A170226 c/w A171966

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 5

C.F., ET AL.,
Plaintiffs and Respondents,

v.

ALTERNATIVE FAMILY SERVICES, INC.,
Defendant and Appellant.

CASE NO. SCV264540
HON. PATRICK BRODERICK, TRIAL JUDGE
SONOMA COUNTY SUPERIOR COURT

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS; BRIEF OF *AMICUS CURIAE* CHILDREN'S ADVOCACY INSTITUTE

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APPLICATION FOR PERMISSION TO FILE BRIEF

Pursuant to California Rules of Court, Rule 8.520(f), the Children's Advocacy Institute ("CAI"), through attorney Ed Howard, respectfully requests permission to file the accompanying brief as a friend of the Court.

Founded in 1989 at the University of San Diego's School of Law and housed continuously within the law school since that time, CAI is an academic center that promotes the well-being of children through scholarship, coursework, direct legal services, litigation, agency rulemaking, and California and federal legislative advocacy. It is headed by the University's Fellmeth-Peterson Professor in Child Rights.[1]

Since its founding, ensuring the safety and well-being of California's foster children has been CAI's chief advocacy priority. The reason is simple: foster children need more protection than any other group of children. Outside of foster care, children have adults in their lives who champion their interests more than any other — their parents. In contrast, already abused or neglected foster children are blamelessly and traumatically separated by force of our laws from their parents, siblings, families, friends, schools, and communities. Thereafter, foster children are, maybe for the rest of their childhoods, too often raised by a frequently rotating cast of strangers overseen by overlapping and underfunded bureaucracies whose daily operations largely escape the accountability of public scrutiny. Foster children are too young to vote, and they are otherwise entirely estranged from any group with substantial political power.

In every way and at every point in their lives, foster children need more protection than other children, never less. Hence, CAI prioritizes them in its advocacy. It is for this reason that CAI has a keen interest in whether

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[1] Children's Advocacy Institute, University of San Diego (2025) https://www.sandiego.edu/cai/

the "actual knowledge" foreseeability standard urged by Appellant and its insurer *amici* is in the best interests of foster children.

"The Legislature has determined that the provision of public social services, including foster care, is a county function and responsibility subject to any applicable state and federal statutes and regulations. [citation omitted] Counties are responsible for a public system of statewide child welfare services[.]" (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1256. See also, Welfare & Inst. Code § 16500, et seq.) As permitted by law, sometimes counties contract with private actors called foster family agencies ("FFA") to aid them in recruiting, screening, and monitoring foster parents. (RB pp. 13-27; AOB pp. 10-26, ARB pp. 56-57; APCIA Amicus Brief pp. 5, 9, 17, 24; D&M Amicus Brief pp. 8-9; Alliance Amicus Brief pp. 5, 7; NIAC Amicus Brief p. 10.)

Appellant and its insurer *amici* here urge the court to adopt a rule whereby a contracting private FFA like Appellant can only be held liable for failing to screen prospective foster parents for their likelihood of sexually abusing the children under their care if an FFA somehow "actually knew" the prospective foster parent already had a predisposition to rape or otherwise sexually abuse foster children. The question of whether foster children are or are not better served by the Court adopting this legal standard in sexual abuse tort cases as urged by Appellant and its aligned *amici* is of great significance to whether FFA-involved foster children will be adequately protected from sexual abuse and, if sexually abused, whether they will receive the same compensation to pay for their mental health therapy, medications, health insurance, gynecological treatment, and support throughout their lives as would a non-FFA foster child identically abused.

No party, attorney for a party, or judicial member drafted this brief or made any monetary contribution intended to fund the preparation or submission of this brief. No person other than CAI or CAI's general

charitable supporters made any financial contribution intended to fund this brief's preparation or submission.

Dated: September 22, 2025 Respectfully Submitted,

By: 

Ed Howard
Attorney for Amicus Curiae

SUMMARY OF ARGUMENT

Resurrection of the "actual knowledge" foreseeability standard as proposed by Appellant and its *amici* invites three errors.

Appellant's **first** error is asserting that *Rowland v. Christian* (1968) 609 Cal.2d 108 ("*Rowland*") compels the use of an "actual knowledge" standard in this case. To the contrary, as the Fourth District recently held in *D.G. v. Orange County Social Services Agency* (2025) 108 Cal.App.5th 465, 471-472 ("*D.G.*"), our Supreme Court first "rejected" such a test in *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 630 ("*Regents*") and then held such a test to be incompatible with *Rowland*, in *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 221 ("*Brown*").

Appellant's **second** *Rowland* error derives from its arguments that "actual knowledge" should be adjudicated as a kind of duty under *Rowland* when *Rowland* is a case establishing the conditions for exemptions from already-recognized duties.

Appellant's **third** *Rowland* error is in characterizing a judicial refusal to recognize a *Rowland* exemption as an "expansion" of a duty. But not recognizing an exemption leaves the pre-established duty intact; it does not expand or contract it.

Not only is resurrecting the "rejected" "actual knowledge" standard impossible to square with *Regents* and *Brown*, but resurrecting the "actual knowledge" standard in FFA child sex abuse screening cases such as this one would be catastrophic for FFA-involved foster children.

First, the evidence below was uncontested that sexual abusers are attracted to the criminal opportunity presented by becoming foster parents. Thus, as an FFA cannot "actually know" what it does not search for, a resurrected "actual knowledge" standard as applied to FFA foster parent screening would financially motivate FFA indolence in scrutinizing foster parents for their likelihood of sexually abusing children, including

motivating FFAs to violate laws governing such FFA scrutiny. This, in turn, increases the likelihood of FFA-involved foster children being sexually abused.

