S259216

IN THE SUPREME COURT
OF THE STATE 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

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE OF THE NATIONAL CRIME VICTIM BAR ASSOCIATION AND MANLY, STEWART & FINALDI IN SUPPORT OF PLAINTIFFS AND PETITIONERS YASMIN BROWN, *ET AL.*

ESNER, CHANG & BOYER
Holly N. Boyer, SBN 221788
Shea S. Murphy, SBN 255554
234 East Colorado Boulevard, Suite 975
Pasadena, California 91101
Telephone: (626) 535-9860
Email: hboyer@ecbappeal.com
smurphy@ecbappeal.com
Attorneys for Amici Curiae
NATIONAL CRIME VICTIM BAR ASSOCIATION
AND MANLY, STEWART & FINALDI

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Pursuant to California Rules of Court, rule 8.520, subdivision (f), the National Crime Victim Bar Association ("NCVBA") and the law firm of Manly, Stewart & Finaldi, collectively referred to as "Amici Curiae," respectfully request permission to file the accompanying amici curiae brief in support of Plaintiffs and Petitioners Yazmin Brown, *et al*.

The NCVBA is a non-profit association and an affiliate and program of the National Center for Victims of Crime. NCVBA's members consist of attorneys across the nation as well as expert witnesses dedicated to helping victims seek justice through the civil system. The NCVBA has taken a leading role in advancing and protecting the rights of victims in the civil justice system, including victims of childhood sexual abuse.

Manly, Stewart & Finaldi is one of the Nation's leading law firms for sexual abuse cases and has represented over a thousand victims of clergy sexual abuse, as well as hundreds of children victimized in schools. The firm has also represented several child victims of sexual abuse in the sports context. Poignantly, the firm handled the "Dr. Larry Nassar Cases," obtaining a landmark settlement on behalf of 333 female athletes, mostly minor gymnasts, and some of whom were United States National Team members and Olympians, sexually abused by Dr. Lawrence Nassar. Given Manly, Stewart & Finaldi's commitment to its clients and protecting victims of sexual abuse, and particularly child victims of sexual abuse, the firm is interested in the significant issues presented in this case.

Amici Curiae and its undersigned counsel have no pecuniary interest in this case. No person or entity other than Amici Curiae and its counsel authored this proposed brief in whole or in part and that no person or entity other than Amici Curiae made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520, subd. (f)(4).)

Amici Curiae are grateful for the opportunity to submit the following argument for the Court's consideration. Amici Curiae believe their views specifically concerning the origin of duty and the appropriate analysis of whether a duty exists here will assist the Court in resolving the issue before it. Further, as Amici Curiae are intimately familiar with the hardships faced by victims of childhood sexual abuse and the trauma experienced as a result of such abuse, it is Amici Curiae's hope that they can further shed light on issues of foreseeability and public policy.

Dated: October 8, 2020 **ESNER, CHANG & BOYER**

By: *s/ Holly N. Boyer*
Holly N. Boyer
Attorneys for Amici Curiae
MANLY STEWART & FINALDI and
NATIONAL CRIME VICTIM BAR
ASSOCIATION

AMICI CURIAE BRIEF

I.

INTRODUCTION

The issue before this Court presents one of utmost significance to Amici Curiae who have taken a leading role in advancing and protecting the rights of victims of childhood sexual abuse seeking justice against those organizations and entities whose negligence facilitated or permitted the foreseeable abuse to occur. As outlined below, the analysis of any determination of duty is rooted in *public policy*. Contrary to the arguments advanced by Defendants United States Olympic Committee (USOC) and USA Taekwondo (USAT), considerations of foreseeability, the degree of harm suffered and public policy are not divorced from the initial analysis of whether a duty is owed. Rather, such considerations form the very underpinning of whether a duty exists. While USOC and USAT are correct that this Court's analysis in *Rowland v. Christian* (1968) 69 Cal.2d 108 may justify carving out a categorical exception to a duty owed for a certain class of defendants if supported by public policy, these Defendants fail to appreciate that the public policy factors outlined in *Rowland* may likewise guide the initial analysis of whether a duty is owed.

As explained below, the public policy of protecting youth from the tragic reality of the sheer prevalence of child predators taking shelter in organizations geared towards children demands that the *presumption* is that these organizations owe a duty to protect youth participants from foreseeable sexual abuse. As outlined below, that is precisely the result under both Civil Code section 1714 as well as the special relationship doctrine as applied here. A broad application of duty in circumstances involving foreseeable sexual abuse of children is necessary to protect our most vulnerable.

II.

A DETERMINATION OF DUTY IS AN EXPRESSION OF PUBLIC POLICY

Any analysis of duty begins with an examination of policy, for it is policy that gives rise to the existence of duty. As explained by this Court: "'To say that someone owes another a duty of care "'is a shorthand statement of a conclusion, rather than an aid to analysis in itself.... **"[D]uty" 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.**' [Citation.]" [Citation.] "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." [Citation.]'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477, citing *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933 and *Dillon v. Legg* (1968) 68 Cal.2d 728, 734.)

While a duty of care may arise through statute or contract, it may also be "premised upon the general character of the activity in which the defendant engaged, the relationship between the parties or even the interdependent nature of human society." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803, citing *Valdez v. J.D. Diffenbaugh Co*. (1975) 51 Cal.App.3d 494, 505.) "Whether a duty is owed is simply a shorthand way of phrasing what is '"the essential question - whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."' (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316], quoting from Prosser, Law of Torts (3d ed. 1964) pp. 332-333. *See also* Prosser, Law of Torts (4th ed. 1971) pp. 324-327; Fleming, An Introduction to the Law of Torts (1967) pp. 43-50.)" (*J'Aire Corp*., at p. 803.)

According to Defendants USOC and USAT, the analysis to be employed in determining whether an entity owes a duty to protect children from foreseeable sexual abuse is constrained to a determination of whether a special relationship exists – if such a special relationship is not found, then according to Defendants there is no analysis of the factors outlined in this Court's *Rowland* decision. While, as explained below, the duty to protect minors from foreseeable sexual abuse is *not* limited to a finding of a special relationship, and in any event a special relationship no doubt exists under the facts here as to both USOC and USAT, Defendants' analysis overlooks the very foundation of a determination of duty: ***policy***.

The *Rowland* analysis is typically used to determine whether a categorical exception should be carved out of an otherwise existing duty for a certain class of defendants. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1144-1145, citing *Cabral v. Ralphs Grocery Co*. (2011) 51 Cal.4th 764, 772.) The idea is that courts may create an exception to the general rule of duty only where clearly supported by public policy. (*Id*.) The *Rowland* factors serve as a formula of policy illustrative of whether a duty should or should not be imposed. While an analysis of whether a categorical exception should exist as to a particular class of defendants necessarily requires a finding of duty to begin with, the initial determination of whether a duty exists is not independent from the factors outlined in *Rowland*. In other words, while an analysis of *Rowland's* foreseeability and policy considerations may justify a categorical no-duty rule, the same foreseeability and public policy considerations may give rise to the very finding of a duty as in the end duty is simply "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." (*Merill,* 26 Cal.4th at p. 477.)

As this Court has made clear: "**The existence or nonexistence of a common law legal duty of care is a question of policy that, depending upon the context, may turn on a court's consideration of a variety of factors**. (*See, e.g.*, *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561; *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650, 320 P.2d 16 (*Biakanja*).)" (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 837 (emphasis added).)

This Court's recent decision in *Southern California Gas Leak Cases* (2019) 7 Cal.5th 391 highlights the fluidity of a duty analysis and the interplay of foreseeability and public policy in the formulation of duty. There, this Court was faced with whether the Southern California Gas Company owed a duty to guard against "purely economic losses" suffered by businesses located near a massive, months-long leak from a natural gas storage facility just outside Los Angeles. This Court began by recognizing that 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." (*Southern Calif. Gas Leaks*, at p. 398, citing *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 and Civ. Code 1714 (a).) This Court explained that generally, the analysis begins by presuming the defendant owed the plaintiff a duty of care and then determining whether "the circumstances 'justify a departure' from that usual presumption." (*Id*., citing *Cabral*, at p. 771.)

"In *Rowland* [], we identified several factors that, among others, may bear on that question: (1) "the foreseeability of harm to the plaintiff," (2) "the degree of certainty that the plaintiff suffered injury," (3) "the closeness of the connection between the defendant's conduct and the injury suffered," (4) "the moral blame attached to the defendant's conduct," (5) "the policy of preventing future harm," (6) "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 (7) "the availability, cost, and prevalence of insurance for the risk involved." (*Id*. at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561.)" (*Southern Calif. Gas Leaks*, at p. 398-399.)

