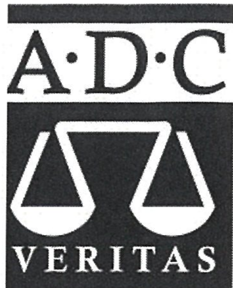

Association of Defense Counsel of Northern California and Nevada

Association of Southern California Defense Counsel

June 2, 2017

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Support for grant of review in *Doe v. United States Youth Soccer Assn.* (2017) 8 Cal.App.5th 1118
Supreme Court Case No. S241038

Honorable Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADCNCN") and the Association of Southern California Defense Counsel ("ASCDC") write to jointly urge the Court to grant the petitions for review filed by California Youth Soccer Association, Inc. and West Valley Youth Soccer League (together, "CYSA/West Valley").

Review is "necessary to secure uniformity of decision [and] to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The questions presented are undeniably important; the decision will affect many parties other than the litigants; and the decision is in apparent conflict with both other Court of Appeal decisions and the Legislature's determination of appropriate safeguards in this precise circumstance.

Interest Of The Requesting Organizations

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including summary judgment practice and employment matters. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in

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California. ADCNCN has filed briefs as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal across the state.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. ASCDC is comprised of over 1,000 attorneys in Central and Southern California. ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas. It has appeared as amicus curiae in numerous cases before both the California Supreme Court (e.g., *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire and Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) and the Courts of Appeal (e.g., *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524).

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on some matters of shared interest, such as this letter supporting review.

Why Review Should Be Granted

This Court regularly reviews cases involving questions of duty. (See, e.g., *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167 [duty as sophisticated intermediary defense]; *Kesner v. Superior Court (Pneumo Abex, LLC)* (2016) 1 Cal.5th 1132 [duty to prevent "take-home" toxic exposure]; *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 [addressing foreseeability as pertinent to duty].) Duty is a matter of law, and so it is particularly important to have uniformity among the courts of appeal. Duty questions are also particularly significant to the defense community, because they significantly effect litigation workload and duty issues often allow cases to be resolved without the time and expense of discovery and trial. When duty law is clear, attorneys can better counsel their clients, disputes and cases are more likely to settle or be resolved amicably, and courts are less likely to reach disparate results on identical or similar facts.

The duty questions presented in this case are likely to affect a broad swath of litigants other than those involved in this particular case.

First, although the Court of Appeal's published opinion involves specific soccer leagues, the decision's holding and reasoning impact every youth sports league in California, not just soccer leagues but basketball, volleyball, baseball, football, softball,

all youth sports leagues. The decision found a "special relationship" here because protecting children is important (no debate there) and because some parents dropped off their kids and were not present for all practices and games. This rationale applies equally to *any* youth sports league where volunteer adults are coaching or coming into contact with children. There are thousands of such youth sports leagues in California, and thousands upon thousands of such adult volunteers. (See, e.g., *Youth Sports Statistics,* Statistic Brain <http://www.statisticbrain.com/youth-sports-statistics> [as of May 30, 2017] [research conducted March 16, 2017, indicates 60% of kids age 5 to 18 play sports outside of school]; *Nearly 6 Out of 10 Children Participate in Extracurricular Activities, Census Bureau Reports* (Dec. 9, 2014) U.S. Census Bureau <https://www.census.gov/newsroom/press-releases/2014/cb14-224.html> [as of May 30, 2017] [2014 U.S. census report concluding 35% of children age 6 to 17 participate in at least one after-school extracurricular sports program]; *Parenting in America* (Dec. 17, 2015) Pew Research Center <http://www.pewsocialtrends.org/2015/12/17/5-childrens-extracurricular-activities> [as of May 30, 2017] [31% of parents of school-age children help coach sports teams on which their children participate].)

