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IN THE SUPREME COURT OF CALIFORNIA

UNITED STATES SWIMMING, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA,
Respondent,

JANCY ANN TORRES THOMPSON,
Real Party in Interest.

AFTER THE SUMMARY DENIAL OF A WRIT PETITION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT • CASE NO. H038057

PETITION FOR REVIEW

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ISSUES PRESENTED

Where, as here, the plaintiff alleges childhood sexual abuse by her former swim coach and demands discovery of documents from a nonperpetrator defendant that include all allegations of *unrelated* sexual wrongdoing by *any* other coach, against swimmers of *any* age, at independent swim clubs *anywhere* in the country, during the past 20 years:

1. Is the recipient of the allegations of unrelated sexual wrongdoing—here, the national governing body for the sport (NGB)—entitled to redact the identities of the other nonparty

victims, any nonparty "whistleblowers," and the alleged nonparty wrongdoers, to protect their fundamental right to privacy guaranteed by the California constitution?

2. Does an order requiring that the documents be stamped "confidential" and limiting their "use[ ]" to the instant lawsuit cure the invasion of privacy that would result from the disclosure of the identities of persons involved in the unrelated wrongdoing—nonparties who may wish to remain anonymous to everyone including the plaintiff and her in-state and out-of-state litigation team?

3. If the only (potentially) viable theory of liability against the NGB, as a nonperpetrator defendant, is based on sexual abuse that occurred *before* the plaintiff turned 18 in January 2000, is the plaintiff entitled to discover allegations of unrelated wrongdoing toward other swimmers that the NGB received during the ten years since she became an adult, on the speculative theory that these subsequently reported allegations may show the NGB exercised "control" over the particular coach that had already abused the plaintiff and acted with "malice" in failing to prevent his conduct toward her?

4. If the theory of liability against the NGB is based on acts of *childhood* sexual abuse, is the plaintiff entitled to discover allegations of unrelated wrongdoing by other coaches toward nonparty *adult* swimmers?

INTRODUCTION:
WHY REVIEW SHOULD BE GRANTED

A. Introduction.

By this petition for review, United States Swimming, Inc. (USA Swimming), the national governing body for the sport of swimming, seeks to protect the fundamental privacy rights of persons, including many minors, who are not parties to this lawsuit and have no connection to it. Their rights, which are threatened by the trial court's order for the production of documents detailing their identities and involvement in unrelated acts of sexual wrongdoing, can be protected only by USA Swimming's petition for relief by writ that the Court of Appeal has summarily denied. (*Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336 (*Roberts*).)

This court should grant review, and then either decide the issues presented, which raise important questions of law, or retransfer the case to the Court of Appeal with directions to issue an alternative writ and address the merits of the USA Swimming's writ petition.

B. Nature of the proceedings.

Plaintiff Jancy Thompson was 28 when she commenced this action in 2010, alleging acts of sexual abuse and harassment

between 1994 and 2002 by her former swim coach, Norm Havercroft. Despite her lengthy delay in bringing suit, Thompson conceivably still has potentially viable causes of action against Havercroft.

But as to a nonperpetrator defendant like USA Swimming, her claims are strictly limited by the statute of limitations. At this late date, Thompson can only sue USA Swimming based on Havercroft's acts of childhood sexual abuse occurring before January 2000 when she turned 18, and only if (among other things) USA Swimming had reason to know, in advance, about such conduct by Havercroft toward *other children* and "was in a position to exercise some control over [his future behavior toward her]." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544 (*City of Los Angeles*); Code Civ. Proc., § 340.1, subd. (b)(2).)

Seeking evidence of such "control" over someone like Havercroft who was not a USA Swimming employee, and a basis for punitive damages, Thompson demanded that USA Swimming produce all documents containing allegations of sexual wrongdoing by *any coach* against swimmers of *any age* at independent swim clubs *anywhere* in the country *during the past 20 years*. USA Swimming moved for a protective order on various grounds, including the right of privacy of the nonparties referred to in the documents—i.e., swimmers of all ages, nonvictim "whistleblowers," and accused coaches who may have been innocent of the wrongdoing alleged. In particular, USA Swimming sought permission to remove all directly and indirectly identifying information from the documents and to narrow the scope of the production to reports of

sexual wrongdoing toward minors that it received before Thompson became an adult.

Though it acknowledged there were third-person privacy rights at stake, the trial court denied USA Swimming's motion in almost all respects. It ordered that all the documents Thompson seeks be produced in a wholly *unredacted* form that will disclose the identities and contact information for the underage and adult swimmers who suffered the unrelated sexual abuse or harassment, any "whistleblowers," and the nonparty coaches whether guilty of wrongdoing or not. The only conditions the court imposed on the production were that the documents be stamped "confidential" and that Thompson's litigation team could only "use[ ]" them in this lawsuit. (v.2 Exh. pp. 434, 486.)

As we explain, the trial court's ruling was an abuse of discretion, which is subject to review only by a writ petition. (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1432 (*Doe*).) Because the Court of Appeal has summarily denied the writ petition it filed, USA Swimming's only recourse to protect the fundamental third-person privacy rights at stake here is to seek review by this court and a stay of the trial court's order for production of the documents that Thompson seeks.