This Court then emphasized: "**At core, though, the inquiry hinges not on mere rote application of these separate so-called *Rowland* factors, but instead on a comprehensive look at the "'the sum total'" of the policy considerations at play in the context before us**. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472, 63 Cal.Rptr.2d 291, 936 P.2d 70 (*Parsons*), quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6, 224 Cal.Rptr. 664, 715 P.2d 624; *see also T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164, 226 Cal.Rptr.3d 336, 407 P.3d 18.)" (*Id*. at p. 399 (emphasis added).)

The analysis of duty by this Court then straddled concepts of whether a general duty was in fact owed under Civil Code 1714 given that the harm was purely economic, or whether a special relationship existed giving rise to a duty. (See *Id*., 7 Cal.5th at pp. 399-401.) Notions of foreseeability and public policy was threaded throughout the analysis. (*Id*.) Indeed, while discussing whether a special relationship existed this Court noted its previous decisions where the special relationship analysis embraced a "subset of the *Rowland* factors." (*Id*. at p. 401, citing *J'Aire, supra*, 24 Cal.3d at p. 804.) This Court again cautioned "what is true of all negligence cases" – "**Deciding whether to impose a duty of care turns on a careful consideration of the '"the sum total"' of the policy considerations at play, not a mere tallying of some finite, one-size-fits-all set of factors**." (*Id*. at p. 401, citing *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397, quoting *Dillon, supra,* 68 Cal.2d at p. 734.)

Precisely. The analysis of whether an organization such as USOC or USAT owes a duty to protect children from foreseeable sexual abuse cannot be based on "some finite, one-size-fits-all set of factors." (*Id*.)

Rather, the analysis is fluid – and the very foreseeability and public policy considerations outlined in *Rowland* that can justify a categorical no-duty rule – may overlap with an analysis of whether a duty exists at all.

III.

YOUTH ORGANIZATIONS SUCH AS THE USOC AND THE USAT OWE A DUTY TO PROTECT MINOR PARTICIPANTS FROM FORESEEABLE SEXUAL ABUSE BY THIRD PARTIES

Applying the general duty analysis described above to the facts and public policy present in this case reveals that there can be no question that USOC, as well as USAT, owed a duty to reasonably protect Plaintiffs from foreseeable sexual abuse by their coach. The precept of any analysis of duty is an understanding of the contextual relationship of the parties and the foreseeability of the harm suffered by the plaintiff.

As the central, organizing entity in the United States which administers the Olympic sports structure within which the individual athletic activities and their athletes participate, USOC is responsible for and in fact *creates the very context* in which individual participants within a given recognized Olympic athletic endeavor participate. USOC is the very enterprise responsible for the American athletes who elect to pursue and participate in Olympic level athletic programs. Given the age at which athletic pursuits now begin in our society, a significant if not overwhelming number of athletes pursuing Olympic level athletics are *minors*. These athletes feed the multi-billion dollar industries which reap the vast profits these sports and the Olympic sporting events generate, not to mention national prestige and pride. It would be hard to overstate the significance and perceived importance of participating in Olympic level sports, as well as the concomitant economic and financial significance of the markets created by that participation, all of which flows through the USOC.

In light of this, and as detailed in the facts below, there is a relationship between USOC and the minor athletes that participate in USOC sanctioned competitions in hopes of achieving their Olympic dreams. This relationship demands a duty be imposed to compel USOC to act reasonably and protect those minor athletes from the foreseeable sexual abuse that have long been known to plague such institutions.

The tragic reality is that sexual abuse of minors is particularly rampant in youth organizations. Elite competitive sports is no different and in fact fosters an environment where such abuse can and does flourish. Victims, including, just as one example, the over 250 gymnasts sexually abused by Larry Nassar, have bravely recounted a reality of a culture among elite competitive youth sport where the safeguarding children from foreseeable sexual abuse is subrogated to the pursuit of the Olympic podium and gold metals. In exchange for the glory, prestige and billions of dollars in play, organizations such as the USOC have stuck their proverbial heads in the sand. But this should be permitted no more; these organizations should not be able to benefit from the participation of minors with no obligation to protect them from the ruined lives and unending trauma that forever haunts victims of childhood sexual abuse.

California's strong public policy dictates that a duty should be owed by those youth organizations requiring them to take reasonable steps to ensure that the physical and emotional well-being of minor athletes is at the forefront of any activities they engage in involving minors. Contrary to the arguments advanced by USOC and USAT, these considerations of foreseeability and public policy are not to be ignored at the initial determination of a duty, only to be considered *after* a duty has been found in determining whether a categorical exception should be made. Rather, these considerations guide the analysis of the very existence of a duty from the outset.

Indeed, it is the position of Amici Curiae that the public policy of protecting youth from foreseeable sexual abuse is the *presumption* in the analysis of duty owed by youth organizations, or any organization engaged in activities expressly involving children, to protect against foreseeable sexual abuse of minor participants. As outlined below, that is precisely the result under both Civil Code section 1714 as well as the special relationship doctrine as applied here.

A broad application of duty in circumstances involving foreseeable sexual abuse of children is necessary to protect our most vulnerable. As repeatedly argued by USOC and USAT, an analysis of whether a *categorical exception* should apply to a certain category of defendants under an analysis of *Rowland* tempers any concerns of an unyielding duty. Moreover, as is always the case with negligence, a finding of a duty is not synonymous with liability. (*Kesner*, 1 Cal.5th 1132, 1157 ["It must be remembered that a finding of duty is not a finding of liability. To obtain a judgment, a plaintiff must prove that the defendant breached its duty of ordinary care and that the breach proximately caused the plaintiff's injury, and the defendant may assert defenses and submit contrary evidence on each of these elements"]; *C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 876 ["The scope and effect of our holding on individual liability is limited by requirements of causation and duty, elements of liability that must be established in every tort action."].) Thus, precisely what steps may or may not be appropriate in light of the relationship between the organization and the child will necessarily formulate the applicable standard of care and the element of causation.

Contrary to the hyperbole offered by USOC and USAT, recognition of such a duty will not "upend fundamental tort principles without effectively addressing the problem of sexual abuse." (See USOC AB at 9; USAT AB 10, 40-43.) On the contrary, imposing a duty to protect against

foreseeable sexual abuse of children is a consequential if not obvious first step in combating such sexual abuse. And excusing organizations such as USOC and USAT from *any duty* to protect its minor athletes, who generate billions of dollars in profit for the organizations and others, from the tragedy of sexual abuse will in fact "upend" California's strong interest in protecting our children.

As the *Juarez* court grimly recounted, quoting from *Wallace v. Der–Ohanian* (1962) 199 Cal.App.2d 141 at page 146: "'It is certain that there exists in our civilization the constant possibility that persons suffering from a lack of proper mental balance or normal decency might subject young people to sexual molestation. This fact is illustrated by frequent newspaper accounts of crimes against children, the many litigated criminal cases, accounts of which find their way into the reports, and the concerns of the Legislature evidenced by the enactment of many laws for the protection of children.... **The general feeling of the public that this problem does exist in a threatening way lead[s] to the conclusion that people charged with the care of children should guard against it** ....' [Citation.] [¶] ... *Unfortunately, in the almost 40 years since these words were written, the scourge of sexual molestation of children has not abated;* ***and the danger that a child who participates in organized youth activities will encounter a sexual predator certainly is at least as foreseeable now as it was then***." (*Juarez v. Boy Scouts of America* (2000) 81 Cal.App.4th 377, 404.) Tragically, sexual abuse of children in youth organizations has only escalated since *Juarez*.

In light of California's interest in protecting its youth and the foreseeability of sexual abuse plaguing youth organizations, the "sum total" of the relevant considerations of policy reveal that sports organizations such as USOC owe a duty to reasonably protect minor athletes that participate in their programs from foreseeable sexual abuse by third parties.

IV.

AS IS THE REALITY FOR SO MANY ELITE YOUTH ATHLETES, USAT TAEKWONDO COACH GITELMAN ABUSED HIS POSITION OF TRUST AND AUTHORITY OVER PLAINTIFFS TO SEXUALLY EXPLOIT AND ABUSE THEM FOR YEARS

Because the backdrop for any analysis of duty are the broad considerations of foreseeability and public policy, the existence of a duty here rests in the context of the allegations of sexual abuse suffered by Plaintiffs and which implicate the general foreseeability of sexual abuse in organizations with programs targeted to youth participants.