As foster children are our most fragile and vulnerable children, the *Rowland* "public policy" factor cannot support any rule that has even a slight possibility of diminishing the financial incentive for FFAs to screen prospective foster parents for predispositions to rape or otherwise sexually abuse foster children. Nor can the *Rowland* "public policy" factor support any rule that has even the slightest possibility of diminishing the financial incentive for FFAs to robustly comply with laws governing that screening, such as the laws broken by Appellant here. Remembering that pedophiles are drawn to try to be foster parents, FFAs must be motivated to be *more* ambitious in their screening, not less, as what happened to the child plaintiffs in this case tragically underscores.

Second, notwithstanding that foster children have already been abused or neglected so badly the State has dramatically intervened to sever them from their parents, application of Appellant's proposed "actual knowledge" standard would mean that foster children who suffer the additional, searing trauma of rape or sexual abuse will receive zero compensation, no matter how negligent the FFA, and no matter the number of laws the FFA broke governing scrutiny of prospective foster parents. This is because, under Appellant's standard, unless the FFA "actually knew" a foster parent was predisposed to child sex crimes and then approved the foster parent anyway, there would be zero liability. Because that would never happen, there will never be compensation. However, an already traumatized foster child who is additionally sexually abused will really, really, *really* need money throughout their lives for therapy, gynecological care, medicines, to stabilize their living arrangements to prevent being sexually trafficked when older, and for life-assistance if too mentally ill to work productively. By

denying all compensation to FFA-involved, sexually abused foster children even when an FFA was negligent, even when it broke screening laws, as a way of *maybe* enticing insurers to once again insure FFAs at *maybe* reasonable prices on a timetable that *hopefully* will keep some unknown number of FFAs in business, Appellant's proposal would elevate the financial interests of FFAs and their insurers over those of FFA-involved sexually abused foster children. As FFAs only exist as county contractors in foster care as part of county child welfare programs, Appellant's proposed rule turns child welfare policy and several related case precedents upside down.

More broadly, as a child has no say in whether they are placed under the care of an FFA, "public policy" under *Rowland* or any other authority cannot rationally or morally support a result where some foster children are better protected from sex abuse than others, and better able to obtain compensation for their life-long trauma if abused, based solely on the fortuity of whether their care is overseen by a county directly or, as here, a contractor acting on the county's behalf.

When it comes to the FFA insurance "crisis," Appellant and *amicus curie* Nonprofits Insurance Alliance ("NIAC") assert that the verdict in this case specifically, and to some unclear extent, other FFA verdicts, prompted NIAC suddenly to announce it would no longer insure FFAs in California.[2]

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[2] Citations to the parties' brief herein are as follows: Appellant's Opening Brief is abbreviated "AOB," its Reply "ARB," and Respondents' Brief is abbreviated "RB." See, e.g., AOB, Table of Contents ("Because FFA Liability for Foster Family Molestations, Absent Actual Knowledge of Propensities, Would Eliminate Insurance and Put FFAs out of Business, Public Policy Is Against Expanding Duty") and ARB, Table of Contents ("10. Plaintiffs Fail to Show That the *Rowland* Policy Arguments Favor Destruction of California's FFA System by Imposing Liability for Unprecedented Molestations; iv. Plaintiffs Fail to Rebut the Devastating Effect Imposing this Liability Has Had and Will Have on Insurance Availability") The *amici* aligned with the same arguments.

(*See*, e.g., ARB p. 43: "Matters 1.1. and 1.2 in Appellant's Judicial Notice motion arise out of the insurance crisis that arose from the verdict in this lawsuit and associated events."; NIAC Amicus Brief p. 8.)

The version of events does not withstand even cursory scrutiny. Appellant's and insurer *amici's* version of the "crisis" here ignores how the verdict the insurer says hallmarks a "crisis" could have been entirely avoided had NIAC accepted not one but two settlement offers for all three child plaintiffs within NIAC's policy limits. The version of events is also based on assertions mostly without citation, cherry-picked documents and news articles that are outside the record and untested by adversarial scrutiny, and a surgical omission of contrary facts and authorities, including omissions found in NIAC's own publicly available data and data cited in authorities it relies upon here. Those authorities show the "crisis" — if it can be called a "crisis" — is a part of a larger insurance problem extending beyond FFAs and California's borders, which would not likely be remedied by adopting an "actual knowledge" standard.

Similarly, Appellant's and insurer *amici*'s version of events omits how NIAC made the disruption of California's foster care system needlessly and far worse, both before it introduced its mostly rebuffed "gut and amend" legislation and after.

Finally, many, many other policy options exist that offer more predictable and compassionate ways to address FFA insurance unaffordability and unavailability than what is proposed by Appellant and its insurer *amici*. Recently enacted law requires state agencies and counties to review options; a process that is ongoing and prevents FFAs from being held liable for county negligence; the latter reform proposed by NIAC itself. The Legislature appropriated a subsidy of over $30 million to help FFAs defray the cost of insurance. Many good proposals are suggested in a study cited by NIAC. Notably, none of those proposals recommend courts adopting an

outside-the-record-based, "actual knowledge" tort reform-inspired proposal that would financially motivate FFA indolence or lawbreaking in screening for pedophiles and entirely deny compensation to foster children — already traumatized — when they are raped or otherwise sexually abused due to the negligence or lawbreaking of FFAs.

ARGUMENT

I. Resurrection of the "Actual Knowledge" Foreseeability Standard Rejected by the Supreme Court Invites Three Legal Errors.

Appellant's first legal argument on appeal regarding *Rowland* invites three errors.