C. Why review should be granted to assure consideration of USA Swimming's writ petition on its merits.

Privacy is enshrined in California's constitution as a fundamental right. As a result, the normal rules for liberal

discovery in civil litigation do not apply. A party seeking information that another person reasonably expects will remain private—and this includes the sexual behavior of a person, especially a minor—must show it is *directly relevant* to the ongoing litigation. If the information is directly relevant, then the court must balance the need for the information against the competing privacy interests. And any order compelling disclosure of private information must be the least intrusive possible.

Thompson showed no need for the personal identifying information of nonparties that the trial court has ordered be disclosed, let alone the compelling need required because of the privacy interests at stake. Indeed, in her trial court opposition, Thompson represented *that she did not object* to the removal of directly identifying information (names, addresses, e-mail addresses, and telephone numbers). It was only when the trial court indicated it would limit her use of the documents to this lawsuit that Thompson demanded them in their *unredacted* form (until then, she planned to make the documents available to plaintiffs attorneys elsewhere in the country). She insisted that USA Swimming—really, she meant the nonparties whose privacy is at stake—"can't have it both ways." (v.2 Exh. pp. 501, 507.)

Nonsense. Protection for the privacy of nonparties, especially minors who have described sexual abuse, is not a matter for negotiation. It wasn't for Thompson to insist on a quid pro quo. Thompson's willingness to accept redacted documents *under any circumstances* confirms she does not need the third-person identifying information *at all*.

The court's order limiting use of the documents, stamped "confidential," to this lawsuit is not enough to protect the nonparties. Individuals who may wish to remain anonymous *to everyone* will still become known to Thompson—and linked to the disturbing acts of sexual misconduct they endured. It will then be up to Thompson and her in-state and out-of-state attorneys to decide how to use the information. Individuals across the country could find their private lives invaded by an unwelcome knock on the door, a phone call, an embarrassing visit at their workplace, or even a subpoena.

A protective order allowing removal of information from the documents that would directly or indirectly identify the nonparties would go far to protecting their privacy. At the same time, by disclosing the substance of the allegations against coaches that USA Swimming has received at times relevant to this lawsuit, the documents as redacted should satisfy any need Thompson has for discovery. If, after reviewing a redacted document, she decides she needs information that has been removed, then she can seek relief from the protective order, including an in camera review. (Cf. *GT, Inc. v. Superior Court* (1984) 151 Cal.App.3d 748, 756, fn. 4.)

Finally, Thompson has shown no need for documents, redacted or not, concerning allegations against swim coaches made since she turned 18 more than a decade ago. Nor has she shown she needs reports of sexual conduct between coaches and adults. The information in these documents is irrelevant to Thompson's claim that before the events of this case, USA Swimming should have

been aware of Havercroft's criminal abuse of *minors* and failed to prevent his similar behavior toward her *when she was a minor.*

STATEMENT OF THE CASE

A. Thompson has named USA Swimming as a co-defendant in this lawsuit, alleging it was somehow responsible for the childhood sexual abuse by her former swim coach.

Thompson is a swimmer formerly coached by Norm Havercroft, an employee of the West Valley Swim Club in Santa Clara County. (v.1 Exh. pp. 122-126.) In 2010, she filed a complaint and first amended complaint alleging sexual abuse and harassment by Havercroft. (v.1 Exh. pp. 15-58, 122-171.) The alleged misconduct occurred between 1994 and 2002. (v.1 Exh. pp. 122-123, 153.) During that time Thompson turned 18, on January 29, 2000, which is more than 10 years before she commenced this action. (v.1 Exh. pp. 15, 123, 150.)

Thompson named USA Swimming as a co-defendant, alleging it was responsible for Havercroft's conduct. (v.1 Exh. p. 123.) USA Swimming is an amateur sports organization created pursuant to the "Ted Stevens Olympic and Amateur Sports Act" as the national governing body for the sport of swimming. (v.1 Exh. p. 124; 36 U.S.C.A. § 220501 et seq.)

Thompson's claims against USA Swimming would ordinarily be barred by the statute of limitations because Havercroft's acts of

sexual misconduct occurred at least eight years before Thompson commenced this action at age 28. (v.1 Exh. pp. 15, 122-123, 150, 153; Code Civ. Proc., §§ 335.1, 352.) But the Legislature has created a narrow exception to the limitations period for claims against an entity that did not perpetrate an act of childhood sexual abuse but was a legal cause of it. In this case, Thompson must prove (among other things) that USA Swimming was on notice of Havercroft's unlawful sexual conduct with a minor at a time when it (somehow) could have still acted to avoid the risk of similar behavior by Havercroft toward Thompson herself. (Code Civ. Proc., § 340.1, subd. (b)(2).) As this court has explained, "[t]he statute's enumeration of the necessary relationship between the nonperpetrator defendant"—here, USA Swimming—"and the perpetrator implies that the former was in a position to exercise some control over the latter." (*City of Los Angeles, supra*, 42 Cal.4th at p. 544.)

B. Thompson demanded the disclosure of private information concerning nonparties, and USA Swimming moved for a protective order.

On or about September 1, 2011, Thompson served a request for production of documents on USA Swimming. (v.1 Exh. pp. 220-230.) Among the documents she asked for were any that USA Swimming has received since 1991 concerning allegations of sexual misconduct by any other swim coach, against swimmers of any age,

at independent swim clubs anywhere in the country. (v.1 Exh. p. 223.)