Plaintiffs Brianna Borden, Yazmin Brown and Kendra Gatt were just 15 and 16 year-old female taekwondo athletes when their USAT coach, Marc Gitelman, began sexually exploiting and abusing them. As alleged, Gitelman sexually abused Plaintiff Borden at Taekwondo events sanctioned by USOC and USAT from 2007 until 2010. (*Brown et al. v. United States Olympic Committee* (2019) 40 Cal.App.5th 1077, 1086.) For Plaintiffs Yazmin Brown and Kendra Gatt, the sexual abuse spanned from 2010 to 2013 and again at USOC and USAT sanctioned events. (*Id*.) Indeed, USOC and USAT not only sanctioned the events but sponsored and promoted the very Taekwondo competitions where Gitelman was able to sexually exploit his relationship with Plaintiffs for his own sexual gratification. Gitelman openly carried on relationships with Plaintiffs at events such that it became *common knowledge* through the sport of Taekwondo. (*Id*.) USOC and USAT knew or should have known of Gitelman's sexual abuse and inappropriate relationship with young girls based on the behavior of Gitelman and Plaintiffs displayed in public and at USOC and USAT competitions. (Id.) Yet, USOC and USAT did nothing.

In its decision, the court of appeal acknowledged the allegations of USOC's awareness of the rampant sexual abuse plaguing minor athletes

who overwhelmingly make up the ranks of its participants. (*Brown*, at p. 1084-1085.) Since the 1980s, USOC knew that minor female athletes had been raped at its Olympic Training Centers across the country. (*Id*.) Only a few years after making its debut as an Olympic sport, allegations of sexual abuse within the sport of Taekwondo emerged. "In 1992 the USAT delegation was evicted from their rented house in Barcelona after the Spanish landlord walked in on the national team coach having sex with a young female Olympian." (*Id*. (emphasis added).) As alleged, "USOC had actual knowledge" of the incident. (AA 41.)

Tragically, sexual abuse of Olympic athletes had become so commonplace that by 1999, USOC required all national governing bodies to have insurance to cover sexual abuse by coaches. (*Id*. at p. 1084.) Those NGBs that did not comply with USOC's mandate were *denied access* or given only limited access to Olympic Training Centers. (AA 41.)

Decades before Plaintiffs were abused, USOC had actual knowledge that numerous female athletes were raped in Olympic training center all over the country – including the *same* dormitories and facilities that Plaintiffs here were molested at. (AA 40, 46.) As alleged, Plaintiff Borden was sexually abused by Gitelman at the Olympic Training Center dorms in Colorado Springs, Colorado – a facility *owned* by USOC. (AA 46.)

Shockingly, USOC was aware that another female Taekwondo athlete, Amanda Meloon, was raped at the Olympic Training Center in Colorado shortly before the sexual abuse of Plaintiffs. (AA 46.) In response to the rape of Meloon, USOC "placed a guard outside the girls dormitory at its training center in Colorado Springs." (AA 46-47.) The guard, however, was removed sometime between 2005 and 2009.

As acknowledged by the court of appeal, "[i]n 2007 Gary Johanson, a USOC employee, knew of at least one rape of a female taekwondo youth

athlete at the Olympic training center in Colorado Springs." (*Id*. at p. 1084.)

As alleged, neither USOC nor USAT had 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." (AA 44, 46.) Plaintiffs allege that USOC and USAT not only failed to have policies and procedures to protect minor athletes from sexual abuse by their coaches, but also failed to have any policies, procedures or oversight for ensuring that any code of ethics that existed was being adhered to. (AA 45, 55-56.)

In 2010, after multiple sexual abuse scandals surfaced, including the 2010 USA swimming scandal where more than 100 coaches were banned for life from working with USA Swimming-affiliated clubs because of sexual abuse and predatory behavior and following revelation of the hundreds of female gymnasts (many of whom were minors) had been sexually abused and exploited by Larry Nassar, USOC appointed a task force to study sexual abuse of minor athletes by coaches. The task force *required* that all NGBs implement and adopt a "Safe Sport" program to protect against such foreseeable sexual abuse by 2013. (*Brown,* at p. 1085; AA 41-42.)

The effectiveness of the USOC's power over governing boards was acknowledged by the court of appeal, which noted that because USAT had failed to adopt a "Safe Sport" program, *USOC placed USAT on probation* in 2013. Only after USAT adopted a code of conduct and code of ethics that complied with USOC's requirements for a "Safe Sport" program did USOC lift USAT's probationary status. (*Brown,* at p. 1085.)

Astonishingly, the complaint reveals that even after the USOC task force required all national governing bodies to adopt a "Safe Sport program" in 2010 to protect against the atrocious sexual abuse of a minor

athlete by her coach, USOC and USAT had actual knowledge of Plaintiffs' recounts of sexual abuse in 2013 and yet did not remove Gitelman from his status as a USAT coach until 2015. (AA 43-44.) The complaint details that as of September 2013, the USOC director of ethics and "Safe Sport," Malia Arrington, had *actual knowledge* of Plaintiffs' allegations against Gitelman. (*Brown*, at p. 1087.) Gitelman, however, was still permitted to coach until September 2015. (*Id.*; AA 44.)

The facts reveal that following a USAT hearing in which Gitelman participated by counsel and in which Yasmin Brown, then only 18 years old represented herself, the panel recommended that Gitelman's membership in USAT be terminated but that USAT's Board President *refused*. (AA 43.) Gitelman was allowed to continue coaching at USAT's tournaments, including the USA Open in 2014. (*Id.*) USOC and specifically Malia Arrington had actual knowledge that Gitelman was still coaching in 2014 despite the recommendation of the hearing panel.

As alleged, USOC and USAT had the authority and the ability to prevent the sexual abuse of Plaintiffs and so many others at the hands of Gitelman but failed to do so.

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 (36 U.S.C. § 220501, et seq. – "the Act"), examined USOC's role in *several 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***. Not only could USOC directly regulate aspects of the athlete-coach relationship to prevent sexual abuse, but in the very least USOC could have enacted safeguards and policies designed to prevent the very abuse that these young Plaintiffs suffered.

Lyon's testimony demonstrates how despite having the power and obligation, USOC has "regrettably" failed to exercise its 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.[1]

Literature concerning the prevalence of sexual abuse in youth sports organizations echo the same concern – the organizational entities can do better and indeed *should have done better* to protect athletes from foreseeable sexual abuse. (See Marc Edelman & Jennifer M. Pacella, *Vaulted into Victims: Preventing Further Sexual Abuse in U.S. Olympic Sports Through Unionization and Improved Governance,* (2019) 61 Ariz. L. Rev. 463; Christian Dennie, *Post Penn State: Protecting Against Sexual Harassment and Misconduct in Athletics*, 75 Tex. B.J. 828, 830 (2012) [the author lists policies and practices that may be taken by universities and sports organizations can take to protect against sexual abuse in sports; "In the case of Penn State, an early report of abuse or neglect to the proper authorities could have saved numerous innocent victims and protected Penn State from potential liability and exposure to damages."].)[2]

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[1] The 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].)

[2] "A request for judicial notice of published material is unnecessary. Citation to the material is sufficient. [Citation.] We therefore consider the request for judicial notice as a citation to those materials that are published." (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 9 Cal.4th

This literature further identifies and acknowledges the prevalence of sexual abuse of elite competitive athletes by their coaches. (See Deborah L. Brake, *Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds*, 22 Marq. Sports L. Rev. 395, 406 (2012) ["The extent of control exerted by coaches over athletes in elite levels of sports is likely the reason why the risk of sexual abuse in sport has been found to increase as the level of athletic competition advances. It is the higher levels of sport where the coach exerts the most control over the widest areas of the athlete's life."]; Charlotte L. Wilinsky & Allyssa McCabe, *A Review of Emotional and Sexual Abuse of Elite Child Athletes by Their Coaches,* Journal of Child Sexual Abuse, (published June 5, 2020), available at https://www.tandfonline.com/doi/ref/10.1080/21640629.2020.1775378?scroll=top.)