In fact, the prevalence of community youth athletic programs has spurred the California Legislature to enact legislation concerning criminal background checks for such organizations, yet the Legislature has declined to impose the duty that the Court of Appeal created here. (See Penal Code, § 11105.3; Bus & Prof. Code, § 18900.) That the Legislature has specifically legislated in this area yet refrained from imposing the duty judicially imposed by the Court of Appeal is, in itself, a strong ground for review.

Second, the opinion does not impact just sports programs. Its reasoning applies equally to any other organization or individual working with youth in any capacity whatsoever. The decision's finding of a special relationship could apply to many other youth-oriented activities (e.g., Great Books programs at libraries; Kid's Day at the park or forest preserve, extracurricular dance and art clubs). Again, most school-age children participate in such activities. (See, e,g., *Nearly 6 Out of 10 Children Participate in Extracurricular Activities, Census Bureau Reports* (Dec. 9, 2014) U.S. Census Bureau <https://www.census.gov/newsroom/press-releases/2014/cb14-224.html> [as of May 30, 2017] [2014 U.S. census report concluding that 57% of children between 6 and 17 years old participate in at least one after-school extracurricular activity, including sports, clubs, music or dance.) The decision appears to justify a heightened duty for every activity that involves children in any way, other than (perhaps) the most incidental or trivial.

Third, the opinion's imposition of potential negligence liability without requiring *actual* knowledge of the volunteer coach's unfitness conflicts with existing precedent in a manner that could sweep well beyond youth organizations and potentially impact any

employer in California. Even apart from the "special relationship," the decision essentially affirms liability for negligent hiring or retention even without knowledge that the employee was unfit and likely to cause the harm that actually materialized. This has never been the law even with respect to sexual abuse of minors, and is not the law in other negligent hiring or retention cases. (See, e.g., *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 396-397 [requiring actual knowledge of propensities of perpetrator or prior similar occurrences]; *Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899 [requiring actual knowledge]; *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1081 [same]; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828 [duty to further investigate where knowledge of facts encompassing the particular risk of harm].) Moreover, negligent hiring and retention law has always required a direct causal link between the employee's alleged unfitness and the specific harm that *actually materialized.* (See, e.g., *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1055 ["the cornerstone of a negligent hiring theory is the risk that the employee will act in a certain way and the employee *does act in that way*" (emphasis added)]; *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [negligence liability can be imposed "on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that *particular harm* materializes'" (citation omitted) (emphasis added)].)

The published opinion conflicts with such precedent, and thus potentially impacts employers across the state, because it allows the plaintiff to proceed with a negligence claim based upon the league's failure to run a criminal background check on this particular coach even though it is undisputed that a criminal background check would *not* have revealed *any* sex offenses, let alone against minors, and instead only revealed a conviction for battery against the coach's spouse. (See Typed opn. 7, 20.) Pedophilia is a unique perversion, one which often constitutes mental illness. That someone may have committed a non-sex crime in the past, even battery against a spouse, does not legitimately indicate that the person is likely to commit pedophilia. Under the opinion's theory, any employer who failed to uncover that an employee committed a serious offense in the past could be potentially liable for hiring or retaining that employee even if that past offense provided no red flag whatsoever about the harm that the employee ultimately committed. The opinion's reasoning, thus, exposes all employers to a potential liability explosion. We urge the Court to weigh in on the opinion's potentially harmful impact on California employment law and public policy.

The opinion also impacts a fourth set of potential litigants: any party to a case involving the *Rowland v. Christian* (1968) 69 Cal.2d 108, 117 factor of "closeness of the connection between the injury and the defendant's conduct." The opinion holds that "[t]he connection between plaintiff's harm and defendants' failure to conduct a criminal