Preliminarily, Appellant essentially concedes the existence of a "special relationship" between itself and the three children ("But since it screened the Martinezes' home, certified it, and monitored plaintiff's placement, it arguably had a special relationship with plaintiffs." AOB p. 36). That such a relationship exists between Appellant and the three child plaintiffs cannot be disputed. (*D.G. v. Orange County Social Services Agency* (2025) 108 Cal.App.5th 465, 471 ["There is no dispute that a foster child is in a special relationship with the agency that provides his or her care"].) "Accordingly, as a consequence of the special relationship," Appellant "generally owe[s] a duty to use reasonable care to protect" the foster children under its care. (*Regents, supra*, 4 Cal.5th at 627.)

Thus, as Appellant correctly observes, application of the *Rowland* factors is to test whether this Court should recognize an "exception" to Appellant's duty of "reasonable care" arising from and established by its "special relationship" to the three sexually abused foster children-plaintiffs. (AOB p. 47, quoting *Regents*, 4 Cal.5th at p. 607.)

First, Appellant's "actual knowledge" argument misapplies *Rowland*'s "foreseeability" exemption factor.

Both here and in its JNOV and motion for a new trial, Appellant argues that the case of *Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, decided before *Regents*, requires "that, in addition to the special relationship, there must be evidence showing facts from which the trier of fact could reasonably infer that the defendant had prior *actual knowledge*, and thus *must have known*, of the offender's assaultive propensities." (AOB p. 39 (emphasis in original).)

The "actual knowledge" standard for foreseeability under a *Rowland* "public interest" exemption analysis did not survive either *Brown* or *Regents***.** (*D.G., supra,* 108 Cal.App.5th at 471–472.) For example, in *Regents*, as here, there was a "special relationship" between the plaintiffs and the defendants. (4 Cal.5th at 626–627.) Duty thus established, the *Regents* Court then considered whether application of the *Rowland* factors compelled an exception to that duty. The court held that "we determine not whether they [the *Rowland* factors] support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Id*. at 629.) As was recently explained by the Fourth District in *D.G., supra,* 108 Cal.App.5th at 471–472, where the identical "actual knowledge" argument was pressed and rejected:

> The trial court found, and the County maintains, that actual knowledge of abuse is necessary to find the conduct was reasonably foreseeable, thereby imposing a duty to protect. The court cited *Doe v. Los Angeles County Dept. of Children & Family Services*, supra, 37 Cal.App.5th 675. But the California Supreme Court rejected this approach in *Regents.*

The reason *Regents* "rejected" and *Brown* cannot be squared with the Appellant's favored "actual knowledge" test is because it is logically impossible, on the one hand, for a court to identify a category and then adjudicate whether a *Rowland* exemption should exist in a purely categorical

way as required and, on the other hand, to adjudicate whether a *Rowland* exemption should exist based on what the defendant did or did not "actually know." What a defendant did or did not "actually know" will turn "on the facts of the particular case before" the court, i.e., will impermissibly turn one way or another based upon facts and testimony obtained through discovery.

Said another way, under *Rowland*, a court must be able to exempt a category of cases without having to delve into the factual record of a "particular" case. But there is no way to determine whether an FFA had "actual knowledge" or not without delving into the "facts of the particular case."

The strategy Appellant adopts to try to gloss over this error is a visible one. On page 48 of its AOB, Appellant validly asserts that "[a]lthough the Court focuses on categories, it does so in light of the circumstances that led to injury in the case at issue." This is certainly true. A court cannot evaluate whether to exempt a whole category of cases while ignoring the facts of the case before it, which might fall within or offer an inspiration for an exempt category.

However, Appellant then so narrowly describes the "category" it is proposing so as to be indistinguishable from "the *particular* defendant's [i.e., its own] conduct." (*Regents, supra*, 4 Cal.5th at 629.) To wit, Appellant's offered category is "the question [of] whether it is reasonably foreseeable that a foster parent who has previously served as a foster parent, who has had criminal checks, who has no criminal record, who has raised biological and foster children without incident," etc. (AOB p. 48.) This supposed "category," which is really just a laundry list of the facts uniquely applicable to Appellant in this "particular case," is not what the Supreme Court had in mind when insisting that exemptions under *Rowland* must be adjudicated and recognized at "the appropriate level of generality." (*Regents, supra*, 4 Cal.5th at 629.)

Appellant's **second** and **third** *Rowland* errors are most economically revealed by this heading, at AOB p. 52: "Because FFA Liability for Foster Family Molestations, Absent Actual Knowledge of Propensities, Would Eliminate Insurance and Put FFAs out of Business, Public Policy Is Against Expanding Duty."

Second, the *Rowland* factors cannot be used to disestablish a "duty." While it isn't always clear how Appellant wants the "actual knowledge" test to apply through *Rowland*, one way to read Appellant's "actual knowledge" argument is as follows: if the Court finds that a *Rowland* exemption is warranted here, then the Court should apply the "actual knowledge" test to see if there is a duty. (*See*, e.g., AOB p. 53: "The policy factors here weigh heavily in favor of limiting the duty of an FFA to protect foster children from molestation by foster families to situations of actual knowledge of propensities.") That would be an error. Under every case found, if a court applying *Rowland* concludes that an exemption from a duty is warranted under, say, the moral blame factor, the court applying *Rowland* should grant an exemption from the duty — period. It should not, as Appellant argues, conjure a halfway exemption to duty by resurrecting the "rejected" "actual knowledge" standard so that sometimes there would be a duty and sometimes not.