USOC *itself* recognizes the problem of sexual abuse in Olympic sports. In the 2019 Annual Report produced by the US Center for "SafeSport," founded in 2017 to investigate sex-abuse claims in Olympic sports, reports of sexual abuse rose 55% from 2018 to 2019. (See U.S. Center for SafeSport 2019 *Annual Report*, at p. 4 (published June 20, 2020), available at https://uscenterforsafesport.org/2019-annual-report/.) The Report notes: "At the time we opened [2017], *there were no uniform policies in existence* that protected athletes from emotional, physical, and sexual abuse, so we set out to remedy that." (*Id*. at p. 5 (emphasis added).) The Report further acknowledges that "[w]hen it comes to creating sporting environments that are safe, respectful and free of abuse and harassment, policies are only as effective as people's understanding of them, so education and awareness are critical." (*Id*.) After noting that as of 2002,

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26, 46 fn. 9; *Wittenburg v. Beachwalk Homeowners Assn*. (2013) 217 Cal.App.4th 654, 665, fn. 4 [same].)

one in eight athletes experience sexual abuse or assault in their sport before age 18, and that athletes with disabilities are four times more likely to be abused (id. at 6), the Report poignantly states: "**Holding organizations *accountable for their actions – and sometimes their inaction –* is *critical* to culture change**." (*Id*. at 7 (emphasis added).) Exactly.

Even in the briefing before this Court, USOC admits to the serious problem of coaches exploiting their relationships with youth athletes for their own sexual gratification. While misunderstanding the factor of foreseeability in the analysis of duty and arguing that there is no foreseeability here since "Plaintiffs did not allege facts to support actual knowledge by the USOC of Gitelman's sexual abuse until September 2013" (USOC AB at 46-47), an argument that is flawed for numerous reasons, USOC goes on to argue in the context of a moral blame worthiness that "***USOC fully acknowledges the problem of sexual abuse in amateur sports and wholeheartedly supports efforts to prevent it***" (id. at 48-49) and "USOC *took reasonable steps to support prevention of sexual abuse in amateur sports*. Based on Plaintiffs' allegations alone, the USOC conditioned its recognition of amateur sports organizations as NGBs on their adoption of a code of ethics, implementation of a SafeSport program, and support of the US Center for SafeSport, all to counter sexual abuse in amateur sports" (id. at 47-48).

There can be no debate as to the foreseeability of child sexual abuse in youth organizations such as the USOC and the USAT. Indeed, the very circumstances surrounding elite youth athletics has proven to be a breeding ground for sexual predators like Marc Gitelman.

As is evident in the recent amendments significantly expanding the statutes of limitations for childhood sexual abuse, California's interesting in protecting children from sexual abuse is of paramount importance. (See Assembly Bill 218, amending Code Civ. Proc. § 340.1)

Nearly twenty years ago, the court of appeal in *Juarez* noted, "**Our 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**." (*Juarez*, *supra,* 81 Cal.App.4th at p. 407.) As noted by another court, "'[t]he mission of youth organizations to educate children, the naiveté 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.***" (*Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 913-919, quoting *Juarez, supra,* at p. 411 (emphasis added).)

V.

USOC AND USAT OWED A DUTY TO PLAINTIFFS UNDER CIVIL CODE SECTION 1714

The predicate of both USOC and USAT's position before this Court is that they owe no duty to protect Plaintiffs from foreseeable sexual abuse by a third party absent a special relationship. Both USOC and USAT, however, overlook the allegations of the complaint detailing that the conduct at issue here is not their failure to act where otherwise not required to – but their failure to act reasonably in the affirmative conduct taken by USOC and USAT. As alleged, Defendants ***engaged in conduct*** *the foreseeable result of which was to cause harm to Plaintiffs*.

A youth organization, just as any other entity, is subject to the general duty of due care toward those foreseeably affected by its business activities. (Civ. Code, § 1714(a).) A fundamental and statutory precept of negligence liability begins with the Legislature's pronouncement that:

"[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person ...." (Civ. Code, § 1714(a).)

"It is well established ... that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed ***to an unreasonable risk of harm through the reasonably foreseeable conduct*** (including the reasonably foreseeable negligent conduct) ***of a third person.***" (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716, 110 Cal.Rptr.2d 528, 28 P.3d 249.)" (*Kesner*, *supra*, 1 Cal.5th at p. 1148 (emphasis added).)

"In determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct. (*See Bigbee, supra*, 34 Cal.3d at p. 58, 192 Cal.Rptr. 857, 665 P.2d 947, quoting Rest.2d Torts, § 449.)" (*Id.*) As explained by this Court in *Kesner*, "[w]here there *is* a logical causal connection between the defendant's negligent conduct and the intervening negligence of a third party driver, making the intervening negligence foreseeable, we have found both a duty and liability. (See *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36 [affirming a wrongful death judgment against a radio broadcaster where radio contest that awarded teen drivers for being the first to reach a disc jockey driving around the area induced reckless driving that killed decedent].)" (*Id*. at p. 1149.)

As outlined above, sexual abuse of minor athletes is generally foreseeable and indeed was specifically appreciated by Defendants. Both USOC and USAT created the very platform for elite minor athletes to compete and as such had *a duty to act reasonably in fostering a safe environment for its minor athletes*. The duty at issue is not one of non-feasance, but rather malfeasance.

As early as the 1980s, both USOC and USAT *knew* that sexual abuse of minor athletes was occurring at USOC and USAT sanctioned events. (AA 41-43.) The facts reveal that in 1992, USOC knew that the USAT delegation was evicted from their rented house in Barcelona after the landlord *walked in on the national team coach having sex with a young female Olympian*." (*Brown*, at p. 1084.) Just prior to the sexual abuse of Plaintiffs, USOC and USAT was aware that another female Taekwondo athlete was raped at the *same* Olympic Training Center in Colorado where Gitelman raped one of the Plaintiffs here – a training center owned by USOC. (AA 46.) While USOC "placed a guard outside the girls dormitory" in Colorado in response to the rape (AA 46-47), the guard was *removed* sometime between 2005 and 2009. (Id.) The *removal* of the guard and the failure to maintain similar procedures at all training centers where sexual abuse is foreseeable is active negligence.

Obviously, USOC, as well as USAT, had some responsibility in hosting and sanctioning sports competitions where sexual abuse was particularly rampant and yet USOC and USAT did nothing to take reasonable steps to protect against such abuse at the time Plaintiffs were exploited by their coach. As alleged, neither USOC nor USAT had 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." (AA 44, 46.) Such protections were required in light of USOC and USAT's ongoing business activity of organizing, sanctioning and regulating sports competitions where minors participated.

As is revealed in the complaint here, most of the sexual abuse that occurred in this case occurred while the athletes were participating in USOC and USAT sponsored events and competitions. Minor athletes are often required to travel and stay in hotels to participate in such

competitions. The financial burdens may not permit family members to accompany the minors and as such minors travel with their adult coaches. Under these circumstances, USOC and USAT owe a *duty to act reasonably* and enact certain policies and safeguards to protect against foreseeable sexual abuse. These organizations owed a duty to provide a safe environment for minor athletes given their role in creating the very circumstances for the minor's participation.

The failure to act reasonably can also be seen in the policies that USOC *did* implement. As of 1999, and in light of the revelations of sexual abuse plaguing Olympic sports, USOC *required* all NGBs to have insurance to cover coach sexual abuse of minor athletes and those NGBs that did not comply were *denied access* or given only limited access to Olympic Training Centers. (AA 41.) Despite this mandate, USOC failed to include any policy actually prohibiting sexual abuse of minor athletes.

In 2010, a USOC task force *required* all national governing bodies to adopt a "Safe Sport" program by 2013 *to protect athletes from sexual abuse*. (*Brown,* at p. 1085.) The effectiveness of the USOC's power over governing boards was also acknowledged by the court of appeal, which noted that because USAT had failed to adopt a "Safe Sport" program, USOC placed USAT *on probation*. Only after USAT adopted a code of conduct and code of ethics that complied with USOC's requirements for a "Safe Sport" program did USOC lift USAT's probationary status. (*Brown*, at p. 1085.) There is no indication why these actions could not have been taken sooner and why the failure to do so, in light of the business activities of USOC, did not fall below the applicable standard of care.

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

(AA 45.) As of 2010, USOC made a policy requiring NGBs to create a "Safe Sport" program – but the question remains why USOC at that time did not likewise have such a policy and/or if it did, why it was not being *adhered to* at the time Plaintiffs' were being sexually abused.