USA Swimming objected to Thompson's demand for production on various grounds and then sought a protective order. (v.1 Exh. pp. 95-112; v.2 Exh. pp. 332-333.) Among other things, USA Swimming sought an order that any documents it produced concerning allegations of sexual misconduct should be redacted of directly and indirectly identifying information to protect the fundamental privacy rights of nonparties—many of whom were minors when the misconduct occurred. (v.1 Exh. p. 96.) USA Swimming argued that given the nature of the information in the documents—which includes all allegations USA Swimming has received concerning acts of sexual wrongdoing anywhere in the country during the past 20 years—disclosure could embarrass the victims and their families, identify any "whistleblowers" who communicated concerns in confidence, and ruin coaches who may be innocent of the misconduct. (v.1 Exh. pp. 104-110.)

Alternatively, USA Swimming proposed that the trial court conduct an in camera inspection of the documents to balance any need for disclosure against its impact on the privacy of the nonparties. (v.1 Exh. p. 96.)

Finally, USA Swimming sought an order that it need not produce documents concerning allegations of wrongdoing by coaches that were first made *after* Thompson's 18th birthday, or that do not relate to the sexual abuse of *minors*. (v.1 Exh. pp. 96, 99, 101-104.)

C. Thompson opposed USA Swimming's motion for a protective order.

Opposing USA Swimming's motion for a protective order, Thompson argued the "fact that complaints about coaches' molestation were directed to defendant belies defendant's 'no control' mantra"—i.e., that USA Swimming does not control coaches who are really employees of the local swim clubs that are separate and distinct entities. (v.2 Exh. pp. 374-375.) She also argued the fact complaints were received "demonstrates . . . malice in refusing to properly address the problem . . . until 2010." (v.2 Exh. p. 375.)

Thompson represented in her opposition that she was agreeable "to redactions of [the] name, address, e-mail address, and telephone number of the coach and claimant." (v.2 Exh. p. 383; see also v.1 Exh. p. 299; v.2 Exh. pp. 312, 379.) However, she objected to the removal of other information that could *indirectly* identify the nonparties to whom the documents referred. (v.2 Exh. pp. 379-380.) USA Swimming had already produced over 1,700 pages of documents concerning allegations of unrelated misconduct by coaches toward underage swimmers that it received prior to Thompson's 18th birthday, which were redacted to remove information that directly or indirectly identified the nonparties. (v.2 Exh. pp. 310-311, 422, 430.) Thompson complained about the scope of the redactions. (v.2 Exh. pp. 310-311, 314-316, 379-381.)

Thompson also objected to an order prohibiting "dissemination" of the documents to other persons once her multiple in-state and out-of-state attorneys had them in their possession.

(v.2 Exh. pp. 381-382.) She insisted her attorneys should be able to share the documents she received with other lawyers around the country for use in other cases as part of their "collaborative efforts." (v.2 Exh. pp. 375, 381, 383; see also v.2 Exh. p. 508.)

D. The trial court largely denied USA Swimming's motion for a protective order, including the request to redact information in the documents produced that would directly or indirectly identify the nonparties.

The trial court issued a tentative ruling on USA Swimming's motion for a protective order, which said, in pertinent part: "To balance the privacy rights of the third parties, the parties shall designate the documents requested in plaintiff Jancy Ann Torres Thompson's ('Thompson') request for production of documents (set three) as confidential. The documents shall not be used outside of the present litigation. In all other respects, the motion is DENIED." (v.2 Exh. p. 434.)

In light of this tentative ruling, Thompson backpedaled on her earlier agreement to some redaction of identifying information in the documents she sought. (See v.1 Exh. p. 299; v.2 Exh. pp. 312, 379, 383.) At the January 13, 2012 hearing, Thompson said that if the trial court was going to limit her use of the documents to this lawsuit, then she objected to the redaction of *any* information identifying nonparties, *directly or indirectly*. (v.2 Exh. pp. 500-501, 507.)

On January 26, 2012, the trial court entered its written ruling on USA Swimming's motion for a protective order. The order stated:

> USA Swimming's motion for a protective order is GRANTED IN PART. To balance the privacy rights of the third parties, the parties shall designate the documents requested in Plaintiffs Request for Production of Documents, Set Three, as confidential. The documents shall not be used outside of the present litigation.

(v.2 Exh. p. 486.) In all other respects, the trial court denied USA Swimming's motion for a protective order. In particular, the court ordered that the production of documents is "to be made *without any redaction of information based upon the privacy rights of third parties*." (v.2 Exh. p. 486, emphasis added.)

E. USA Swimming petitioned the Court of Appeal for writ relief, which the court summarily denied.

USA Swimming has no right of appeal from the trial court's order granting its motion for a protective order only in part, and directing that it produce in unredacted form all the documents that Thompson seeks. (*Doe, supra*, 200 Cal.App.4th at p. 1432.) Challenging the order on an appeal from a final judgment in the case would be futile because the disclosure of the information to be protected would have already taken place. (*Roberts, supra*, 9 Cal.3d at p. 336.)

Having no plain, speedy, and adequate remedy at law to protect the fundamental privacy rights of nonparties, USA

Swimming petitioned the Court of Appeal for a writ of mandate, prohibition or other appropriate relief. USA Swimming argued the trial court abused its discretion by ordering it to produce the documents that Thompson seeks in a wholly unredacted form and the order for production was overbroad. (Writ Pet. p. 16.) On May 18, 2012, the Court of Appeal summarily denied USA Swimming's petition.