Third, Appellant erroneously describes failing to apply the "rejected" "actual knowledge" test as a part of a *Rowland* "public policy" exemption analysis as "expansion" of its "duty." (See, e.g., AOB pp. 47, 52.) Not granting an exemption under *Rowland* (or any other authority) is not the same thing as expanding Appellant's legal duties. As Appellant concedes, Appellant's duty here arises from its "special relationship" with the abused children under its care. Failing to grant Appellant the exemption it seeks under *Rowland* does not expand Appellant's duty; it simply leaves its "special relationship" duty undisturbed. (See, e.g., *Brown, supra*, 11 Cal.5th at 218

["And in numerous cases since *Rowland*, we have repeated that the *Rowland* factors serve to determine whether an exception to section 1714 's general duty of reasonable care is warranted, not to determine whether a 'new duty' should be created"].)

II. Resurrection of the "Actual Knowledge" Foreseeability Standard Applied Just to Sexually Abused FFA Foster Children Would Be Catastrophic for and Cruel to FFA Foster Children, Denying Them and Only Them Needed Compensation and Increasing the Risk They Will Be Sexually Abused.

Within a "special relationship" between a foster child and an FFA, Appellant's argument for resurrecting the "actual knowledge" foreseeability test applicable only to when foster children are sexually abused while under the care of an FFA, is indeed, "absurd" (really, circular) as Respondent correctly observes. (RB p. 33.) This is because if Appellant only has a duty to screen an adult if the agency first has "actual knowledge" that the adult has a "propensity" to commit child sexual abuse, then there would be no reason to screen at all. (AOB p. 47.) After all, if an FFA "actually knows" of such a "propensity," screening for it is both redundant and unnecessary to exclude the prospect from being approved as a foster parent.

But illogical "absurdity" is nowhere close to the flagship problem with Appellant's proposed resurrection of the "actual knowledge" foreseeability standard applied to screening to prevent the sexual assault of foster children under the care of FFAs. To understand why, it is critical that one point be highlighted:

- As the record affirms, and as is uncontested by Appellant, adults who are keen to rape and sexually abuse children are drawn to the opportunity to do so presented by foster care. (See, e.g., RB pp. 12–13, 34–35 and record citations therein.)

Thus, to prevent the sexual abuse of foster children from occurring in the first place against a documented threat of sexual abuse, every person and organization in a "special relationship" with foster children that have a hand in selecting which adults will in the privacy of their homes have access to these children, must as a matter of public policy, ***be as motivated as possible to thoroughly and ambitiously screen such adults. Any policy that reduces that motivation is one that increases the chances they will be sexually abused.***

A. Appellant's and insurer *amici*'s proposed *Rowland* "public policy" is upside down. It prioritizes preserving the finances of FFAs and their insurers over preserving the compensating finances of sexually abused foster children who, having been previously abused or neglected, will really, really, *really* need money over the course of their whole lives for medicines, therapy, shelter, gynecological care, and necessities.

Foster care is not an FFA welfare program. It is a child welfare program. The intended beneficiaries of the billions in federal, state, and local tax dollars spent on foster care are not FFAs or any other private county contractor. The intended beneficiaries are foster children. For this reason, the survival of FFAs as a private-sector option for counties for screening and overseeing foster parents is not a good in and of itself that can justify harming foster children, including by denying them the money such children will need if sexually abused, to pay over their lifetimes for medicines, therapy, shelter, gynecological care, and necessities if, because of their trauma upon trauma, they are unable to work as productively as they might have. "Long-term effects of childhood sexual abuse are varied, complex, and often devastating. … Depression, anxiety, and anger are the most commonly reported emotional responses to childhood sexual abuse. Gynecologic problems, including

chronic pelvic pain, dyspareunia, vaginismus, nonspecific vaginitis, and gastrointestinal disorders are common diagnoses among survivors."[3] For foster children, this is all worse.

This point — that the interests of county contractor FFAs and their insurers involved in foster care cannot be elevated over the interests of foster children if those interests are in tension — should be obvious to anyone considering matters of "public policy" related to FFAs and sexually abused foster children. Any other policy is upside down. Burdens in this setting should not fall on foster children. As the Fourth District observed, "[w]hile we recognize the burden of finding a tort duty is significant, it is overcome by the importance of protecting children from sexual abuse." (*D.G., supra*, 108 Cal.App.5th at 472.)

But, closely analyzed, Appellant's and insurer *amici's* "public policy" *Rowland* argument urges this Court to adopt just such an upside-down policy. Put aside for a moment the titanically inconvenient fact that even if this Court resurrected the "rejected" "actual knowledge" foreseeability standard, there is zero guarantee that even a single insurer will re-enter the FFA market at all, let alone on the same terms as enjoyed before, let alone on any predictable timetable broadly and soon enough to "save" some unknowable critical mass of FFAs. Putting that all aside, here is how Appellant and insurer *amici's* "public policy" *Rowland* argument prioritizes the interests of FFAs and their insurers over the interests of sexually abused and raped foster children:

- First, they assert (with no substantiation) there is one policy approach and one policy approach only that will preserve FFAs and that is that

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[3] *Committee Opinion No. 498: Adult Manifestations of Childhood Sexual Abuse*, 118 (2 Part 1) Obstetrics & Gynecology 392–395 (August 2011) https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/08/adult-manifestations-of-childhood-sexual-abuse

courts adopt an "actual knowledge" foreseeability standard, as offered.[4]

