and USOC lacked actual knowledge of Gitelman's misconduct. (AA 82-84, 130-135.) As for plaintiffs' direct negligence theory, USAT and USOC argued they owed plaintiffs no duty of care to prevent Gitelman's sexual abuse because they had no special relationship with Gitelman or with plaintiffs, and because they lacked actual knowledge of Gitelman's misconduct. (AA 85-87, 136-143.) The trial court sustained USAT's and USOC's demurrers and entered judgment for them. (AA 233-243, 254-274.) Plaintiffs appealed. (AA 275-278.)

The Court of Appeal held plaintiffs failed to allege sufficient facts to support their vicarious liability claims against USAT and USOC because plaintiffs failed to allege facts showing a joint venture among Gitelman, USAT, and USOC, or that Gitelman was either an agent or employee of USAT or USOC. (*Brown*, *supra*, 40 Cal.App.5th at pp. 1104-1108.) On plaintiffs' direct negligence claim, the Court of Appeal reversed the judgment as to USAT and affirmed the judgment as to USOC. (*Id.* at pp. 1083, 1109.) The court followed the general rule that one owes no duty to protect

others from the conduct of third parties absent a special relationship. (*Id.* at pp. 1091-1092.) It found plaintiffs alleged facts showing USAT owed them a duty because USAT had a special relationship with Gitelman. (*Id.* at pp. 1094-1095.) The court then analyzed the *Rowland* factors to determine whether policy considerations " 'justify excusing or limiting' " the duty and concluded they did not. (*Id.* at pp. 1095-1101.) On the other hand, the Court of Appeal found plaintiffs failed to allege facts showing USOC had a special relationship with them or with Gitelman, so no duty existed, and the court did not need to analyze the *Rowland* factors. (*Id.* at pp. 1101-1103.)

Plaintiffs did not seek review of the Court of Appeal's holding on vicarious liability. They sought, and this Court granted, review only to address the appropriate test that minor plaintiffs must satisfy to establish a duty by defendants to protect them from sexual abuse by third parties.

LEGAL ARGUMENT

I. This Court has long applied different analytical frameworks to lawsuits alleging misfeasance and lawsuits alleging nonfeasance. Plaintiffs offer no reason to depart from these established frameworks.

A. In cases involving misfeasance, people generally owe a duty under Civil Code section 1714. Courts analyze the *Rowland* factors to examine the scope of the duty and whether public policy justifies an exception in specific cases.

In 1872, the Legislature enacted Civil Code section 1714, subdivision (a), which provides that "[e]veryone is responsible, not

only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." This Court has consistently applied this general duty rule. (See, e.g., *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398 (*Southern California Gas Leak Cases*) ["In California, the 'general rule' is that people owe a duty of care to avoid causing harm to others and that they are thus usually liable for injuries their negligence inflicts"]; *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 619 (*Regents*) ["In general, each person has a duty to act with reasonable care under the circumstances"]; *Smith v. Whittier* (1892) 95 Cal. 279, 291 [applying section 1714].)

This Court departs from the general duty rule "only where public policy clearly supports (or a statutory provision establishes) an exception." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164 (*T.H.*); see *Rowland*, *supra*, 69 Cal.2d at p. 112 ["in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy"].)[4] Thus, when a plaintiff alleges a defendant's actions injured the plaintiff, the law "presume[s] the defendant owed the plaintiff a duty of care and then ask[s] whether the circumstances 'justify a departure' from that usual presumption." (*Southern California Gas Leak Cases*, *supra*, 7 Cal.5th at p. 398;

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[4] *Rowland* was superseded by statute on another ground as stated in *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 722.

see *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 (*Cabral*).) To determine whether public policy justifies a departure from the usual presumption of duty, the Court balances the *Rowland* factors.[5] (See *Rowland*, at pp. 112-113.)

In the 52 years since this Court decided *Rowland*, it has not used the *Rowland* factors to create a duty when none otherwise exists. To the contrary, in two recent cases, this Court stated precisely the opposite—that it relies on the *Rowland* factors not to determine whether to create a duty, but to determine whether to create an exception to an existing duty. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1143 (*Kesner*) ["we rely 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"]; *Cabral*, *supra*, 51 Cal.4th at p. 783 [same].)

Many of this Court's opinions highlight its framework of first determining whether a duty exists and then, if a duty exists, applying the *Rowland* factors to determine the scope of the duty and whether to find an exception. (See *Southern California Gas Leak Cases*, *supra*, 7 Cal.5th at p. 398 ["we presume the defendant owed the plaintiff a duty of care and then ask whether the

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[5] The *Rowland* factors are "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, 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, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland*, *supra*, 69 Cal.2d at p. 113.)

circumstances 'justify the departure' from that usual presumption" by applying the *Rowland* factors]; *Regents*, *supra*, 4 Cal.5th at pp. 628-629 [the *Rowland* factors "may, on balance, justify excusing or limiting a defendant's duty of care"]; *T.H.*, *supra*, 4 Cal.5th at pp. 163-174 [applying *Rowland* factors to determine whether to create exception to drug manufacturer's duty to warn]; *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 [the *Rowland* factors analyze "whether policy considerations weigh in favor of such an exception" to a duty]; *Kesner*, *supra*, 1 Cal.5th at p. 1143 [same]; *Cabral*, *supra*, 51 Cal.4th at p. 771 ["In the *Rowland* decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714"]; *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1191-1193 [finding general duty existed under Civil Code section 1714 and that *Rowland* analysis "does not justify a departure from the general rule"]; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 363 ["This court has held that it will not depart from the fundamental concept that a person is liable for injuries caused 'by his want of ordinary care . . . in the management of his property or person . . .' [citation] except when such a departure is 'clearly supported by public policy' "].)