The fact that USOC's existing policies from at least 1999 through 2015, when Gitelman was finally stripped of his coaching credentials, did not adequately protect against foreseeable sexual abuse is active negligence. A relationship existed between USOC and the youth participants in its organization and yet the existing policies during the time Plaintiffs were sexually abused fell woefully short of protecting against the foreseeable minor participants encountered.

The very fact that USAT at some point adopted a Code of Ethics, which prohibited certain behavior indicative of sexual abuse (AA 41-43), demonstrates USAT's negligence in failing to include such policies and procedures at an earlier date. Surely, USAT had policies in place governing participation in the sport for athletes and coaches. The failure to include among such policies certain protective measures to avoid sexual abuse of children is negligence.

Lugtu is instructive. (*Lugtu v. California Highway Patrol*, *supra*, 26 Cal.4th 703.) There, the issue concerned whether a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops, such that the duty includes the obligation not to expose such persons to an unreasonable risk of injury by *third parties*. According to the defendants, the alleged failure to protect the plaintiffs from injury by a third party "is, at most, a negligent omission, or nonfeasance" and thus the officer owed no duty of care to protect plaintiffs in the absence of a special relationship. (*Id*. at p. 716.) This Court rejected such a characterization of the duty at issue. "We agree with plaintiffs that this

argument rests upon a fundamental mischaracterization of the basis of [the officer's] alleged responsibility for plaintiffs' injuries." (*Id*.)

Citing its earlier decision in *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, the Court explained:

> "[M]isfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., ***defendant has created a risk***. Conversely, nonfeasance is found when the *defendant has failed to aid plaintiff through beneficial intervention*." In this case, unlike the cases relied upon by defendants, plaintiffs' cause of action does not rest upon an assertion that defendants should be held liable *for failing to come to plaintiffs' aid*, but rather is based upon the claim that [the officer's] *affirmative conduct itself*, in directing Michael Lugtu to stop the Camry in the center median of the freeway, placed plaintiffs in a dangerous position and created a serious risk of harm to which they otherwise would not have been exposed. Thus, **plaintiffs' action against [the officer] is based upon a claim of misfeasance, not nonfeasance**.

(*Id*. at pp. 716-717 (emphasis added); see also *Williams v. State of California* (1983) 34 Cal.3d 18, 24.)

This same mischaracterization of the duty at issue exists here. Defendants' entire analysis of duty rests on the notion that the duty to protect a child from foreseeable sexual abuse is nonfeasance and thus requires a special relationship. But this is not accurate. Just as in *Lugtu*, Defendants here *created the very risk*. Defendants' actions placed these children in a position where foreseeable sexual abuse could and did occur. The fact that the sexual abuse was at the hands of a third party does not foreclose the duty. The analysis rests on whether a defendant's actions are reasonable *in light of the foreseeability* of the third-party criminal conduct.

Furthermore, where the foreseeability of harm involves *children,* the duty is heightened given their lack of lack of capacity to appreciate risks and to avoid danger. (See *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 240; *McDaniel v. Sunset Manor Co.* (1990) 220 Cal.App.3d 1,

7; *Copfer v. Golden* (1955) 135 Cal.App.2d 623, 629 [duty to "protect the young and heedless from themselves and guard them against perils that reasonably could have been foreseen"]; CACI No. 412.)

In *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, the court recognized such when it found that a special relationship was not required before a defendant could be found to owe a duty to prevent her husband from molesting children at her home. (*Pamela L.*, at pp. 209–210.) The court explained:

> Respondent cites the principle that generally a person has no duty to control the conduct of a third person, nor to warn those endangered by such conduct, in the absence of a "special relationship" either to the third person or to the victim. (Rest., 2d Torts, sec. 315; *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 435, 131 Cal.Rptr. 14, 551 P.2d 334; *Nipper v. California Auto. Assigned Risk Plan*, 19 Cal.3d 35, 46-47, 136 Cal.Rptr. 854, 560 P.2d 743; *Coulter v. Superior Court,* 21 Cal.3d 144, 155, 145 Cal.Rptr. 534, 577 P.2d 669.) However, **this rule is based on the concept that a person should not be liable for "nonfeasance" in failing to act as a "good Samaritan."** ***It has no application where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person.*** In such cases the question of duty is governed by the standards of ordinary care. (*Weirum v. R. K. O. General, Inc*., 15 Cal.3d 40, 49, 123 Cal.Rptr. 468, 539 P.2d 36; see also *Tarasoff v. Regents of University of California, supra,* 17 Cal.3d at p. 435, fn. 5, 131 Cal.Rptr. 14, 551 P.2d 334.)
>
> This latter principle is embodied in Restatement Second of Torts section 302B which provides: "An act or an omission may be negligent if the actor realizes or should realize that *it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.*" (See *O'Hara v. Western Seven Trees Corp*., 75 Cal.App.3d 798, 804, 142 Cal.Rptr. 487.)

(*Id*. at pp. 209-210 (emphasis added); see also *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531 ["Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention."].)

The duty at issue here is therefore not nonfeasance given that affirmative conduct of USOC and USAT fostered the very environment upon which the sexual abuse of children could and did occur. The notion that a person may not generally be liable for failing to act a as a "good Samaritan" (nonfeasance) has no application in a case such as this where Defendants' actions have exposed minor athletes to an unreasonable risk of foreseeable sexual abuse by a third party.

USOC and USAT are *not* bystanders who happen to become aware of a harm inflicted on another. Nor are Defendants disinterested uninvolved parties to the minors that participate in their organizations. In *Regents*, this Court highlighted a similar notion when it discussed the connection between a college and athletes from another school competing at a college sports event. (*Regents University of California v. Superior Court,* 4 Cal.5th 607, 624, citing *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 392-393.) In *Avila* "a college baseball player was injured by a pitch to the head, and we examined a university's duty to students participating in intercollegiate sports. We noted that athletic competition is often an important part of the college environment, *benefiting* both the students who participate and the schools they represent. (*Id*. at p. 162 [].) Given these benefits, we held that a school hosting an athletic event owes a duty to student-players "to, at a minimum, not increase the risks inherent in the sport.' (*Ibid*.) While acknowledging and professing 'no quarrel with' the Court of Appeal cases holding colleges have no general duty to ensure student welfare (*ibid*.), we concluded that

recognizing a duty to students in school-sponsored athletic events was 'plainly warranted by the relationship of the host school to all the student participants in the competitions it sponsors' (*id*. at p. 163 []).'' (*Regents, supra,* 4 Cal.5th 607, 624.)

Likewise, here a duty exists to take reasonable measures to protect the minor athletes who participate in the programs and competitions organized by USOC and USAT from foreseeable sexual abuse.

VI.

FURTHERMORE, A SPECIAL RELATIONSHIP EXISTS BETWEEN USOC AND USAT AND PLAINTIFFS GIVING RISE TO A DUTY

Even if the allegations of negligence were viewed through the lens of nonfeasance, "a defendant may owe an *affirmative duty* to protect another from the conduct of third parties if he or she has a 'special relationship' with the other person.' [Citation.]" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531-532; see also *Tarasoff*, *supra*, 17 Cal.3d 425, 435.) A special relationship exists when "*the plaintiff is particularly vulnerable* and dependent upon the defendant who, correspondingly, has ***some control over the plaintiff's welfare***. [Citation.]" (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1129 (emphasis added); *Regents, supra,* 4 Cal.5th at p. 621 ["'[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***.'" [Citations.]"].)

Courts have *repeatedly* recognized the existence of a special relationship between organizations such as schools, churches, youth organizations like the Boy Scouts of America, as well as youth sports programs, that gives rise to an affirmative duty to protect children participating in such organizations from foreseeable sexual abuse by third parties. (See *C.A., supra,* 53 Cal.4th at p. 870; *Youth Soccer, supra,* 8

Cal.App.5th at p. 1131; *Juarez, supra,* 81 Cal.App.4th at p. 411; *J.H. v. Los Angeles Unified School Dist.* (2010) 183 Cal.App.4th 123, 141–142; *Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 717; *Conti v. Watchtower Bible & Tract Soc'y of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1233-1237; *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 913-919; *D.Z. v. Los Angeles Unified Sch. Dist.* (2019) 35 Cal.App.5th 210, 223; *Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 246-247.)