- Second, CAI presumes — we pray safely — that no FFA would ever approve foster parents that the FFA "actually knows" have a "propensity" to sexually abuse children. That means no "actual knowledge" cases would ever be brought because none would exist. (See discussion regarding the circularity of Appellant's argument, *supra*, at pp. 16–17.)
- Therefore, and third, Appellant's and its insurer *amici* are advocating for a *Rowland* "public policy" exemption that would bar all compensation for a sexually abused foster child arising from an FFA's screening even if a jury (i) finds that FFA was negligent exercising the screening duty that arose from its "special relationship," (ii) finds that such negligence was a substantial factor in its foster children being raped or otherwise abused sexually, (iii) finds that the FFA broke laws that required certain kinds and levels of screening to weed out foster parents who are predisposed to sexually abuse children, and even when, as here (iv) the FFA's own experts concede that pedophiles pursue foster parent opportunities. (See, e.g., RB pp. 12–13, and record citations therein.) Appellant and its insurer *amici* argue that, even under these circumstances, "public policy" demands that Appellant's insurer be protected from having to compensate such children for their physical harms and trauma *at all*.
- And, to boot, Appellant and its insurer *amici* press this argument to this Court even though the children implicated are not just any children — they are *foster* children.[5] Children who had no choice

[4] This is provably untrue, of course. See discussion, *infra* at pp. 33–34.
[5] Not all. Just the ones with the bad luck to be assigned to an FFA.

about whether to be served by an FFA. Children who — without the additional of trauma of sexual abuse — are already deeply traumatized.[6] ***These are children who have the fewest supports to navigate a lifetime of trauma of any other kind of children*****,** and therefore, if sexually abused when very young, are far, far more likely to be sexually trafficked when older. ("Researchers have found that child sexual abuse increases the risk of exploitation and is the most common characteristic of commercially sexually exploited girls."[7])

When Appellant's and its insurer *amici*'s arguments are unpacked, as above, it is readily apparent that denying all compensation to sexually abused FFA-involved foster children no matter how many laws the FFA broke, no matter how extensive its negligence, is not a policy that properly prioritizes the welfare of foster children in a child welfare program.[8]

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[6] See, e.g., "More than 70% of children in foster care have a documented history of child abuse and/or neglect, and more than 80% have been exposed to significant levels of violence, including domestic violence." (Moira A. Szilagyi, MD, et al., *Health Care Issues for Children and Adolescents in Foster Care and Kinship Care*, 136 (4) Pediatrics, e1131–e1140 (2015))
https://publications.aap.org/pediatrics/article/136/4/e1131/73819/Health-Care-Issues-for-Children-and-Adolescents-in?autologincheck=redirected

[7] California Child Welfare Council, *Commercial Sexual Exploitation: The Intersection with Child Welfare* (2017)
https://www.chhs.ca.gov/wp-content/uploads/2017/06/Committees/California-Child-Welfare-Council/Council-Information-Reports/CSEC-Fact-Sheet-4.pdf

[8] And, of course, the costs that will be incurred in attempting to help them will be shifted to taxpayers, philanthropies, and private individuals of goodwill who try to help these children.

B. If it is truly the case that the only way to preserve FFAs is to increase the risk that foster children will be raped and sexually abused, then FFAs should not be preserved.

Resurrection of the "actual knowledge" foreseeability standard under *Rowland* as applied only to the subset of foster children randomly assigned to FFAs will not only mean FFA-involved sexually abused foster children will receive zero compensation compared to other identically harmed foster children, based only on their bad luck in being assigned to an FFA. Such a resurrection will also increase the likelihood that more FFA-involved children will be sexually abused and raped in the first place.

Presume the standard was as Appellant and insurer *amici* argue and that, even in the context of the sexual assault of small children, "a foster family agency owes a foster child a duty to protect the child from sexual abuse by a member of the foster family only where the FFA has actual knowledge of the member's assaultive propensities." (AOB p. 47) An FFA cannot "actually know" what it does not search for. Thus, under a resurrected "actual knowledge" standard urged by Appellant and its insurer *amici*, to avoid liability, an FFA would be financially motivated "actually" to "know" as little as possible about the "assaultive propensities" of its recruited and monitored foster parents. The less the FFA "actually knows," the less likely it will be liable for the sexual assault of children under its care.

This is a catastrophe for FFA-involved foster children in two ways:

First, FFA liability exposure for the sexual assault of children with which the FFA has a "special relationship" *would rise in proportion to the meticulousness and care it exercised in scrutinizing adults* for their propensities sexually to abuse them. Likewise, an FFA's exposure to liability for sexual assault of foster children *would fall in proportion to how little it scrutinized such adults* for such propensities.

This policy is not just absurd. This policy is exactly backwards of what a judicially crafted "public policy" involving foster children should embrace. Again, *it is uncontested that pedophiles are drawn to the opportunity presented to them by foster parenting*. (See, e.g., RB pp. 12–13 and record citations therein.)

Against this backdrop, it is self-evident that resurrection of the "actual knowledge" standard as proposed by Appellant and the insurer *amici* through *Rowland* would financially motivate FFA indolence — even willful ignorance — in scrutinizing the sexual abuse "propensities" of the foster parents they recruit and monitor even *when they know that pedophiles are drawn to be foster parents*.

For this reason, Appellant's proposed rule cannot jurisprudentially, logically, or morally stand beside "the societal goal of safeguarding youth from sexual abuse" which **"**weighs strongly in favor of imposing a duty to implement policies and procedures to protect minor children placed in foster care." (*John H.G. Doe v. Roman Catholic Archbishop of L.A.* (2021) 70 Cal.App.5th 657, 680-81; *see also*, *D.G. v. Orange County Social Services Agency* (2025) 108 Cal.App.5th 465 (recognizing that the duty of care in tort is justified by "the importance of protecting children from sexual abuse.")