B. In cases such as this one involving nonfeasance, people generally have no duty to protect others from a third party unless an exception applies. Courts analyze the *Rowland* factors only if an exception applies and a duty exists.

A corollary to the general duty rule stated in Civil Code section 1714 is the general rule that " 'one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.' " (*Regents*, *supra*, 4 Cal.5th at p. 619; see *Morris v. De La Torre* (2005) 36 Cal.4th 260, 269 (*Morris*) ["As a general matter there is no duty to act to protect others from the conduct of third parties"]; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235 (*Delgado*) [same]; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 293 (*Nally*) ["Under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control"]; *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 806 (*Peterson*) ["As a general rule one has no duty to control the conduct of another, and no duty to warn those who may be endangered by such conduct"]; *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203 (*Davidson*) [same]; *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 751-752 (*Thompson*) [recognizing the "general rule that one owes no duty to control the conduct of another"]; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435 (*Tarasoff*) ["under the common law, as a general rule, one person owed no duty to control the conduct of another [citations], nor to warn those endangered by such conduct" (fn. omitted)], superseded by statute as stated in *Regents of University of California v.*

Superior Court (2018) 29 Cal.App.5th 890, 902-903; *Richards v. Stanley* (1954) 43 Cal.2d 60, 65 (*Richards*) ["Ordinarily . . . there is no duty to control the conduct of a third person so as to prevent him from causing harm to another"].)

One exception to the general no-duty rule is the special relationship doctrine at issue here. (See *Regents*, *supra*, 4 Cal.5th at p. 627 ["The 'special relationship' doctrine is an exception to [the] general rule" that there is "no duty to protect others from the conduct of third parties"]; *Morris*, *supra*, 36 Cal.4th at p. 269 ["One exception to [the] general [no-duty] rule is found in the 'special relationship' doctrine"]; *Delgado*, *supra*, 36 Cal.4th at p. 235 ["courts have recognized exceptions to the general no-duty-to-protect rule, one of which [is] the 'special relationship' doctrine"]; *Nally*, *supra*, 47 Cal.3d at p. 293 ["Under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control"]; see also *Peterson*, *supra*, 36 Cal.3d at p. 806 [recognizing special relationship exception to general no-duty rule]; *Davidson*, *supra*, 32 Cal.3d at p. 203 [same]; *Thompson*, *supra*, 27 Cal.3d at pp. 751-752 [same]; *Tarasoff*, *supra*, 17 Cal.3d at p. 435 ["when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim"]; *Richards*, *supra*, 43 Cal.2d at p. 65 [noting general no-duty rule applies "in the absence of a special relationship between

the parties"].) Under the special relationship doctrine, a defendant might have a duty to protect a plaintiff from a third party's conduct if the defendant has a special relationship with the plaintiff or with the third party. (See pp. 43-46, *post*.)

Many leading treatises recognize the well-settled no-duty rule and the special relationship doctrine. (See, e.g., Dobbs et al., Dobbs Law of Torts (2d ed. 2011) §§ 251 ["Where the defendant does not create or continue a risk of harm, the general rule, subject to certain qualifications, is that he does not owe an affirmative duty to protect, aid, or rescue the plaintiff"], 413 [discussing general "[n]o duty to control others" rule], 415-424 [discussing special relationships]; 6 Witkin, Summary of Cal. Law (11th ed. 2020) Torts, § 1177 ["A person who has not created a peril is ordinarily not liable in tort merely for failure to take affirmative action to assist or protect another, no matter how great the danger in which the other is placed, or how easily he or she could be rescued, unless there is some relationship between them that gives rise to a duty to act"]; Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2019) ¶ 2:1895 ["Generally, one who has not created a peril has no duty to affirmatively act so as to prevent harm to third persons. . . . [¶] However, the law *does* impose a legal duty to *affirmatively act* (to protect someone else from danger or to control the conduct of a third person) if there is a '*special*

relationship' between defendant and the person in danger or the third person creating the danger."].)[6]

Despite the long history of the general no-duty rule and the special relationship exception in California law, plaintiffs repeatedly refer to this analysis as the "Restatement's 'Special Relationship' test," suggesting both that these principles originated from the Restatement of Torts and that this Court therefore should give them less weight. (See OBOM 10-13, 21-23, 26-27, 31-33, 35, 37.) Not so. While the Restatement offers a clear formulation, this Court recognized the general no-duty rule long before the first edition of the Restatement of Torts was published in 1934. (E.g., *Kennedy v. Chase* (1898) 119 Cal. 637, 640-641 [employer had no duty to protect employee from injury sustained while on "private excursions" off-premises]; *Toomey v. Southern Pac. R. Co.* (1890) 86 Cal. 374, 381 [" 'For mere omissions,' . . . 'a man is not, generally speaking, held answerable. Not that the consequences or the moral gravity of an omission are necessarily less; . . . but, unless he is under some specific duty of action, his omission will not in any case be either an offense or a civil

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[6] The general no-duty rule and special relationship exception have achieved such widespread adoption that the Restatement has included the principles in all three editions, from 1934 to 2012. (See Rest., Torts, § 315 & com. b; Rest.2d Torts, § 315; Rest.3d Torts, Liability for Physical and Emotional Harm, § 37 & coms. a & b.) Other treatises surveying the national landscape have likewise recognized the same principles. (See, e.g., Annot., Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person (1966) 10 A.L.R.3d 619.) These sources show that nearly all jurisdictions in this country follow a general no-duty rule and special relationship doctrine.

wrong.' "]; see *Lane v. Bing* (1927) 202 Cal. 590, 592; *Perry v. Simeone* (1925) 197 Cal. 132, 136, superseded by statute on another ground as stated in *Strandt v. Cannon* (1938) 29 Cal.App.2d 509, 515; *Buelke v. Levenstadt* (1923) 190 Cal. 684, 689; see also Rest., Torts (1934) § 315.)