By its terms, the trial court's order requires USA Swimming to produce the documents that Thompson seeks, in their unredacted form, within ten (10) days of the Court of Appeal's determination not to consider the merits of USA Swimming's petition for writ relief. (v.2 Exh. p. 486.) However, the parties through counsel have stipulated to entry of an order by the trial court that will extend the time for production until after all appellate proceedings on USA Swimming's writ petition are finally concluded, which include the proceedings related to this petition for review.

LEGAL ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY REQUIRING THE DISCLOSURE OF NONPARTY IDENTIFYING INFORMATION IN DOCUMENTS THAT INCLUDE ALLEGATIONS OF UNRELATED SEXUAL MISCONDUCT AGAINST SWIMMERS OF ANY AGE BY ANY COACH AT INDEPENDENT SWIM CLUBS ANYWHERE IN THE COUNTRY DURING THE PAST 20 YEARS.

A. The normal rules for permissible discovery must yield when the information sought is protected by California's constitutional right to privacy.

The first provision of the California Constitution states that "privacy" is one of the "inalienable rights" of "[a]ll people." (Cal. Const., art. I, § 1.) It "is a 'fundamental interest' of our society." (*Garstang v. Superior Court* (1995) 39 Cal.App.4th 526, 532.)

The right to privacy limits compelled disclosure of information in civil litigation. (*Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 566-567.) In particular, when the right to privacy is involved, "the party seeking discovery of private matter must do more than satisfy" the usual broad standards for discovery. (*Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853 (*Lantz*); cf. Code Civ. Proc., § 2017.010, subd. (a) [general rule for discovery].) If compelled disclosure would intrude on constitutionally protected areas, "[t]he

proponent of [the] discovery"—here, Thompson—"has the burden of making a threshold showing that the evidence sought is 'directly relevant' to the claim or defense." (*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 665 (*Harris*); see also *Ombudsman Services of Northern California v. Superior Court* (2007) 154 Cal.App.4th 1233, 1251 (*Ombudsman Services*); *Britt v. Superior Court* (1978) 20 Cal.3d 844, 859 (*Britt*); *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 391, 394 (*United Farm Workers*) ["Only when the disclosure . . . is *essential* to a fair resolution of the case may it be compelled," emphasis added].)

But a showing of direct relevance only *begins* the analysis. "Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a careful balancing of the compelling public need for discovery against the fundamental right of privacy." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014 (*Davis*); *Estate of Gallio* (1995) 33 Cal.App.4th 592, 597; *Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 900 (*Binder*).) "An impairment of an interest of constitutional dimension [i.e., the right to privacy] passes constitutional muster only if it is *necessary* to achieve the compelling interest." (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1148.)

And even "if an intrusion on the right of privacy is deemed necessary under the circumstances of a particular case, any such intrusion should be the minimum intrusion necessary to achieve its objective." (*Lantz, supra*, 28 Cal.App.4th at p. 1855; see also *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1072

(*Johnson*); *Davis*, *supra*, 7 Cal.App.4th at p. 1014 [discovery must be "narrowly circumscribed"/"the least intrusive"]; *Binder*, *supra*, 196 Cal.App.3d at p. 900 [same].) Constitutional protections "dictate that the compelled disclosure be narrowly drawn to assure maximum protection of the constitutional interests at stake." (*Britt*, *supra*, 20 Cal.3d at p. 859.)

The right to privacy in a civil lawsuit extends beyond the parties themselves, to include third persons about whom information is sought. (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 655-658.) " 'The custodian [of private information] has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of [it] is entitled to expect that his right will be thus asserted.' " (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526 (*Board of Trustees*); see also *Binder*, *supra*, 196 Cal.App.3d at p. 899; *Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, 77.) Courts have a duty "to reconcile the conflicting interests of litigants in obtaining necessary discovery and third parties in maintaining privacy[.]" (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 712 (*Schnabel*).)

Thus, a discovery order should be "carefully tailored" to avoid unnecessarily invading the privacy of nonparties. (*Schnabel*, *supra*, 5 Cal.4th at p. 714.) There must be a "practical necessity" for the compelled disclosure. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1200 (*John B*), internal quotation marks omitted.) "[S]uch an invasion of the right of privacy 'must be drawn with narrow specificity.' " (*Board of Trustees*, *supra*, 119 Cal.App.3d at p. 526,

quoting *Britt*, *supra*, 20 Cal.3d at p. 856.) "[P]recision . . . is required . . . ." (*John B.*, at p. 1199, internal quotation marks omitted.)

Such attention to privacy interests will often require the redaction of identifying information. (See *John B.*, *supra*, 38 Cal.4th at p. 1198 ["the discovery we have authorized does not include identifying information about John's sexual partners"]; *Johnson*, *supra*, 80 Cal.App.4th at p. 1073 ["John Doe's identity is to be protected to the fullest extent possible and the identities of his family members are not to be disclosed"]; *Board of Trustees*, *supra*, 119 Cal.App.3d at p. 532 [court should permit deletion of third-person names and "identifying characteristics"]; *Morales v. Superior Court* (1979) 99 Cal.App.3d 283, 291-292 [order lacked required narrow specificity because it required disclosure of third-person identifying information].)

B. The trial court abused its discretion by ordering disclosure of documents detailing unrelated allegations of sexual misconduct by nonparty swim coaches with no redaction of identifying information.