In *Juarez*, the plaintiff, a boy scout, brought an action against the Boy Scouts of America, Inc., and the San Francisco Bay Area Council for negligence in failing to take reasonable measures to protect him from sexual abuse by his scoutmaster. (*Juarez, supra,* 81 Cal.App.4th at pp. 384–385.) The court of appeal observed: "Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger." (*Id*. at p. 411.) "Based on the vulnerability of children and the insidious methods of sexual offenders, the court in *Juarez* held that there was a special relationship between the Scouts and the plaintiff." (*United States Youth Soccer Assn.,* 8 Cal.App.5th at p. 1129.)

In *United States Youth Soccer Assn.,* a child was sexually abused by her soccer coach. The plaintiff filed an action for negligence against defendants United States Youth Soccer Association, Inc. (US Youth), California Youth Soccer Association, Inc. (Cal North), and West Valley Youth Soccer League (West Valley). (*Id.* at p. 1112.) Similar to the situation here, in that case

> US Youth is a *national* youth soccer association. Cal North is US Youth's designated *state association*, its highest administrative body in northern California, and a member of its Region IV. West Valley is an affiliated league of Cal North. Under US Youth's bylaws, Cal North and West Valley are *required to comply with US Youth's rules for the operation* of US Youth soccer programs. Fabrizio was employed by West

> Valley and was a member of US Youth. Plaintiff participated in US Youth soccer programs and played for West Valley's soccer teams."

(*Id*. at p. 1123.) The plaintiff alleged that the defendants owed her a duty to protect her from foreseeable sexual abuse by her coach and they breached this duty to "failing to conduct criminal background checks and by failing to warn or educate her about the risk of sexual abuse." (*Id*. at p. 1123.) The court of appeal began by finding that ***a special relationship exists*** between defendants and the minors participating in their programs so as to give rise to a duty to protect against foreseeable sexual abuse. (*Id*. at pp. 1129-1131.)

Notably, the court rejected an argument similar to that raised here by USOC and USAT that a special relationship did not exist since many of the parents attended practices and games and thus the Defendants had no "quasi-parentals" control over the minors. (*Id*. at p. 1130.) The court explained the characteristics of the special relationship may differ depending on the circumstances and highlighted that a special relationship existed as "parents entrusted their children to defendants with the expectation that they would be kept physically safe and protected from sexual predators while they participated in soccer activities." (*Id*.)

Of course, the same is true here. Just as in other voluntary youth programs for which courts have recognized a special relationship, USOC's recruitment of minors to participate in its programs gave rise to a duty to protect these minor athletes from foreseeable sexual abuse. [3]

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[3] As the court of appeal correctly concluded that a special relationship existed between USAT and Plaintiffs so as to support a duty to protect them from foreseeable sexual abuse, Amici Curie focuses the special relationship discussion on USOC. Moreover, the facts justifying the special relationship between Plaintiffs and USOC mirror those supporting such a relationship between Plaintiffs and USAT.

As made clear in *United States Youth Soccer Assn.* and *Juarez,* the policy rationale for imposing a "greater degree of care" on certain youth organization defendants engaged in activities with minor children is the judicial recognition that minors are particularly vulnerable. It is well established that in the context of these youth organizations, the sexual abuse of minors is *foreseeable*. (See *Id*., at 1131-1135; *Juarez, supra,* 81 Cal.App.4th at p. 404 ["the danger that a child who participates in organized youth activities will encounter a sexual predator" is entirely foreseeable].)

While the facts alleged here leave no doubt that the USOC was in a position to exercise at least "***some control***" over the welfare of minor athletes participating in USOC events, the court of appeal astonishingly held that USOC owed no duty to these athletes.

The court of appeal mistakenly focuses the special relationship analysis on whether USOC "'was in the *best position* to protect against the risk of harm,'" noting that the "'the defendant's ability *to control the person who caused the harm* ***must be such*** that "if exercised, [it] would meaningfully reduce the risk of the harm that actually occurred."'" (*Brown,* at p. 1092, citing *Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 78 [national fraternal organization had no special relationship with local chapter and no duty to protect the plaintiff guest at party at the local chapter].) The court's reliance on *Barenborg* is misplaced as the analysis of the special relationship doctrine there was framed by the allegations that the national fraternity had a special relationship with the local chapter. The analysis does not control here where the allegations provide that USOC is in a special relationship with the *minor athlete Plaintiffs*.

The court of appeal essentially absolved USOC of any duty to protect minor athletes whom they knew were being sexually abused by

their coach, simply because another entity could do it better. This is not the law. Indeed, the court of appeal's analysis that because USAT "was in the best position" to control the coach that molested the young athletes, such a duty was borne *only* by USAT, reveals an analysis akin to whether a *categorical exception* under *Rowland* should be made for a category of institutional defendants like USOC. In other words, the court of appeal's analysis is less about whether a special relationship exists between USOC and Plaintiffs and more about whether USOC *should* bear a duty to protect minors. This is the very context for which the categorical exception analysis outlined in *Rowland* applies. Yet, the court of appeal refused to engage in the multi-factor test necessary to determine whether a categorical exception is warranted. Indeed, had it gone through the factors outlined in *Rowland*, the factors would all lean in favor of a duty owed by USOC.

Circling back to the issue of whether a special relationship exists between USOC and Plaintiffs, the court of appeal's analysis mistakenly focused only on USOC's relationship to Gitelman – and not the minors that were exposed to the unreasonable and foreseeable risk of sexual abuse posed by Gitelman and their participation in USOC sanctioned events and competitions.

As explained by this Court in *Regents*, a case heavily cited by the court of appeal, "[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. 619-620 (emphasis added), citing *Tarasoff v. Regents of Univ. Of Calif.* (1976) 17 Cal.3d 425, 435 [Supreme Court found that where a psychotherapist determines or should determine that a patient present a serious danger of violence to another, the therapist owes a duty to use reasonable care to protect the intended victim against such danger]; see also *Doe v. Superior Court* (2015) 237 Cal.App.4th 239 [church summer

camp had a special relationship not only with its counselor who allegedly molested the plaintiff but also the plaintiff and her parents as the "foreseeable victim[s]" of such harm].)

In *Regents,* this Court addressed whether a college or university owes a duty of care to protect college students from foreseeable harm. This Court explained:

> Rosen's complaint alleges UCLA had *separate duties* to protect her and to "control the reasonably foreseeable wrongful acts of third parties/other students." Here, **we have focused on the university's *duty to protect students* from foreseeable violence**. Having concluded UCLA had a duty to protect Rosen under the circumstances alleged, *we need not decide whether the school had a separate duty to control Thompson's behavior to prevent the harm*.

(*Id*. at p. 620 (emphasis added).) Noting that although the college students were not minors, but that they were vulnerable, this Court concluded: "Considering the unique features of the collegiate environment, we hold that universities have *a special relationship with their students* and *a duty to protect them from foreseeable violence* during curricular activities." (*Id*. at p. 613.)

Again, and as held by this Court in *Regents*, a special relationship exists where the "'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, *has some control over the plaintiff's welfare*.'" (*Id*. at p. 621.)

The analysis as to USOC should therefore focus on whether, given the vulnerable nature of minor athletes and their dependence on USOC, whether USOC can exercise *some control* over their welfare to protect them from foreseeable harm. As poignantly noted by this Court in *Regents*, "although relationships often have advantages for both participants, many special relationships especially *benefit the party charged with a duty of care*. [Citation.] Retail stores or hotels could not successfully operate, for

example, without visits from their customers and guests." (*Id*.) This could not be more true for USOC and its dependence on the minor athletes that compete at the Olympic level. USOC reaps enormous profits from the participation of elite youth athletes. Further USOC is actively engaged in the organization and structure of the sporting activities and events through which minor athletes must participate in to achieve Olympic status.

USOC has *exclusive authority* to certify or decertify national governing bodies for Olympic sports in the United States. Decertification would be ruinous to a given Olympic sport, not to mention the efforts of the innumerable participating athletes, effectively depriving the governing boards of their reason for being and the athletes of their ability to participate in Olympic level competition. Moreover, the ripple effects of a decertification within a given sport, including merchandising and marketing among myriad others, would be profound.

As outlined above, USOC has long had the power to create and enforce policies to protect against sexual abuse of minors. As acknowledged by the court of appeal, USOC was aware of the rampant sexual abuse plaguing minor athletes who overwhelmingly make up the ranks of its participants. (*Brown,* at p. 1084-1085.) Since the 1980s, USOC had actual knowledge that numerous female athletes were raped in Olympic training centers all over the country, including the same facilities Plaintiffs here were molested at. (AA 40.) Likewise, USOC has long been aware of sexual abuse occurring within USAT. (AA 40-48.)