In short, when a plaintiff sues a defendant for the acts of a third party, this Court begins its analysis with the general no-duty rule and then determines whether a special relationship creates a duty. If no special relationship exists, this Court has no need to analyze the *Rowland* factors but sometimes does so to reinforce its conclusion that no duty should exist. (See, e.g., *Nally*, *supra*, 47 Cal.3d at pp. 296-300 [finding no special relationship and analyzing the *Rowland* factors to "explain further why" this Court should not impose a duty]; *Davidson*, *supra*, 32 Cal.3d at pp. 203-209 [no analysis of *Rowland* factors after finding no special relationship]; *Thompson*, *supra*, 27 Cal.3d at pp. 750-754 [no consideration of *Rowland* factors after finding no special relationship].)

Only if a special relationship exists does this Court then analyze the *Rowland* factors to determine the scope of the duty and whether to recognize an exception to the duty. (See, e.g., *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 870, 877-878 (*C.A.*) [finding special relationship between school district's administrators and their students and analyzing the *Rowland* factors to determine limits of duty]; *Morris*, *supra*, 36 Cal.4th at pp. 276-278 [reviewing *Rowland* factors after finding special relationship and concluding *Rowland* factors support a

duty]; *Delgado*, *supra*, 36 Cal.4th at p. 244-245 [reviewing *Rowland* factors after finding special relationship to examine scope of duty]; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1079-1080 [finding special relationship between physician and patient and analyzing *Rowland* factors to determine whether policy justifies exception].)

Regents, *supra*, 4 Cal.5th 607 represents the most recent case in which this Court applied this analytical framework. There, a student alleged her university and its employees owed her a duty to protect her from another student who stabbed her during a chemistry lab. (*Id.* at pp. 613-617.) This Court recognized that "there is generally no duty to protect others from the conduct of third parties," and that "[t]he 'special relationship' doctrine is an exception to this general rule." (*Id.* at p. 627.) It found that universities have a special relationship with their students who are "engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." (*Id.* at pp. 624-625.) This special relationship supported universities' "duty to use reasonable care to protect their students from foreseeable acts of violence in the classroom or during curricular activities." (*Id.* at pp. 627-628.)

Only *after* finding a special relationship did this Court apply the *Rowland* factors to " 'determin[e] whether to create an exception to the general duty to exercise reasonable care.' " (*Regents*, *supra*, 4 Cal.5th at p. 629.) It concluded the *Rowland* factors did not "persuade [it] to depart from [its] decision to

recognize a tort duty arising from the special relationship between colleges and their enrolled students." (*Id.* at pp. 633-634.)

In their opening brief, plaintiffs correctly identify the framework this Court applied in *Regents*. (OBOM 21-23, 27-28.) But despite the clarity of this Court's opinion, plaintiffs create confusion where none exists by contending that this Court "appeared to view [the two tests] as complementary, alternative analytical paths for reaching the same conclusion" (OBOM 28), and that this Court left unclear the interplay between the special relationship test and the *Rowland* factors (OBOM 28-29).

Plaintiffs' arguments reflect a misunderstanding of the roles of the general no-duty rule, the special relationship test, and the *Rowland* factors in this Court's jurisprudence. In *Regents*, the general no-duty rule applied because the student sued the university for a third party's conduct. (See *Regents*, *supra*, 4 Cal.5th at pp. 619-620.) This Court thus analyzed whether the special relationship test created a duty on the part of the university to protect its student from that third party. (*Id.* at pp. 620-627.) If this Court had found no special relationship, the inquiry would have ended without the need to address the *Rowland* factors. But because this Court found a special relationship, it then analyzed the *Rowland* factors to determine whether to "depart from" recognizing the duty. (*Id.* at p. 628.) In short, this Court did not apply the *Rowland* factors as an independent, alternative basis to create a duty, but only to determine whether to create an exception to an existing duty.

C. The cases plaintiffs cite either follow this Court's existing analysis or should be rejected as inconsistent with this Court's precedent.

Plaintiffs contend this Court's cases have created "[o]ne line of authority [that] 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 theories to properly conduct that analysis." (OBOM 23-24, emphasis omitted.) As discussed above, plaintiffs are wrong. None of the cases they cite from this Court supports their argument.[7] (See OBOM 24 [citing *Nally*, *supra*, 47 Cal.3d at p. 293 and *Davidson*, *supra*, 32 Cal.3d at pp. 203-209], 33-34 [citing *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 501-511 (*Merrill*)

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[7] In one opinion not cited by plaintiffs, this Court suggested in dictum that an analysis of the *Rowland* factors could "create a duty to exercise reasonable care." (*Tarasoff*, *supra*, 17 Cal.3d at p. 435.) *Tarasoff* involved allegations that a therapist failed to protect a person killed by a dangerous patient. (See *id.* at p. 430-431.) This Court concluded the therapist's relationship with the patient created a duty to the decedent and that this Court had no need to determine whether the *Rowland* factors separately created a duty. (*Id.* at p. 435.) Besides *Tarasoff*, the only other statements from this Court suggesting the *Rowland* factors could create a new duty appear in concurring and dissenting opinions where the Justices nevertheless applied the correct framework. (See *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 949-950 (conc. & dis. opn. of Mosk, J.) [citing *Tarasoff* but finding no special relationship and "[t]hus, there is no need to address the *Rowland* factors"]; *Truman v. Thomas* (1980) 27 Cal.3d 285, 298 (dis. opn. of Clark, J.) [applying *Rowland* factors to address physician's duty to patient and concluding physician should have no duty to explain potential risks of not consenting to pap smear].)