But, and **second**, even this understates the danger of Appellant's proposed rule to FFA-involved foster children. Under Appellant's view, *even if, as here, an FFA broke laws passed or promulgated that obligated FFAs to exercise particular kinds of scrutiny of foster parents to screen out those likely sexually to assault children*, there would *still* be no tort liability absent the FFA somehow otherwise "actually" learning of the "actual [child sex abuse] propensities" of prospective foster parents.[9] In other words, even an

[9] Would actual knowledge of a propensity to sexually abuse adults count under Appellant's and insurer *amici*'s standard? Unknown.

FFA flouting all laws enacted or promulgated that required the FFA to do certain things to detect pedophilic "propensities" would *still* under Appellant's proposal to this Court not be exposed to liability in tort absent "actual knowledge" that might have been gained had they obeyed the laws and regulations requiring scrutiny. Appellant's proposed rule therefore motivates not just FFA indolence but FFA lawbreaking, too.

Tying these facts together, under the "public policy" Appellant and insurer *amici* are offering, the safety of our FFA-involved foster children from sexual predation would to a significant degree hinge either upon an FFA's bad luck in stumbling upon "actual knowledge" of a potential foster parent's child sexual assault "propensities" or upon whether a pedophile was honest with an FFA about their predatory reasons for becoming a foster parent.

This is untenable. Child safety from sexual assault cannot be left to such contingencies. When, as in *T.L. v. City Ambulance of Eureka, Inc.* (2022) 83 Cal.App.5th 864, 887, courts ask "whether … carving out an entire category of cases from [the] general duty [of care] rule is justified by clear considerations of policy," not only is there no reason in law, logic, policy, or morality here to "carv[e] out" "the category" of FFA foster care child sexual assault cases from the "general duty" of care decreed by our Supreme Court decisions. There is every reason in law, logic, policy and morality not to do so.

III. Given that NIAC in This Case Twice Rejected Settlement Offers for All Three Child Plaintiffs that Were Within Policy Limits, That the Insurer is Withdrawing from Insuring FFAs Nationally, and its Publicly Available California Data Do Not Reveal A Recent Spate of Massive Sex Abuse-related Claims or Losses, It Is, At Best, Debatable Whether there Exists a "Crisis" That Could Be Comprehensively or Definitively Resolved By Imposition of an "Actual Knowledge" Foreseeability Standard. Other Facts, Too, Cast Doubt on Who or What Is Responsible for What Happened to California's FFAs.

As Appellant and NIAC have here opened the door to a "what really happened?" discussion about the California FFA insurance market by grounding their "public policy" arguments in their answer to that question, CAI's research in response to the "gut and amend" legislation proposed by NIAC and subsequent research are relevant. That research reveals that if an FFA insurance "crisis" exists it has many causes, with the single biggest one being NIAC's own risk-preferential litigation strategy at trial in this case. CAI's research revealed the following:

1) NIAC and Appellant not once but twice rejected settlement offers for all three child plaintiffs that were within policy limits. (See accompanying Table of Exhibits, Exhibits 1 and 5.) It is therefore Appellant's and NIAC's risk-preferential litigation strategy of taking a case to a jury (i) involving not one, not two, but three small children, (ii) who were not just children but foster children, (iii) involving not just any abuse but sexual abuse, where (iv) there were ample examples of screening laws being broken by Appellant, that is to blame for the verdict being larger than the NIAC policy limits otherwise would have been ample to pay for the damages. To repeat: NIAC's underwriting was spot-on. The case — twice — could have been settled within the limit of the risk NIAC's underwriters correctly insured against.

Making matters worse for NIAC, as the verdict exceeded policy limits, not only is NIAC exposed to the verdict up to the limit of the policy, it is also now exposed to an insurance bad faith claim filed by Appellant for the verdict amount above the policy limit, for which punitive damages are available.[10] (See Table of Exhibits, Exhibit 7.)

Confronted with having possibly to pay both some or all of the policy limits in a case Hollywood-made to elicit the sympathy of a jury and NIAC's exposure to a bad faith claim by the Appellant, it is unsurprising NIAC's reinsurer decided to quit reinsuring NIAC in FFA cases which, ***according to NIAC itself, this is what caused it, in turn, to quit insuring FFAs***. "Ultimately, NIAC was forced to cease insuring FFAs in California at the insistence of its reinsurers." (NIAC Amicus Brief p. 22.)

Indeed, properly viewed in light of these rejected settlements, what NIAC is asking for is a liability standard that can be understood as both asking the court (i) to save NIAC from its own litigation strategies and (ii) for a precedent that would permit an insurer — any liability insurer — by its unilateral act of withdrawing from a market to conjure a basis for its own custom-made, financially rewarding *Rowland* "public policy" exemption, after having failed to obtain one legislatively, even if foster children are harmed and would face greater exposure to being raped or otherwise sexually abused as a result.

2) Another explanation exists for NIAC's reinsurer refusing to reinsure FFAs: changes that are generally occurring in the reinsurance market**.** "For a number of years, the reinsurance industry was essentially

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[10] CACI No. 2334. Bad Faith (Third Party) - Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits - Essential Factual Elements https://www.justia.com/trials-litigation/docs/caci/2300/2334/ Such claims permit punitive damages. CACI No. 2350. Damages for Bad Faith https://www.justia.com/trials-litigation/docs/caci/2300/2350/

subsidizing the insurance industry, and ultimately the front-end consumer, because we were bearing more of the risk than we were getting paid for,' said John Welch, chief underwriting officer at Aspen Reinsurance. 'What we saw in 2023 is that, after several years of underperformance, the reinsurance companies said enough was enough. It reached a tipping point where the reinsurers said, 'I can't get the return I need if I'm participating on every secondary peril cat that comes along, so I need to refocus the business on the peak cats of earthquake, hurricane, etc. where there's less frequency and more severity."[11]

3) NIAC's own audit report for 2023 and 2024 shows no obvious trend in FFA liability cases satisfactorily explaining the insurer's sudden exit. (See, Nonprofits Insurance Alliance of California, Inc. Audited Financial Statements (2025), https://insurancefornonprofits.org/NIAC-audited-financials.pdf.) Page 25 of that report is titled "Note 5 - Loss and Loss Adjustment Expense Reserves Improper Sexual Conduct and Physical Abuse." It shows a 60% *decrease* in the "Cumulative Number" of such claims between 2022 and 2024 (186/287). The same page shows what appears to be an apparently unprecedented *drop* in the amount "Cumulatively Paid" for such claims (2023: $2,274,917, 2024: $263,689).