1. Allegations of sexual misconduct are covered by the constitutional right to privacy.

The right to privacy includes protection against the disclosure of a person's sexual behavior. (*John B.*, *supra*, 38 Cal.4th at p. 1198; *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841-842; *Fults*

v. Superior Court (1979) 88 Cal.App.3d 899, 904 (*Fults*).) This extends to allegations of sexual misconduct. (See *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 390-392 (*Juarez*) [files which documented reasons why the Scouts had determined certain persons to be "unfit" to serve as volunteers, including sexual misconduct, were protected by the right to privacy].)

Here, Thompson seeks production of all documents USA Swimming has received during the past 20 years that concern allegations of sexual misconduct by coaches toward swimmers, minor or adult, at independent swim clubs anywhere in the country. (v.1 Exh. p. 223.) The information in the documents is very sensitive and would, if disclosed, intrude on the privacy of the swimmers and their families, any nonvictim "whistleblowers," and nonparty coaches who may be innocent of the wrongdoing alleged. It is therefore constitutionally protected.

The trial court acknowledged "the privacy rights of the third parties" in its ruling on USA Swimming's motion for a protective order. (v.2 Exh. p. 486.) But as we explain, the court's balance of interests did not protect the privacy of those other persons around the country who do not know Thompson and have nothing to do with her lawsuit. (v.2 Exh. p. 486.)

2. Thompson showed no need for third-person identifying information.

Opposing USA Swimming's motion for a protective order, Thompson argued the documents she seeks were discoverable

because "[t]he fact that complaints about coaches' molestation were directed to defendant belies defendant's 'no control' mantra; why would such 'private' matters be submitted to USA Swimming if it truly were disinterested and helpless to control the coaches?" (v.2 Exh. pp. 374-375.) She insisted "[t]he more coaches involved in molestation, the harder it is for defendant to deny knowledge." (v.2 Exh. p. 375.) She also argued that receipt of the complaints regarding a "plethora" of coaches showed USA Swimming's "malice" in failing to address the problem. (v.2 Exh. p. 375.)

Since protected privacy interests are at stake, the burden was on Thompson to show the information in the documents is "directly relevant" to these claims against USA Swimming. (*Ombudsman Services, supra,* 154 Cal.App.4th at p. 1251; *Harris, supra,* 3 Cal.App.4th at p. 665.) The trial court decided the documents Thompson seeks, including the "names, addresses and phone numbers" of nonparties to whom the documents refer, were directly relevant to her claims.

> I agree with Mr. Allard [Thompson's attorney]. [Redaction of identifying information] makes the production kind of meaningless in some respects. [¶] There is a claim out there nobody knows something or anything about them.

(v.2 Exh. p. 508.) The court did not explain this finding of direct relevance. It has no support in the record.

As USA Swimming explained to the trial court, under Thompson's theory it is *the fact* that other swimmers submitted allegations about sexual misconduct to USA Swimming that might show the element of "control" over the coaches' behavior—not the

truth of the allegations or the identities of the persons involved. (v.2 Exh. pp. 503-504.) But were there merit to this theory, the redacted text of the allegations would reveal what, if anything, was reported to USA Swimming. Thompson did not even try to show why she also needed the identity and contact information of nonparties whose privacy must be protected as much as possible.

Juarez, supra, 81 Cal.App.4th 377 is instructive. There, the plaintiff argued that " 'extensive "ineligible volunteer file[s]," which document those scout masters who have been kicked out for molesting boy scouts, provid[e] knowledge of the rampant risk of pedophiles entering the Boy Scouts and molesting vulnerable Boy Scouts.' " (*Id.* at p. 392.) The Court of Appeal rejected that argument for discovery of the files:

> In our view, Juarez has not shown that the information contained in the ineligible volunteer files is directly relevant to any *disputed* issue in this case; let alone, that there is a compelling need for this information that outweighs the right to privacy [of nonparties]. The Scouts admitted in response to Juarez's request for admissions that the Scouts knew molestation could occur and did occur between scoutmasters and scouts before Juarez was molested. . . . Juarez has failed to show there was a compelling need for disclosure of this information that would outweigh the right of privacy of many individuals who are not parties to this lawsuit.

(*Ibid.*)

Similarly, there is no dispute here that USA Swimming has received complaints over the years about sexual misconduct by coaches toward swimmers, including minors. USA Swimming has

already turned over 1,700 pages of documents in redacted form that evidence that fact. (v.2 Exh. pp. 310-311, 422, 430.)

Likewise, USA Swimming has never denied that acts of sexual misconduct toward minors by their swim coaches can and do occasionally occur. What it has already turned over to Thompson shows that sad truth.

Finally, the trial court refused to consider Thompson's contention that the documents were relevant to a claim for punitive damages: "I am not going to deal with the punitive damages issues. That's not before the court." (v.2 Exh. 510; cf. *Board of Trustees, supra,* 119 Cal.App.3d at p. 526 [court rejects the plaintiff's claim for punitive damages as reason to discover third person's private information].) Even if the court had considered such an argument for discovery, it would be the fact that allegations were communicated to USA Swimming concerning coaches that (conceivably) might be useful to Thompson, not disclosure of identifying information for the nonparties involved. In particular, the identities would be immaterial because due process considerations would preclude evidence of the unrelated wrongful acts as a basis for an award of punitive damages to Thompson in this case. (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 [127 S.Ct. 1057, 166 L.Ed.2d 940]; *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423 [123 S.Ct. 1513, 155 L.Ed.2d 585] ["Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant"].)