(dis. opn. of Werdegar, J.)], 37 [citing *Kesner*, *supra*, 1 Cal.5th at pp. 1143-1165].)

In *Nally*, the parents of a decedent who committed suicide sued a church and its pastors for not preventing the suicide. (*Nally*, *supra*, 47 Cal.3d at p. 283-287.) This Court began with the general no-duty rule and then analyzed whether a special relationship existed between the deceased and the defendants. (*Id.* at p. 293 ["Under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control"].) This Court found no special relationship between the decedent and the defendants. (*Id.* at p. 296.) While it could have ended its analysis there, this Court went on to discuss the *Rowland* factors not as an independent basis to establish a duty but to "explain further why we should not impose a duty to prevent suicide on defendants and other nontherapist counselors." (*Ibid.*)

In *Davidson*, the victim of a stabbing alleged that police officers failed to protect her from or warn her about the assailant. (*Davidson*, *supra*, 32 Cal.3d at p. 201.) This Court analyzed whether the officers owed the victim a duty by beginning with the general no-duty rule and the special relationship exception. (*Id.* at p. 203.) It found the officers had no special relationship with either the assailant or the victim and concluded the officers owed no duty to the victim. (*Id.* at pp. 205-209.) This Court mentioned the

Rowland factors (see *id.* at p. 203) but did not analyze them because it found no special relationship to begin with.[8]

Nally and *Davidson* thus follow this Court's longstanding framework in which it first determines whether a duty exists under a special relationship and then applies the *Rowland* factors only if a duty exists to determine whether to create an exception. In neither *Nally* nor *Davidson* did this Court alter the framework. In *Davidson*, the Court mentioned the factors without analysis. In *Nally*, the Court discussed the factors to "explain further" the policy reasons against imposing a duty under a special relationship. (*Nally*, *supra*, 47 Cal.3d at p. 296.)

Plaintiffs' discussion of *Merrill*, *supra*, 26 Cal.4th 465 further highlights their misunderstanding of this Court's duty framework. In *Merrill*, an individual went on a shooting rampage using guns made by the defendant, and the plaintiffs sued the defendant for " 'manufacturing, marketing, and making available

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[8] *Davidson*'s discussion of the framework used in determining whether to apply a statutory immunity is apt: "Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity." (*Davidson*, *supra*, 32 Cal.3d at pp. 201-202.) Some Court of Appeal opinions had overlooked this "logical sequence of inquiry," and this Court clarified that the "possible inapplicability of immunity [does] not create a special relationship where none otherwise exists." (*Id.* at p. 202.) This Court found no need to address statutory immunity because it found no special relationship that would establish a duty. (*Id.* at p. 203.) The same logical sequence of inquiry applies to the *Rowland* factors—whether they justify an exception to a duty does not arise unless a duty exists to begin with.

for sale to the general public' " those guns. (*Id.* at pp. 470-473.) The plaintiffs did *not* allege that the defendant had a duty to control or prevent the actions of the shooter. Thus, plaintiffs are wrong to contend that Justice Werdegar's dissenting opinion "explain[ed] how a duty could be established (notwithstanding the provisions of [Civil Code] section 1714.4) under the *Rowland* factors test, even in the absence of a 'special relationship' duty to prevent the harm in question." (OBOM 34.) Since the plaintiffs sued for the defendant's misfeasance and not for its nonfeasance, Justice Werdegar correctly began her duty analysis with the general duty rule under Civil Code section 1714 followed by an examination of the *Rowland* factors to determine whether to find an exception to the general duty. (See *Merrill*, at pp. 501-502 (dis. opn. of Werdegar, J.).) Justice Werdegar specifically found that neither the general no-duty rule nor the special relationship exception applied. (See *id.* at pp. 506-507 (dis. opn. of Werdegar, J.) ["plaintiffs seek not imposition of a duty of rescue or prevention, but rather, application of the ordinary duty . . . to conduct one's activities with reasonable care for the safety of others" (citation omitted)].)

Moreover, plaintiffs misplace their reliance on *Kesner* for the proposition that "*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." (OBOM 37.) To the contrary, the Court in *Kesner* held that it relies on the *Rowland* factors "not to determine 'whether a *new duty* should be created, but whether an *exception*" to an existing duty should be created.

(*Kesner*, *supra*, 1 Cal.5th at p. 1143.) And it applied the established framework—not plaintiffs' proposed test.

Recent Court of Appeal opinions—including the one below—have correctly followed this Court's established framework. (See, e.g., *Hanouchian v. Steele* (June 4, 2020, B291609) __ Cal.App.5th __ [2020 WL 3446862, at pp. *3-*7] [finding special relationship existed and then applying *Rowland* test to conclude the defendants owed no duty to plaintiff]; *Brown*, *supra*, 40 Cal.App.5th at pp. 1091-1103 [applying special relationship test first and then applying *Rowland* test only where court found a special relationship]; *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 76-77 (*Barenborg*) [rejecting contention that the court should analyze *Rowland* factors to create a duty and instead analyzing them only to determine whether policy reasons " 'justify excusing or limiting a defendant's duty of care,' where a duty would otherwise exist"];[9] *University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 451 (*University of Southern California*) [recognizing the *Rowland*

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[9] In *Barenborg*, *supra*, 33 Cal.App.5th at page 77, the Court of Appeal held that "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." While this Court has not specifically formulated the framework in that way, the Court of Appeal's statement is correct when the defendant argues both that no special relationship exists *and* that, if a special relationship did exist, the *Rowland* factors would justify a departure from the duty. When courts have found a special relationship but did not analyze the *Rowland* factors, the defendant likely did not raise the latter argument.