In contrast, there was a big jump in "Incurred" losses between 2017 and 2018 (2017: $7,765,312, 2018: $16,809,077) and again between 2020 and 2021 (2020: $7,765,312, 2021: $16,809,077) without NIAC declaring a "crisis" and abruptly casting California's foster care system into disarray. And, overall, the number of "Incurred Claims" between 2023 and 2024 increased by about the same dollar amount as the increase between 2022 and

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[11] Mia Wallace, *What is reshaping the reinsurance market today?*, Insurance Business Magazine (July 9, 2024) https://www.insurancebusinessmag.com/uk/news/reinsurance/what-is-reshaping-the-reinsurance-market-today-496366.aspx

2023 (2022: $13,728,486, 2023: $18,613,443, 2024: $23,813,928), again without declaration of a "crisis." The number of "Improper Sexual Conduct and Physical Abuse" claims fell significantly between 2021 and 2022 (2021: 16,809,077, 2022: $13,728,486).

"Improper Sexual Conduct and Physical Abuse" reserves for the year ending 2024 were $77,732,795 with "Reinsurance Recoverable" for "Improper Sexual Conduct and Physical Abuse" nearly half that amount: $31,318,408 (*Id.* p. 20.) More broadly, NIAC is a robust concern, according to its audit. As of 2024, NIAC reported total assets of $535.7 million compared to $461 million in the year prior. (*Id.* p. 4.)[12]

4) Part of the "crisis" as it afflicted California's foster children was created not by the jury's verdict here or even the lack of insurance but by NIAC inexplicably waiting more than half a year before apparently alerting the counties, the State, or other stakeholders of its decision to abruptly to withdraw from the FFA market. The verdict in this case was rendered on December 1, 2023. (6 AA 1046–1048.) On May 13, NIAC hired a prestigious Sacramento-based lobbying firm[13] that at the time was representing such clients as Exxon, Lyft, and Verizon.[14] Counties and the State, and other stakeholders such as lawyers for foster children, first learned

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[12]The reference in the audit to "Restricted Cash" of $32,880,980 on page 6 appears to be a reference to an appeal bond in this case. (*Id*. p.Page. 10: "Restricted cash consists of cash that is restricted as to its use for an appeal bond that enabled a member insured to appeal an adverse judicial ruling. The cash will remain restricted until the matter is settled.")

[13] Lobbying Activity Nonprofits Insurance Alliance of California https://cal-access.sos.ca.gov/Lobbying/Employers/Detail.aspx?id=1223071&session=2023&view=general

[14] Lobbying Activity Deveau Burr Group, LLC, https://cal-access.sos.ca.gov/Lobbying/Firms/Detail.aspx?id=1463989&session=2023

of NIAC's withdrawal decision when learning of its "gut and amend"[15] legislation, AB 2496 (previously a noncontroversial bill involving dentistry), in mid-June 2024.[16] This seven-month delay between the verdict and NIAC announcing to state and county officials and child welfare stakeholders that it was leaving the market forced state and local agencies to scramble unnecessarily to find alternative placements for foster children, making the crisis needlessly worse. "The bill was a shock to some child welfare advocates, who were caught flat-footed by the proposal and by the private agencies' sudden demand for action on an issue they had never heard about."[17] Had NIAC introduced legislation — even a bill expressing a legislative intent to address FFA insurance — on the normal legislative

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[15] See, Sen. Judiciary Com., Analysis of Assem. Bill No. 2496 (2023-2024 Reg. Sess.) as amended June 10, 2024, at p. 5 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB2496 ("The bill currently in print, sponsored by NIAC, is a gut and amend that was amended on June 10, 2024.")

[16] To illustrate how "gut and amends" can take the whole legislative world by surprise, consider the history of AB 2496. Introduced in February 2024, AB 2496 was a bill regarding the requirements a dentist must satisfy to perform oral conscious sedation. Apparently uncontroversial, the bill passed through both the Assembly Business & Professions Committee, the Assembly Appropriations Committee, and the Assembly floor with no "no" votes. The Senate received the bill, and, on May 15th, the measure was referred to the Senate Business & Professions Committee. At no point did any child welfare stakeholder have a reason to watch this bill. When it was gutted and amended, the Senate Rules Committee quickly re-referred it to the Senate Judiciary Committee. (See, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240AB2496 under the tab "History.")