By 1999, USOC required all NGBs to have insurance to cover coach sexual abuse of minor athletes and those NGBs that did not comply were *denied access* or given only limited access to Olympic Training Centers. (AA 41.) The very fact that USOC could require NGBs to secure insurance for sexual assaults by coaches as of 1999 and revoke an NGB's use of

Olympic training facilities for failure to comply reveals the power and control implicit in the relationships at issue.

Perhaps most poignant in the analysis of duty here is the fact that in 2010, a USOC task force *required* all national governing bodies to adopt a "Safe Sport" program by 2013 *to protect athletes from sexual abuse*. (*Brown,* at p. 1085.) The effectiveness of the USOC's power over governing boards was also acknowledged by the court of appeal, which noted that **because USAT had failed to adopt a "Safe Sport" program, USOC placed USAT *on probation***. Only after USAT adopted a code of conduct and code of ethics that complied with USOC's requirements for a "Safe Sport" program did USOC lift USAT's probationary status. (*Brown*, at p. 1085.) Again, NGBs, coaches and others would be motivated to comply with any such policy and procedure to avoid probation and decertification as such consequences would be disastrous for the sport and any hope of participation in the Olympic games.

While USOC has taken a decidedly "hands-off" approach to the plight of victims of sexual abuse competing in its programs and sanctioned events, it undoubtedly *has the power* to require strict adherence to its "Safe Sport" policies, all ostensibly meant to protect Olympic athletes from the very type of sexual abuse endured by the Plaintiffs here. That USOC has chosen not to exercise that plenary power and authority only militates strongly in favor of imposing a duty. Such a careless and indifferent exercise of power cannot serve to somehow limit the special relationship it enjoys with the Olympic athletes it attracts, develops, and promotes through national governing bodies like USAT, and coaches like Gitelman.

The very notion that USOC did not have the ability to exercise "some control" over the welfare of its minor athletes so as to protect them from known and foreseeable sexual abuse is belied not only be the record but also by USOC's testimony before Congress.

Thus, the facts reveal that USOC had the ability to exercise *some control* over the welfare of the minor athletes that participate in its sanctioned events, including Plaintiffs, and thus a special relationship exists to protect these children from the very real risk of sexual abuse by those in positions of trust and authority around them.

Notably, in considering whether a special relationship exists in a college setting, this Court noted: "[a]lthough comparisons can be made, the college environment is ***unlike any other***." (*Regents*, at p. 625 (emphasis added).) This Court highlighted:

> Colleges provide academic courses in exchange for a fee, but a college is far more to its students than a business. Residential colleges provide living spaces, but they are more than mere landlords. Along with educational services, **colleges provide students social, athletic, and cultural opportunities**. Regardless of the campus layout, ***colleges provide a discrete community for their students.*** For many students, college is the first time they have lived away from home. *Although college students may no longer be minors under the law, they may still be learning how to navigate the world as adults*. **They are dependent on their college communities to provide structure, guidance, and a safe learning environment.** "In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime." (Peterson, supra, 36 Cal.3d at p. 813, 205 Cal.Rptr. 842, 685 P.2d 1193.)
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> Colleges, in turn, have *superior control over the environment and the ability to protect students*. **Colleges *impose a variety of rules and restrictions,* both in the classroom and across campus, to maintain a safe and orderly environment**. They often employ resident advisers, mental health counselors, and campus police. They can monitor and discipline students when necessary. "While its primary function is to foster intellectual development through an academic curriculum, the institution

> is involved in all aspects of student life. Through its providing of food, housing, security, and a range of extracurricular activities the modern university provides a setting in which every aspect of student life is, to some degree, university guided." (Furek v. University of Delaware (Del. 1991) 594 A.2d 506, 516.) Finally, ***in a broader sense, college administrators and educators "have the power to influence [students'] values, their consciousness, their relationships, and their behaviors."*** (de Haven, The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability (2009) 35 J.C. & U.L. 503, 611 (hereafter de Haven).)
>
> The college-student relationship thus fits within the paradigm of a special relationship. *Students are comparatively vulnerable and dependent on their colleges for a safe environment*. Colleges have a superior ability to provide that safety with respect to activities they sponsor or facilities they control. Moreover, this relationship is bounded by the student's enrollment status. Colleges do not have a special relationship with the world at large, but only with their enrolled students. The population is limited, as is the relationship's duration.

(*Regents*, *supra,* 4 Cal.5th at pp. 625–26.)

Just as the college environment is "*unlike any other*," so too is the world of elite athletic competition. Just as students are vulnerable and dependent upon their colleges for a safe environment, elite athletes are vulnerable and dependent upon the USOC and NGBs for providing a safe environment. Such vulnerability is more pronounced where the elite athlete is a *minor* – a child whose family has likely left him or her alone with a coach for hours on end, reluctant to interfere with the training process. A minor athlete may likely be encouraged by his or her parents at an early age to follow the coach's instructions and refrain from questioning his or her methods or reporting suspected abuse so as not to risk losing a coveted spot on the national or Olympic-bound teams, removal from Olympic training, or the loss of their coaching and mentoring relationships. (See Marc Edelman & Jennifer M. Pacella, *Vaulted into Victims: Preventing Further*

Sexual Abuse in U.S. Olympic Sports Through Unionization and Improved Governance, (2019) 61 Ariz. L. Rev. 463.) For these same reasons, there is often a strong desire among youth athletes to please authority figures so as not to jeopardize Olympic dreams. (*Id*.)

These vulnerabilities are only exacerbated by the USOC's lack of policies targeted at detecting and preventing such foreseeable sexual abuse.

VII.

APPLICATION OF THE *ROWLAND* FACTORS DOES NOT JUSTIFY A CATEGORICAL EXCEPTION FOR ORGANIZATIONS LIKE USOC, EXCUSING IT FROM ITS DUTY TO ACT REASONABLY IN PROTECTING MINOR ATHLETES FROM FORESEEABLE SEXUAL ABUSE

As noted above, the court of appeal's analysis finding that USAT owed a duty to protect minor athletes from foreseeable sexual abuse but that USOC *did not* because USAT "was in the best position" to control the coach that molested the young athletes reveals an analysis akin to whether a *categorical exception* under *Rowland* should be made for a category of institutional defendants like USOC. A determination of whether USOC *should* bear a duty to protect minors is precisely the context for which the categorical exception analysis outlined in *Rowland* applies. Yet, the court of appeal refused to engage in the multi-factor test necessary to determine whether a categorical exception is warranted. As aptly laid out in the briefing submitted before this Court by Plaintiffs, and indeed by the court of appeal's own *Rowland* analysis as to USAT, the foreseeability and public policy factors all support imposition of a duty as to USOC. No categorical exception is warranted.

Amici Curiae note that while no such exception is justified as to the allegations of negligence here, the availability of the categorical exception analysis in *Rowland* helps temper the broad recognition of a duty owed by youth organizations to protect children from foreseeable sexual abuse. For

example, in *United States Youth Soccer Assn.*, discussed above, the plaintiffs argued that the national and local soccer organizations failed to protect the minors from foreseeable sexual abuse by failing to conduct adequate screening of coaches and volunteers, and failing to educate and train minor players and their parents as to the contours of sexual abuse of children. (*United States Youth Soccer Assn.*, 8 Cal.App.5th at pp. 1123.)

After finding the existence of a special relationship, the court engaged in an analysis of the *Rowland* factors to determine whether a categorical exception to the duty to protect is warranted. (*United States Youth Soccer Assn.*, 8 Cal.App.5th at pp. 1131-1140.) The court's analysis revealed that "balancing the degree of foreseeability of harm to children in defendants' soccer programs against their minimal burden, we conclude that defendants had a duty to require and conduct criminal background checks of defendants' employees and volunteers who had contact with children in their programs." (*Id*. at p. 1138.) The court, however, found that these same factors did not support a duty to educate children and/or their parents about sex abuse. (*Id*. at p. 1139.) The court concluded that while such a duty was appropriate in *Juarez*, given the role played by the Boy Scouts' in shaping children's values and morals, no such similar relationship existed for the recreational youth soccer organization. (*Id*.)

United States Youth Soccer Assn. is an example of how a broad recognition of the affirmative duty owed to minors by organizations with programs geared towards children can be modified should public policy so warrant. While nothing before this Court justifies a categorical exemption or limitation of the duties alleged here with respect to USOC, the availability of the *Rowland* analysis remains in place and available for those circumstances where public policy requires that an exception be carved out for a certain class of defendants based on public policy considerations.