factors are analyzed to determine "whether to recognize an exception" to existing duties and "may be unnecessary if the court determines as a matter of law based on other policy considerations that no duty exists in a category of cases"]; *Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1129-1139 (*Youth Soccer*) [finding a special relationship and analyzing the *Rowland* factors to determine the scope of the duty arising from the relationship]; *Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 246-248 [finding a special relationship and analyzing the *Rowland* factors to support conclusion regarding the scope of a summer camp's duty of disclosure to parents regarding dangerous employee]; *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1227-1228 (*Conti*) [finding no special relationship and that "the absence of a special relationship is dispositive and there is no reason to conduct the analysis prescribed in [*Rowland*] to determine whether a duty nevertheless existed"]; *Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 438 [finding no special relationship and therefore no need to address *Rowland* factors]; *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1202-1203 [same]; *Eric J. v. Betty M.* (1999) 76 Cal.App.4th 715, 727-730 (*Eric J.*) [same].)

In fact, many of the cases plaintiffs cite to support their argument actually apply this Court's framework and support USAT's analysis.

Plaintiffs assert that *Conti*, *supra*, 235 Cal.App.4th at pages 1227-1231 "appl[ied] 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." (OBOM 25-26.) The Court of Appeal made clear, however, that "the absence of a special relationship is dispositive and there is no reason to conduct the analysis prescribed in [*Rowland*] to determine whether a duty nevertheless existed." (*Conti*, at pp. 1227-1228.) The court considered the *Rowland* factors not as an independent basis for creating a duty, but only to support its conclusion that no duty existed. (*Id.* at p. 1228 ["even if we were required to consider the *Rowland* factors, we would not conclude that the elders had a duty to warn"].)

In addition, plaintiffs argue that *University of Southern California*, *supra*, 30 Cal.App.5th at pages 447-448 and 451-455 "consider[ed] both the Special Relationship test and the *Rowland* factors tests [*sic*] 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." (OBOM 26.) But again, the Court of Appeal made clear that "[a]n analysis of the *Rowland* factors may be unnecessary if the court determines as a matter of law based on other policy considerations that no duty exists in a category of cases." (*University of Southern California*, at p. 451.) As in *Conti*, the court considered the *Rowland* factors not as an independent basis for creating a duty, but only to support its conclusion that no duty existed. (*Id.* at p. 452 ["some courts have considered the *Rowland* factors despite concluding that there was no special relationship and no duty, with the *Rowland* analysis supporting the conclusion of no duty"].)

Further, plaintiffs contend the Court of Appeal below "applied two different testing regimens to two different defendants" when it followed *Regents*. (OBOM 35, emphasis omitted; see OBOM 12-13, 30-31 [arguing the Court of Appeal applied the special relationship test and *Rowland* factors "in conflicting ways"].) Plaintiffs are mistaken. The court applied the same framework to both USAT and USOC. It began with the general no-duty rule and then applied the special relationship test. (See *Brown*, *supra*, 40 Cal.App.5th at pp. 1091-1103.) Finding a special relationship between USAT and Gitelman, the court proceeded to analyze the *Rowland* factors to determine whether to depart from the duty arising from the special relationship. (*Id.* at pp. 1094-1101; see *id.* at p. 1095 ["Even if an organization has a special relationship with the tortfeasor or plaintiff, '[t]he court may depart from the general rule of duty . . . if other policy considerations clearly require an exception' "].) But the court found no special relationship between USOC and Gitelman and thus had no need to analyze the *Rowland* factors. (*Id.* at pp. 1101-1103 [concluding that "[b]ecause 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."].) In short, the Court of Appeal correctly applied this Court's framework to both defendants.

That said, plaintiffs have identified three outlier Court of Appeal opinions that have failed to follow this Court's framework. (See *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899 (*Doe 1*); *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377

(*Juarez*); *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243 (*Adams*).)

This contrary line of cases begins with *Adams*, *supra*, 68 Cal.App.4th at page 248, in which the Court of Appeal analyzed whether police officers responding to an emergency call owed the family of a suicidal person a duty to prevent the suicide. The court first reviewed the *Rowland* factors and concluded they "militate against imposing a legal duty on police officers to take reasonable steps to prevent a threatened suicide from being carried out." (*Id.* at p. 276.) The court then applied the special relationship test and found that none existed, but that even if one did exist, "an analysis of the traditional *Rowland* factors weighs against the imposition of a duty." (*Id.* at p. 285 ["Where police conduct results in some increase in a preexisting risk of harm, but an analysis of the traditional *Rowland* factors weighs against the imposition of a duty, we conclude that no special relationship duty may be imposed"].)

The discussion in *Adams* shows the court's confusion over this Court's precedent. For example, the court suggested that applying the special relationship test necessarily meant "eschewing public policy concerns." (*Adams*, *supra*, 68 Cal.App.4th at p. 286 ["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"]; see *id.* at p. 285 ["the question of duty must not ignore matters of policy regardless of whether the duty purportedly arises under the special relationship doctrine"].) The court overlooked

the fact that the special relationship test itself embodies a public policy—persons should not be legally obligated to prevent third parties from harming others, except where a special relationship justifies imposing such a duty. Further, the court overlooked the fact that even when a special relationship exists, the courts then proceed to analyze the *Rowland* factors, the essential purpose of which is to assess whether public policy justifies limiting or eliminating the duty.

As this Court stated in *Regents*, *supra*, 4 Cal.5th at page 620, "[t]he determination whether a particular relationship supports a duty of care rests on policy." Indeed, "[t]he 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.*, *supra*, 4 Cal.5th at p. 164.)