Thompson wants the identities and contact information of nonparties to start a speculative "fishing expedition." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 384-386.) But where, as here, the fundamental right to privacy is at stake, that justification for discovery is insufficient. (See *Board of Trustees, supra*, 119 Cal.App.3d at p. 525, internal quotation marks omitted; *Fults, supra*, 88 Cal.App.3d at p. 905.)

3. Thompson has conceded she does not need the documents in their unredacted form.

The implication in the trial court's ruling that disclosure of the identifying information is "essential" to a fair resolution of this case (see *United Farm Workers, supra*, 170 Cal.App.3d at p. 394) is all the more remarkable because Thompson said in her opposition papers that she had "agreed to redactions of [the] name, address, e-mail address, and telephone number" of the nonparties to whom the documents she seeks refer. (v.2 Exh. 383; see also v.1 Exh. p. 299, v.2 Exh. pp. 312, 379.) Having *agreed* to forego the identifying information, Thompson obviously does *not* need it.

It was only when the court announced its inclination to limit Thompson's use of the documents *to this lawsuit* that she backpedaled on her agreement for redaction of at least some information and demanded the nonparties' identities. (v.2 Exh. pp. 500-501, 507.) She said that USA Swimming—by implication, also the nonparties whose privacy is at stake—"can't have it both ways." (v.2 Exh. pp. 501, 507.)

But Thompson either had a compelling need for the identifying information or she didn't, regardless of the limits the trial court put on her use of the documents she received from USA Swimming. Neither she nor the court explained such a compelling need.

The trial court abused its discretion by concluding that the documents Thompson seeks, in their wholly unredacted form, are directly relevant to her claims against USA Swimming.

C. The trial court's order does not protect nonparties from the unnecessary intrusion on their privacy rights by designating the unredacted documents as "confidential" and limiting Thompson's use of them to this lawsuit.

Though the trial court purported to "balance" Thompson's need for discovery against nonparties' privacy rights, it did so without conducting the in camera inspection of the documents that USA Swimming requested. (v.1 Exh. p. 96; v.2 Exh. p. 486.) In the end, the court did nothing to assure that information in the documents linking sensational allegations of sexual misconduct to the nonparties would be kept from the prying eyes of others.

To the contrary, the identities, addresses, and contact information of adult and minor swimmers who may have been victims of unrelated sexual abuse or harassment during the past two decades *anywhere in the country*, along with information about the alleged wrongdoers and other nonparties, will be revealed to

Thompson, her multiple in-state and out-of-state attorneys,[1] and anyone else working on her behalf. (v.2 Exh. p. 486.) Thompson and her litigation team will be free to contact persons identified in the documents and confront them with the allegations made by or against them, whether they want to be contacted or not. It will be open season on the privacy of persons who may wish, more than anything else, to be left alone years or even decades after the disturbing events they endured. Lacking the requirement that identifying information be redacted, the court's order for disclosure falls far short of being "narrowly circumscribed" and "the least intrusive," as respect for a fundamental constitutional right demands.[2] (*Davis, supra,* 7 Cal.App.4th at p. 1014; *Binder, supra,* 196 Cal.App.3d at p. 900.)

The protective order, which (i) allows USA Swimming to designate the documents as "confidential" and (ii) limits Thompson's "use[ ]" of them to this lawsuit, does not cure the unnecessary intrusion on privacy. (v.2 Exh. p. 486.) Specifically:

1. The nonparties whose right to privacy is at stake may prefer to remain anonymous to everyone—*including* Thompson.

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[1] Thompson is represented by attorneys from Missouri and Indiana admitted *pro hac vice,* as well as by her California attorneys. (v.2 Exh. pp. 451, 484.)

[2] The trial court did order that before she uses documents "in a court filing," Thompson must "redact any specific identifying information of all coaches and claimants, i.e., names, addresses, phone numbers, email addresses, addresses, dates of birth and social security numbers." (v.2 Exh. p. 486; see also v.2 Exh. p. 506-507.) However, there was no similar limitation on her use of the documents in other ways.

Absent a showing from Thompson of a compelling need for the identifying information, it would impermissibly intrude on that right to force USA Swimming to turn the documents over in their unredacted form. Stamping the documents "confidential" does not make them so, or cure the intrusion on privacy that will occur when Thompson and her attorneys view the allegations and that may discourage others from reporting abuse.[3] (v.2 Exh. p. 486.)

2. Nor does the order limiting use of the documents to this lawsuit justify their production in unredacted form. (v.2 Exh. p. 486.) "Such a protective order, while laudable, is only available *after* valid discovery has been ordered." (*Boler v. Superior Court* (1987) 201 Cal.App.3d 467, 475; see also *Davis, supra,* 7 Cal.App.4th at p. 1018.) Indeed, if valid discovery has been ordered, a nonparty who may be affected by the disclosure of private information is "presumptively entitled" to such a protective order. (*Richards v. Superior Court* (1978) 86 Cal.App.3d 265, 272.) Here, the underlying discovery order is *not* valid because there is no compelling justification for disclosure of the third-person identifying information that Thompson seeks. The protective order to which

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[3] See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 61 [107 S.Ct. 989, 94 L.Ed.2d 40] (the victims of childhood sexual abuse, together with relatives and neighbors who suspect the abuse, "will be more willing to come forward if they know that their identities will be protected. . . . The Commonwealth's purpose [to assure such protection] would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse"); *In re Anthony H.* (2005) 129 Cal.App.4th 495, 506 (" 'Confidentiality . . . encourages full disclosure, by the minors and others, of all information necessary for proper functioning of the juvenile welfare system' ").

the nonparties are already "presumptively entitled" does not make the overly intrusive order for discovery valid.