background check was close." (Typed opn. 20.) But, as previously noted, the defendant coach had no criminal history related to children or to sex. His prior conviction for battery against a spouse does not make it foreseeable that he might commit pedophilia. The opinion does not claim otherwise. Instead, it adopts a "closeness" theory that no California case has ever adopted: It concludes that the act and the harm are closely connected because if the defendants had uncovered the coach's prior conviction for spousal battery "it would have been highly unlikely that he would have been hired." (Typed opn. 20-21.) Thus, instead of applying any foreseeability test regarding the actual harm that materialized or any standard principle of proximate causation, the opinion creates a brand new duty (one rejected by the Legislature) based on the conclusion that it is possible that if the league had discovered this prior offense, it might not have hired this coach, and had it not hired him then he might not have met the plaintiff and caused her injury, *even though her injury had nothing to do with the coach's prior offense*. The dangerous slippery slope created by this sort of unbridled "but for" approach to the requisite closeness is obvious. It goes without saying that such a tenuous "connection," if upheld, could be used to justify equally, or even more, tenuous connections in other cases and lead to an explosion of potential liability not just against volunteer organizations but against any employer.

That has never been the law in California. As stated in a child-sex-abuse case finding an insufficient connection:

> Unlike in *Evan F.* where facts encompassed *the particular risk of harm* if Murphy were employed, here there were no facts showing an undue risk of harm that Omemaga would commit criminal child sexual abuse if he were employed by the church.

(*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1566, italics added.) So too here, the criminal background check in the present case would have revealed no "facts showing an undue risk of harm that [Fabrizio] would commit criminal child sexual abuse."

Doe's consolidated answer to the two pending petitions for review does not address the applicability of Rule 8.500 so much as it argues the merits of appellant's position. It does not, and cannot, deny that the issues are important and of statewide importance. It does not, and cannot, deny that the decision imposes new requirements on youth sports leagues, above and beyond those mandated by the Legislature. And it does not, and cannot, deny that the decision's impact will potentially sweep well beyond youth sports leagues to any organization or employer. Doe's attempts to harmonize the result in

this case with the results in cases requiring actual notice are unavailing, for the reasons set forth in CYSA/West Valley's reply. If the disparate strands of authority created by this published opinion are to be harmonized, or one selected over the other, it must be done by this Court. Duty issues require clarity and uniformity.

Conclusion

The questions presented by this case affect every California youth sports program, every California organization working with youth, and potentially every California employer. The opinion stakes new, dangerous ground inconsistent with prior reported decisions. This Court should grant review.

Respectfully submitted,

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By: Don Willenburg/ELX
Don Willenburg

On Behalf of the Association of Defense Counsel of Northern California and Nevada

GREINES, MARTIN, STEIN & RICHLAND LLP

By: Edward L. Xanders
Edward L. Xanders

On Behalf of the Association of Southern California Defense Counsel

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP, 1111 Broadway, Suite 1700, Oakland, California 94607. On June 2, 2017, I served the within document:

Support for grant of review in *Doe v. United States Youth Soccer Assn.* (2017) 8 Cal.App.5th 1118
Supreme Court Case No. S241038

Via U.S. Mail: By placing the document(s) listed above in a sealed envelope, with postage thereon fully prepaid, in United States mail in the State of California at Oakland, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

Andrew Joseph Piunti Kelly Raftery DPA Law Group 1100 Lincoln Ave., Suite 381 San Jose, CA 95125 Jon Robert Williams Boudreau Williams, LLP 666 State Street San Diego, CA 92101	Plaintiff and Appellant Jane Doe
Margaret Manton Holm M. Christopher Hall Sedgwick LLP 2020 Main Street, Suite 1100 Irvine, CA 92614 Neil Howard Selman Rachel Elizabeth Hobbs Selman Breitman LLP 11766 Wilshire Boulevard, Sixth Floor Los Angeles, CA 90025	Defendant and Respondent United States Youth Soccer Association, Inc.

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David Fernando Beach Deborah Sandine Bull Oscar Amor Pardo Perry, Johnson, Anderson, Miller & Mokowitz 438 1st Street, Fourth Floor Santa Rosa, CA 95401	Defendant and Respondent West Valley Youth Soccer League

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 2, 2017 at Oakland, California.

Eileen Spiers