The *Adams* court also erred by claiming that "the interrelationship between the traditional duty analysis and the 'special relationship' doctrine has never been clearly defined" and that the two tests conflicted with each other. (*Adams*, *supra*, 68 Cal.App.4th at pp. 267, 285-286.) As discussed above, the roles of the special relationship test and the *Rowland* factors have long been clear.

The court's confusion in *Adams* led it to consider whether to apply the *Rowland* factors *or* the special relationship test to determine whether to create a duty, instead of applying the special relationship test first and the *Rowland* factors only if necessary to determine whether to create an exception to a duty. (See *Adams*,

supra, 68 Cal.App.4th at pp. 266-267, 282, 286-287.) The court's muddied analysis recognized that in cases involving an alleged failure to prevent a third party from inflicting harm on others, this Court's opinions begin with the special relationship test, yet the court relied on other Court of Appeal opinions and selected law review articles to bypass the special relationship test and apply the *Rowland* factors first instead. (See *id.* at pp. 266 [citing Court of Appeal opinions for the proposition that the "more common approach" is to apply the *Rowland* factors to create a duty], 266-267 [citing this Court's opinions for the proposition that "[o]ther courts have relied on the more amorphous 'special relationship' doctrine"], 286-287 [citing law review articles to supports its use of the *Rowland* factors].) The court also misread this Court's opinions in *Nally* and *Davidson* as "engag[ing] in a duty analysis under both standards."[10] (*Adams*, at p. 267.)

Adams had no reason to depart from this Court's framework. The court found no special relationship between the responding police officers and the suicidal person that could have given rise to a duty to prevent the suicide. The court could have concluded its analysis at that point, consistent with this court's established

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[10] Other courts have read *Nally* and *Davidson* as suggesting that the special relationship test incorporates the *Rowland* factors. (See, e.g., *Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906, 911-912; *Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 646; see also *Eric J.*, *supra*, 76 Cal.App.5th at pp. 729-730 [stating that the *Rowland* factors have "already been done by the courts over the centuries in formulating the 'no duty to aid' rule"].) While certain considerations likely overlap in the two analyses, this reading of *Nally* and *Davidson* is also wrong.

framework. The court's analysis of the *Rowland* factors was superfluous but simply confirmed that no duty was owed.

The few opinions that have followed *Adams* have done so without analyzing this Court's precedent and framework. In *Juarez*, *supra*, 81 Cal.App.4th at pages 410-411, the court offered no analysis of this Court's framework, but relied solely on *Adams* for the proposition that "the expanding view in tort jurisprudence [is] that the use of special relationships to create duties has been largely eclipsed by the more modern use of balancing policy factors enumerated in *Rowland*." Likewise, in *Doe 1*, *supra*, 102 Cal.App.4th at pages 913-918, the court failed to discuss this Court's framework, but quoted *Juarez* at length to justify its primary reliance on the *Rowland* test to create a duty and applied the special relationship test only as an alternative and disfavored analysis.

These courts misunderstood the purpose of the special relationship test and the *Rowland* analysis. In *Juarez*, for example, the Court of Appeal claimed the special relationship test "developed as a means of avoiding imposing a duty to take protective action for the benefit of a potential victim when there is no relationship to the person needing protection." (*Juarez*, *supra*, 81 Cal.App.4th at p. 410.) But this Court has never applied the special relationship test to "avoid[ ] imposing a duty." (*Ibid.*) Instead, the law *presumes* a defendant owes no duty to protect a plaintiff from the acts of a third party, and this Court analyzes the special relationship test to find whether an exception to this

presumption applies. The cited courts' misunderstanding ultimately led them to stray from this Court's established analysis.

Finally, as discussed above at pages 18 and 30-31, in *Kesner* and *Cabral*, this Court dispelled any possible confusion arising from these cases about the duty analysis and framework, and recent Court of Appeal cases all apply this Court's framework and do not follow *Adams*. This Court should disapprove *Adams*, *Juarez*, and *Doe 1*'s suggestion that the *Rowland* factors can be applied as an independent, alternative basis to create a duty when none exists, as well as their statements suggesting the *Rowland* factors should be applied instead of the special relationship test when a plaintiff sues a defendant for failing to prevent misconduct by a third party.

D. Public policy supports this Court's existing framework. Plaintiffs' contrary proposal represents an unwarranted and sweeping change in the duty analysis in tort law.

Plaintiffs have offered no legal basis for this Court to depart from the existing framework it has developed and to instead apply the *Rowland* factors and special relationship test as independent, alternative bases to create a duty. Plaintiffs have also offered no public policy supporting their novel approach, and there is none.

As discussed above, this Court applies different duty analyses depending on whether the plaintiff sues the defendant for the defendant's own conduct or for the acts of a third party. The differences arise from the well-settled distinction between misfeasance and nonfeasance. (See *Tarasoff*, *supra*, 17 Cal.3d at p. 435, fn. 5 [explaining the general no-duty-to-protect rule

"derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter"]; *Youth Soccer*, *supra*, 8 Cal.App.5th at pp. 1128-1129 [discussing misfeasance versus nonfeasance]; see also Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. Pa. L.Rev. 217, 218-220 ["There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant"]; Harper & Kime, *The Duty to Control the Conduct of Another* (1934) 43 Yale L.J. 886, 886-887 [recognizing the "old" distinction between misfeasance and nonfeasance and its policy bases].)

The *Rowland* factors operate as a way to determine whether public policy justifies an exception to an existing duty in cases of misfeasance, while the special relationship test operates as a way to determine whether public policy justifies creating a duty in cases of nonfeasance. By arguing that the same duty analysis should apply to both types of cases, plaintiffs would do away with the distinction and upend the careful framework this Court has established.