Opposing USA Swimming's motion for a protective order, Thompson's attorneys said that the plaintiffs bar across the nation is engaged in "collaborative efforts . . . to expose USA Swimming's disregard for its vulnerable swimmers." (v.2 Exh. p. 381.) They insisted USA Swimming's motion would "eliminate use of these documents in other cases [of molestation by coaches] being litigated across the nation." (v.2 Exh. p. 375; see also v.2 Exh. pp. 383 ["quell the collaborative efforts of plaintiff counsel across the nation"], 508 ["I [Thompson's attorney] think we should be able to use the documents in any claim against USA Swimming by my legal [team]"].) In light of this candid acknowledgement why Thompson's multiple in-state and out-of-state attorneys want the documents, USA Swimming and nonparties understandably question whether limiting their "use" to this lawsuit will really protect the nonparties' privacy.

In sum, this court has said that intrusion upon sexual privacy may only be done "on the basis of practical necessity." (*John B.*, *supra*, 38 Cal.4th at p. 1200, internal quotation marks omitted.) Here, as a practical matter, the trial court's order for the unredacted disclosure of documents did nothing to limit the intrusion on the privacy of swimmers, their families, coaches, and others connected with the sport across the country—none of whom have anything at all to do with this lawsuit. To protect the privacy interests of nonparties, the trial court should have ordered

redaction of all identifying information in the documents that Thompson seeks.[4]

II. THE TRIAL COURT'S ORDER FOR PRODUCTION OF DOCUMENTS (REDACTED OR NOT) IS OVERBROAD.

A. Thompson failed to show the relevance of allegations about coaches that USA Swimming received after she became an adult in 2000.

The acts of sexual misconduct that Thompson has alleged against Havercroft occurred at least eight years before she commenced this action at age 28. (v.1 Exh. pp. 15, 122-123, 150, 153.) Her claims against USA Swimming based on Havercroft's conduct would ordinarily have been barred by the statute of limitations. (Code Civ. Proc., §§ 335.1, 352.) In particular, any claims arising out of Havercroft's conduct toward Thompson after she became an adult would be untimely as a matter of law. (Code Civ. Proc., § 335.1.)

However, the Legislature has carved a narrow exception to the limitations period for childhood sexual abuse claims against an entity that did not perpetrate an act of abuse but was a legal cause

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[4] Because the trial court authorized no redaction at all, the court did not consider the scope of the redactions necessary to protect the nonparties' privacy interests. As part of the writ relief it seeks, USA Swimming has asked for an order to the trial court to address that issue. (Writ Pet. at pp. 42-44.)

of it. Code of Civil Procedure section 340.1, subdivision (b)(2), states that such claims may be brought after the underage victim's 26th birthday if (among other things) the defendant "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by [the perpetrator] and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future *by that person* . . . ." (Emphasis added.) As this court explained, "[t]he statute's enumeration of the necessary relationship between the nonperpetrator defendant"—here, USA Swimming—"and the perpetrator implies that the former was in a position to exercise some control over the latter." (*City of Los Angeles*, *supra*, 42 Cal.4th at p. 544; see also *Quarry v. Doe I* (2012) 53 Cal.4th 945, 968-969.)

Thus, to avoid the statute of limitations on her childhood abuse claims, Thompson must prove as a threshold matter that USA Swimming was on notice of Havercroft's unlawful sexual conduct with a minor at a time when it could have still acted to avoid the risk of similar behavior by Havercroft toward Thompson herself.[5] It would therefore be irrelevant if USA Swimming became aware of such misconduct by Havercroft toward a child *after* Thompson became an adult, or failed to prevent his harassment and abuse of her as an adult.

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[5] "Fairly construed, then, subdivision (b)(2) requires the victim to establish that the nonperpetrator defendant . . . was . . . on notice that the perpetrator had engaged in past unlawful sexual conduct with a minor and . . . failed . . . to avoid acts of future unlawful sexual conduct by the perpetrator." (*City of Los Angeles*, *supra*, 42 Cal.4th at p. 549.)

Here, Thompson has demanded that USA Swimming produce documents evidencing allegations of sexual misconduct by coaches it has received during the past 20 years. (v.1 Exh. p. 223.) USA Swimming objected to the scope of Thompson's demand on the ground that documents it received after she became an adult in 2000 could not show what it knew and failed to do to prevent Havercroft's misconduct while she was a minor. (v.1 Exh. pp. 96, 99, 102-103.)

We have explained that where, as here, the privacy of nonparties is at stake, a showing of direct relevance is required for compelled disclosure. (*Ombudsman Services, supra,* 154 Cal.App.4th at p. 1251; *Harris, supra,* 3 Cal.App.4th at p. 665.) Thompson did not even try to meet that standard. Instead, she argued that "documents existing after [Thompson became an adult] *may demonstrate* that which was known by US Swimming during the time plaintiff was molested." (v.2 Exh. p. 376, emphasis added.) In other words, she contemplates an impermissible "fishing expedition."