VIII.

CONCLUSION

For the foregoing reasons, this Court should find that both USOC and USAT owe a duty to reasonably protect youth athletes, including Plaintiffs, from foreseeable sexual abuse and as such reverse in part and affirm in part the court of appeal's decision below.

Dated: October 8, 2020 **ESNER, CHANG & BOYER**

By: *s/ Holly N. Boyer*
Holly N. Boyer
Attorneys for Amici Curiae
MANLY STEWART & FINALDI and
NATIONAL CRIME VICTIM BAR
ASSOCIATION

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s/ Holly N. Boyer
Holly N. Boyer

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s/ Holly N. Boyer
Holly N. Boyer

SERVICE LIST
Yazmin Brown, et al. v. United States Olympic Committee
(S259216 | B280550 | BC599321)

Stephen J. Estey, Esq.
ESTEY & BOMBERGER LLP
2869 India Street
San Diego, CA 92103
Telephone: (619) 295-0035
Email: steve@estey-bomberger.com

Attorneys for Plaintiffs, Appellants and Petitioners
Yazmin Brown, et al.

via TrueFiling

B. Robert Allard, Esq.
CORSIGLIA MCMAHON & ALLARD, LLP
96 N. 3rd Street, Ste. 620
San Jose, CA 95112
Telephone: (408) 289-1417
Email: rallard@cmalaw.net

Attorneys for Plaintiffs, Appellants and Petitioners
Yazmin Brown, et al.

via TrueFiling

Kenneth C. Turek, Esq.
TUREK LAW P.C.
603 N. Highway 101, Suite C
Solana Beach, CA 92075
Telephone: (619) 234-9000
Email: ken@kenturek.com

Attorneys for Plaintiffs, Appellants and Petitioners
Yazmin Brown, et al.

via TrueFiling

Jon. R. Williams, Esq.
WILLIAMS IAGMIN LLP
666 State Street
San Diego, CA 92101
Telephone: (619) 238-0370
Email: williams@williamsiagmin.com

Attorneys for Plaintiffs, Appellants and Petitioners
Yazmin Brown, et al.

via TrueFiling

Patrick E. Stockalper, Esq.
Matthew A. Schiller, Esq.
KJAR, MCKENNA & STOCKALPER, LLP
841 Apollo Street, Suite 100
El Segundo, CA 90245
Telephone: (424) 217-3026
Email: pstockalper@kmslegal.com
mschiller@kmslegal.com

Attorneys for Defendant and Respondent
USA Taekwondo

via TrueFiling

Mitchell C. Tilner, Esq. Steven S. Fleischman, Esq. Yen-Shyang Tseng, Esq. HORVITZ & LEVY LLP 3601 West Olive Avenue, 8th Floor Burbank, CA 91505 Telephone: (818) 995-0800 Email: mtilner@horvitzlevy.com sfleischman@horvitzlevy.com ytseng@horvitzlevy.com	***Attorneys for Defendant and Respondent*** USA Taekwondo *via TrueFiling*
Evan N. Okamura, Esq. REBACK, MCANDREWS, KJAR, WARFORD & STOCKALPER, LLP 1230 Rosecrans Ave., Ste. 450 Manhattan Beach, CA 90266 Telephone: (310) 297-9900 Email: eokamura@rmblawyer.com	***Attorneys for Defendant and Respondent*** USA Taekwondo *via TrueFiling*
Margaret M. Holm, Esq. CLYDE & CO US LLP 2020 Main Street, Ste. 1100 Irvine, CA 92614 Telephone: (949) 852-8200 Email: Margaret.Holm@clydeco.us	***Attorneys for Defendant and Respondent*** United States Olympic Committee *via TrueFiling*
Douglas J. Collodel, Esq. CLYDE & CO US LLP 355 S. Grand Ave., Ste. 1400 Los Angeles, CA 90017 Telephone: (213) 358-7632 Email: douglas.collodel@clydeco.us	***Attorneys for Defendant and Respondent*** United States Olympic Committee *via TrueFiling*
Beth S. Brinkmann, Esq. COVINGTON & BURLING LLP One CityCenter, 850 10th Street NW Washington, D.C. 20001 Telephone: (202) 662-5312 Email: bbrinkmann@cov.com	***Attorneys for Defendant and Respondent*** United States Olympic Committee *via TrueFiling*

Mitch A. Kamin, Esq.
Carolyn J. Kubota, Esq.
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067
Telephone: (424) 332-4800
Email: mkamin@cov.com
ckubota@cov.com

Attorneys for Defendant and Respondent
United States Olympic Committee

via TrueFiling

David M. Arbogast, Esq.
ARBOGAST LAW
7777 Fay Avenue, Suite 202
La Jolla, CA 92037
Telephone: (619) 374-1281
Email: david@arbogastlaw.com

Attorneys for Amicus Curiae
Consumer Attorneys of California

via TrueFiling

Donald B. Verrilli, Jr.
MUNGER, TOLLES & OLSON LLP
1155 F St., NW
Washington, D.C. 20004
Telephone: (202) 220-1100
Email: donald.verrilli@mto.com

Attorneys for Amicus Curiae
National Collegiate Athletic Association

via TrueFiling

Hailyn J. Chen
John B. Major
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
Email: hailyn.chen@mto.com
john.major@mto.com

Attorneys for Amicus Curiae
National Collegiate Athletic Association

via TrueFiling

California Court of Appeal
Second Appellate District, Division 7
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Case No. B280550

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Hon. Michael P. Vicencia
Los Angeles Superior Court
Governor George Deukmejian Courthouse
275 Magnolia Avenue, Dept. S26
Long Beach, CA 90802

Trial Judge, Case No. BC599321

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Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	10/8/2020 2:02:13 PM
Angelo McCabe Clyde & Co US LLP	angelo.mccabe@clydeco.us	e-Serve	10/8/2020 2:02:13 PM
Beth Brinkmann Convington Burling, LLP 129937	bbrinkmann@cov.com	e-Serve	10/8/2020 2:02:13 PM
Jon Williams Williams Iagmin LLP 162818	williams@williamsiagmin.com	e-Serve	10/8/2020 2:02:13 PM
Evan Okamura Reback, McAndrews, Kjar, Warford & Stockalper, LLP	eokamura@rmkws.com	e-Serve	10/8/2020 2:02:13 PM
David Arbogast	david@arbogastlaw.com	e-	10/8/2020

Arbogast Law 167571		Serve	2:02:13 PM
Hailyn Chen Munger Tolles & Olson LLP 237436	hailyn.chen@mto.com	e-Serve	10/8/2020 2:02:13 PM
Kenneth Turek Turek Law P.C.	ken@kenturek.com	e-Serve	10/8/2020 2:02:13 PM
Holly Boyer Esner, Chang & Boyer 221788	hboyer@ecbappeal.com	e-Serve	10/8/2020 2:02:13 PM
Yen-Shyang Tseng Horvitz & Levy LLP 282349	ytseng@horvitzlevy.com	e-Serve	10/8/2020 2:02:13 PM
Stephen Estey Estey & Bomberger LLP 163093	steve@estey-bomberger.com	e-Serve	10/8/2020 2:02:13 PM
Patrick Stockalper Kjar, McKenna & Stockalper, LLP 156954	pstockalper@kmslegal.com	e-Serve	10/8/2020 2:02:13 PM
Matthew Schiller Kjar, McKenna Stockalper 306662	mschiller@kmslegal.com	e-Serve	10/8/2020 2:02:13 PM
Chenin Andreoli Williams Iagmin LLP	andreoli@williamsiagmin.com	e-Serve	10/8/2020 2:02:13 PM
Steven Fleischman Horvitz & Levy LLP 169990	sfleischman@horvitzlevy.com	e-Serve	10/8/2020 2:02:13 PM
Mitch Kamin	mkamin@cov.com	e-Serve	10/8/2020 2:02:13 PM
Carolyn Kubota	ckubota@cov.com	e-Serve	10/8/2020 2:02:13 PM
Donald Verrilli, Jr.	donald.verrilli@mto.com	e-Serve	10/8/2020 2:02:13 PM
John Major 306416	john.major@mto.com	e-Serve	10/8/2020 2:02:13 PM

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Date

/s/Holly N. Boyer

Signature

Boyer, Holly N. (221788)

Last Name, First Name (PNum)

Esner, Chang & Boyer

Law Firm