Plaintiffs' argument also turns the fundamental purpose of the *Rowland* factors on its head. *Rowland* arose in the context of a premises liability action where landowners generally have a special relationship with their invitees that supports a duty. (See *Rowland*, *supra*, 69 Cal.2d at pp. 110-111, 114.) This Court

formulated the *Rowland* factors as a tool to aid in deciding whether to recognize an *exception* to that established duty, not to create a new duty. (See *id.* at pp. 112-113.) By arguing that the *Rowland* factors should be used to create duties, plaintiffs propose to misapply the *Rowland* analysis to serve a purpose that conflicts with its origins. Moreover, applying the same analysis both to determine whether to create exceptions to existing duties *and* to determine whether to create new duties is contradictory and simply makes no sense.

The *Rowland* factors themselves further show why plaintiffs' suggested approach would be unworkable. Two of the factors—the "closeness of the connection between the defendant's conduct and the injury suffered" and the "moral blame attached to the defendant's conduct"—*presume* the defendant engaged in affirmative "conduct." (*Rowland*, *supra*, 69 Cal.2d at p. 113.) Cases of nonfeasance, by definition, do not involve affirmative conduct. The *Rowland* factors are ill-suited to evaluating whether a duty should be imposed in cases of nonfeasance.

Moreover, the most important factor in the *Rowland* analysis is the foreseeability of harm to the plaintiff. (See *Kesner*, *supra*, 1 Cal.5th at p. 1145 ["The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care articulated by [Civil Code] section 1714 is whether the injury in question was foreseeable"].) By allowing the *Rowland* factors to supplant the special relationship test even in cases of nonfeasance, plaintiffs' proposal would create an entirely new kind of tort action against any bystander who *could*

have protected a plaintiff from a third party's foreseeable conduct but did not do so—even if the bystander is a complete stranger to both the plaintiff and the third party. Plaintiffs' proposal would upend settled tort law by allowing courts to recognize an affirmative duty to rescue a stranger from foreseeable harm.[11] The special relationship test thus serves an important line-drawing function by ensuring that only a defendant who *should have* protected a plaintiff from a third party's foreseeable conduct faces liability for not doing so.

Finally, California courts have not deviated from the framework even when the plaintiff is a minor or the allegations involve sexual abuse. (See, e.g., *Youth Soccer*, *supra*, 8 Cal.App.5th at pp. 1129-1139 [sexual abuse of minor]; *Conti*, *supra*, 235 Cal.App.4th at pp. 1227-1228 [same].) In *C.A.*, *supra*, 53 Cal.4th at page 865, for example, a minor brought an action against his high school counselor and school district for the counselor's sexual abuse of the minor. This Court began the duty analysis by finding that school districts and its employees had a special relationship with their students that supported a duty of care "to use reasonable measures to protect students from

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[11] Imposing a duty to rescue would render moot the negligent undertaking doctrine, under which "a volunteer who, having no initial duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertaking if . . . (a) the volunteer[']s failure to exercise such care increases the risk of harm to the other person, or (b) the other person reasonably relies upon the volunteer[']s undertaking and suffers injury as a result." (*Delgado*, *supra*, 36 Cal.4th at p. 249.) The negligent undertaking doctrine is another well-established exception to the general no-duty rule.

foreseeable injury at the hands of third parties acting negligently or intentionally." (*Id.* at p. 870.) This special relationship created a duty of care on the part of the school district's administrators and supervisors, which included the duty to not negligently hire, retain, or supervise an employee such as the counselor. (*Id.* at p. 877.) But after finding a special relationship, this Court further found that an analysis of the *Rowland* factors justified narrowing the duty to individuals who are "highly influential to the actual decision maker" and who "knew or should have known of the dangerous propensities of the employee who injured the plaintiff." (*Id.* at p. 878.)

In short, there is no reason for this Court to depart from the analytical framework it has established and applied for decades.

II. The special relationship test requires a defendant to have either a custodial relationship with the plaintiff or an ability to control the third party's conduct. No special relationship existed to create a duty for USAT to protect plaintiffs from Gitelman's crimes.

Besides holding that the proper duty analysis uses the analytical framework discussed above, this Court should also take the opportunity presented by this case to clarify the requirements of the special relationship test applicable to cases such as this one. Plaintiffs' discussion of the special relationship test (see OBOM 52-64), as well as the Court of Appeal's analysis below (see *Brown*, *supra*, 40 Cal.App.5th at pp. 1092-1095), do not reflect the correct test that courts should apply.

"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 p. 619.) Such a duty may arise if the defendant has a special relationship "with the foreseeably dangerous person that entails an ability to control that person's conduct," or "with the potential victim that gives the victim a right to expect protection."[12] (*Regents*, at p. 619.)

This Court should clarify that a special relationship between a defendant and a third party arises only when the defendant can control the third party's conduct by monitoring the third party's activities on a contemporaneous, day-to-day basis. A defendant's ability to issue policies and procedures enforceable only through discipline *after* the defendant learns about violations cannot establish a special relationship.