Were allegations that USA Swimming received after Thompson became an adult directly relevant to her case (they aren't), the relevance would be far outweighed by the intrusion on the privacy of nonparties including underage victims that would result from their disclosure. Because the trial court's order that USA Swimming produce such information was overbroad and not the least intrusive possible in light of nonparties' competing rights to privacy, it was an abuse of discretion. (See *Britt, supra,* 20 Cal.3d at p. 859; *Johnson, supra,* 80 Cal.App.4th at p. 1072; *Lantz,*

supra, 28 Cal.App.4th at p. 1855; *Davis*, *supra*, 7 Cal.App.4th at p. 1014; *Binder*, *supra*, 196 Cal.App.3d at p. 900.)

B. Thompson failed to show the relevance of allegations about coaches' conduct toward adult swimmers that is not "unlawful" for purposes of Code of Civil Procedure section 340.1, subdivision (b)(2).

"[T]he Legislature's goal in enacting [Code of Civil Procedure section 340.1,] subdivision (b)(2) was to expand the ability of victims of childhood [sexual] abuse to sue those responsible for the injuries they sustained as a result of that abuse." (*City of Los Angeles*, *supra*, 42 Cal.4th at p. 545.) However, to prove a case against a nonperpetrator like USA Swimming that will survive the statute of limitations, Thompson will have to show (among other things) that prior to the acts she has alleged against Havercroft, USA Swimming should have been aware of his past unlawful sexual conduct *with a minor*, and failed to act to prevent subsequent similar conduct with her. (*Id.* at p. 549.)

Havercroft's behavior *toward adults* will be irrelevant to what Thompson must prove (even if USA Swimming should have known about it) because " 'unlawful sexual conduct' refers to the acts specified in section 340.1, subdivision (e), which defines ' "[c]hildhood sexual abuse" ' in terms of seven provisions of the Penal Code describing various prohibited sexual acts against minors." (*City of Los Angeles*, *supra*, 42 Cal.4th at pp. 545-546.) Unlike sexual conduct with children, behavior like sexual

harassment directed at adults is not necessarily criminal.[6] It will be unimportant whether USA Swimming should have known that Havercroft acted improperly with adults and failed to prevent such conduct in the future. "[I]t is illogical" to assume a person who engages in sexual misconduct with adults will commit sexual crimes against a minor. (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1566-1567.)

But according to Thompson, " 'relevance' is not the test here. Such complaints may well demonstrate USA Swimming's exercise of control over the coaches." (v.2 Exh. p. 378.) She overlooked that even adult victims have the fundamental right to privacy. What Thompson proposed is another "fishing expedition" that will intrude on that right.

The trial court's order for production of documents, redacted or unredacted, was overbroad. The court should have denied Thompson's demand for documents concerning allegations against swim coaches that (1) USA Swimming received after she became an adult and (2) involve conduct by coaches toward adults.

CONCLUSION

For the reasons explained above, the court should grant this petition for review and then either decide the questions the petition

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[6] As for adult swimmers, Thompson's focus has been on claims of sexual harassment by coaches. (v.2 Exh. p. 378 ["USA Swimming contends that issues surrounding coaches' sexual harassment of adults is irrelevant to this minor's molestation claim"].)

presents or retransfer the case to the Court of Appeal with directions to issue an alternative writ and address the merits of USA Swimming's arguments.

May 24, 2012

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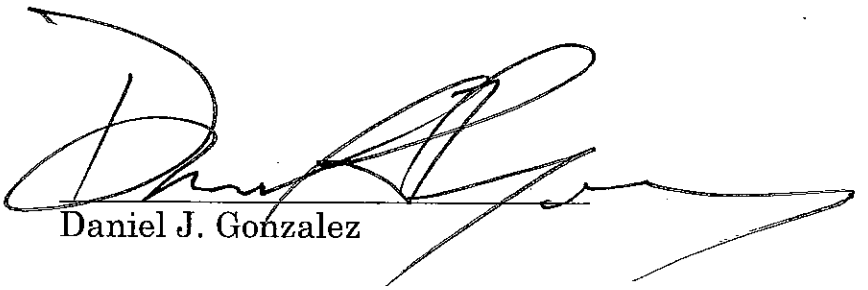
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 7,493 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: May 24, 2012



Daniel J. Gonzalez

COURT OF APPEAL ORDER DENYING PETITION FOR WRIT OF MANDATE
H038057 • MAY 18, 2012

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

UNITED STATES SWIMMING, INC.,
Petitioner,
v.
THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;
JANCY ANN TORRES THOMPSON,
Real Party in Interest.

Court of Appeal - Sixth App. Dist.
FILED
MAY 18 2012
MICHAEL J. YERLY, Clerk
By _____ DEPUTY

H038057
Santa Clara County No. CV174783

BY THE COURT:

The petition for writ of mandate and/or prohibition, or other appropriate relief and request for stay are denied.

(Premo, Acting P.J., Elia, J., and Bamattre-Manoukian, J. participated in this decision.)

Date: MAY 18 2012

PREMO, J. Acting P.J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On May 24, 2012, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on May 24, 2012, at Encino, California.

Kathy Turner

SERVICE LIST
THOMPSON v. US SWIMMING, INC. et al.
Superior Court Case No.: 1-10-CV-174783

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Superior Court Case No.: 1-10-CV-174783

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