The Court of Appeal's analysis in *Barenborg* is instructive. The court surveyed decisions across the country that addressed

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[12] The Court of Appeal did not find that USAT had a special relationship with plaintiffs, and this Court therefore need not reach that issue. But if necessary, this Court can clarify that a special relationship between a defendant and a plaintiff arises only when the defendant has a custodial or supervisory relationship with the plaintiff. Such relationships include common carriers and their passengers, innkeepers and their guests, business owners and landowners and their invited guests, landlords and their tenants, guards and those in their custody, employers and their employees, and schools and their students. (See *Regents*, *supra*, 4 Cal.5th at p. 620; see also Rest.3d Torts, Liability for Physical and Emotional Harm, § 40.) These relationships all have an "aspect of dependency in which one party relies to some degree on the other for protection" and the other party "has superior control over the means of protection." (*Regents*, at pp. 620-621.) Plaintiffs' allegations show no custodial or supervisory relationship between USAT and plaintiffs.

whether a national fraternity had a special relationship with a local chapter of the fraternity. (*Barenborg*, *supra*, 33 Cal.App.5th at p. 79.) The court explained that the national fraternity's ability to establish general policies governing the operation of local chapters and its authority to discipline local chapters for policy violations did not create a special relationship or justify imposing a duty on the national fraternity. (*Ibid.*) The court also explained that no duty may be imposed on a national fraternity that lacks the ability to contemporaneously monitor the day-to-day activities of local chapters. (*Ibid.*) The court found that, "absent an ability to monitor the day-to-day operations of local chapters, the authority to discipline generally will not afford a national fraternity sufficient ability to prevent the harm and thus will not place it in a unique position to protect against the risk of harm." (*Id.* at p. 80.) Ultimately, the court held, "regardless of its policies and disciplinary powers, [the national fraternity] was unable to monitor and control [the local chapter's] day-to-day operations, and it thus owed no duty to protect [the plaintiff] from [the local chapter's] conduct." (*Id.* at p. 81.)

Cases involving a university's relationship with students and fraternities are also apt. In *Regents*, this Court found that universities have a special relationship only with enrolled students "while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." (*Regents*, *supra*, 4 Cal.5th at p. 625.) The limitation to curricular activities was necessary because "many aspects of a modern college student's life are, quite properly, beyond the

institution's control. Colleges generally have little say in how students behave off campus, or in their social activities unrelated to school." (*Id.* at p. 626.) In *University of Southern California*, *supra*, 30 Cal.App.5th at pages 447-448, the Court of Appeal applied this limitation and found that the University of Southern California had no special relationship with a fraternity or its members engaging in off campus social activities such as the party at issue in that case.

Several of the special relationships between defendants and third parties recognized in the Restatement support this control requirement. For example, the Restatement recognizes that parents owe a duty for the acts of their dependent children because of the "parents' responsibility for child-rearing, their control over their children, and the incapacity of some children to understand, appreciate, or engage in appropriate conduct." (Rest.3d Torts, Liability for Physical and Emotional Harm, § 41 & com. d.) Indeed, "[w]hen children reach majority or are no longer dependent, parents no longer have control, and the duty no longer exists." (*Ibid.*) Likewise, "[c]ustodians of those who pose risks to others have long owed a duty of reasonable care to prevent the person in custody from harming others." (*Id.,* § 41, com. f.)

Applying the correct control test here, the Court of Appeal should have found that USAT had no special relationship with Gitelman. The court did not explain how USAT could control Gitelman's conduct from its headquarters in Colorado any more than the national fraternity in *Barenborg* could control the conduct of its local chapters. The lack of control is further highlighted by

plaintiffs' allegations that Gitelman committed his crimes in a car, in hotel rooms, at his training facility in Las Vegas, and at dormitories that USAT did not own. (See AA 45-49.)

Moreover, the Court of Appeal based its holding on the finding that USAT had "control over Gitelman's conduct through its policies and procedures." (*Brown*, *supra*, 40 Cal.App.5th at p. 1094; see *ibid.* [discussing USAT's adopting codes of conduct and ethics in 2013, as well as USAT's enforcement of its policies and procedures by suspending and eventually terminating Gitelman]; *id.* at p. 1095 ["USAT could, and eventually did, establish codes of conduct and ethics" and could have also established other policies and procedures].) But USAT could only enforce its policies and procedures by disciplining coaches *after* learning about violations—just as the fraternity in *Barenborg* "could only control its local chapter by disciplining it after learning of a violation of the fraternity's policies." (*Id.* at p. 1095.)[13]

Thus, the Court of Appeal failed to apply the special relationship test and instead mistakenly found that USAT's mere ability to establish policies and procedures governing coaches'

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[13] The Court of Appeal also noted that USAT did not provide "guards or chaperones at hotels and dormitories at competitions to prevent improper conduct by coaches." (*Brown*, *supra*, 40 Cal.App.5th at p. 1095.) This puts the cart before the horse. What USAT could have done to protect plaintiffs is irrelevant to whether USAT had a duty to protect them. The relevant question is whether USAT had a special relationship with Gitelman through an ability to control his conduct by monitoring him on a contemporaneous, day-to-day basis. Only if a special relationship exists does the inquiry then turn to what the duty of reasonable care requires of USAT.

conduct gave rise to a special relationship between USAT and Gitelman.

CONCLUSION

This Court should reaffirm the well-settled duty framework discussed above. The Court should also reverse the Court of Appeal's decision as to USAT or, alternatively, remand the case to allow the Court of Appeal to apply the special relationship test as this Court formulates it.

July 14, 2020

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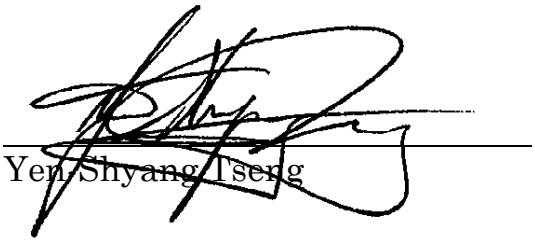

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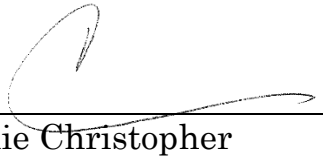

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7/14/2020

Date

/s/Yen-Shyang Tseng

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