[17] Brian Joseph, *The California foster care crisis you know nothing about*, Capitol Weekly (September 18, 2024) https://capitolweekly.net/the-california-foster-care-crisis-you-know-nothing-about/ Of the numerous news articles cited to the court by Appellant and insurer *amici*, this one was omitted. It is by Brian Joseph, a winner of the prestigious Polk Award for Investigative Journalism. https://www.liu.edu/polk-awards/past-winners#2003

timetable in January, stakeholders including NIAC would have had all year to collaborate on a whole range of solutions. NIAC's "gut and amend" effort foreclosed such deliberations on policy alternatives — which is why the "gut and amend" tactic is often used for controversial measures.[18]

5) NIAC wasn't done making the crisis worse even after the legislation that mostly replaced its bill was enacted. After AB 2496 with its replacement contents was enacted, NIAC sent a letter threatening all of its still-insured FFAs that it would not only not renew but *immediately cancel* any FFA that sought to use the law to facilitate a compassionate transition for children to a new home if an FFA went out of business. *Amicus curie* the Alliance asked CAI for a legal opinion addressing the legality of such a threat and the answer is straightforward: the letter exposed NIAC for bad faith actions by any FFA canceled. (See Exhibit 7 to Table of Exhibits.)[19]

6) It is not at all clear that resurrecting the "actual knowledge" foreseeability standard will predictably lead to insurers re-entering the FFA market at affordable rates at a fast timetable, as presumed by the Appellant and NIAC, because it isn't settled that limiting liability always or predictably leads to more, and more affordable, insurance. The most studied example of

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[18] "'Gut and amend' is a legislative maneuver whereby lawmakers 'gut' a bill by removing its content and 'amend' it by inserting entirely new content, sometimes unrelated to the original bill. Legislators may gut and amend bills to introduce topics after the deadline to introduce bills has passed or advance controversial issues which would struggle to proceed through the channel of the traditional legislative process." *June Deadlines: Five Things You Need to Know About the Legislative Process this Month* (June 5, 2025) https://www.counties.org/news-and-media-article/june-deadlines-five-things-you-need-to-know-about-the-legislative-process-this-month/

[19] NIAC also sent an email not just to its FFA insureds but all of its nonprofit insureds that came quite close to alleging that the failure of its "gut and amend" proposal was due to political malfeasance. (See Exhibit 6 to Table of Exhibits.)

whether there is a causal relationship between tort reforms that restrict damage awards and insurance companies lowering premiums in response is in the medical malpractice insurance context. There, the record is at best mixed. As one comprehensive analysis by the Center for Justice & Democracy at New York Law School concluded:

> "Examining the impact of 'tort reforms' and 'caps on damages enacted in response to the 2002-2006 medical malpractice insurance crisis, [Americans for Insurance Reform] finds:
>
> States that enacted new limits on patients' legal rights in medical malpractice cases saw an average 22.7 percent decrease in pure premiums from 2002 to the present — but states that did nothing saw a larger average drop of 29.5 percent.
>
> States that enacted only caps on damages saw an average 21.8 percent decrease in pure premiums from 2002 to the present — but the states that did nothing saw an even greater average drop of 28.9 percent.
>
> Both studies: Severe rates hikes experienced by doctors during the three past insurance crises were not the result of exploding claims or tort system costs but rather the industry's own boom and bust economic cycle, dictated by the state of the economy and insurance industry profitability, including bond and stock market gains or losses." [20]

This is just one study by an advocacy group that opposes so-called tort reform but, at minimum, it makes sense that an insurance company's behavior is best explained by a variety of factors such as the profitability of its investments, its short-and-long term market position strategies and related underwriting priorities, the behavior of its competitors, and, yes, also

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[20] *FACT SHEET: Medical Malpractice Insurance Studies Undermine Leading Arguments for "Tort Reform*"
https://www.insurance-reform.org/fact-sheet-medical-malpractice-insurance-studies-undermine-leading-arguments-for-tort-reform.html

litigation trends. The inconclusive findings of an exhaustively researched Georgetown University Law School law review article that examined medical malpractice premium decrease studies after imposition of damage award caps underscores why accepting Appellant's and NIAC's invitation to ground a "public policy" ruling based entirely upon extra-record evidence predicting future insurance company behavior is, respectfully, unwise. At the end of their exhaustive survey, the scholars concluded: "Our analysis reveals not only that the results are mixed, despite claims to the contrary, but also that more methodologically sound research that employs more comprehensive data is essential."

7) The American Enterprise Institute article[21] cited by NIAC (pp. 15-16) reinforces that NIAC's refusal to insure California's FFAs was not due solely to the verdict in this case, not due solely to California litigation factors related to "actual knowledge" foreseeability, nor, even, due to factors exclusively occurring within California's borders. According to that study, among the contributing factors to FFAs across the nation having a hard time obtaining insurance — factors that would not be resolved by the Court adopting Appellant's proposed "actual knowledge" standard — are:

- ***Statutes of limitation***: "Recently, California amended the statute of limitations on lawsuits related to child sex abuse, allowing claims dating back to the 1950s to be brought in court. [] The recent changes in California resulted in an increase in the number of lawsuits. [] Some suits brought under this change were brought against foster care agencies …." [22]

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[21] Kathryn Zeiler, et al., *Do Damages Caps Reduce Medical Malpractice Insurance Premiums?: A Systematic Review of Estimates and the Methods Used to Produce Them*, Georgetown University Law Center (2012) https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?params=/context/facpub/article/2140/&path_info=121120_zeiler_hardcastle_caps_chapter_SSRN.pdf

[22] Scott Dziengelski, et al., *An Uninsurable and Unavailable Foster Care System: How Lawsuits, Regulations, Social Inflation, and Policy Failures Are Making the Most Vulnerable Children Uninsurable*, (March 19, 2025)

- ***National trends affecting all aspects of foster parenting, not just FFAs***: "In Pennsylvania, more than half of foster care providers report a lack of available and affordable liability insurance. In New York, they have found it 'extremely hard' to find insurance. In Nebraska, 'Foster parents have been unable to obtain liability insurance coverage.' In Florida, liability insurance issues became an 'existential threat.'[5] And in Nevada, the foster care system was left scrambling after the main insurer decided not to renew policies. The challenge across these state systems is not limited to the rare low-quality service provider. It is affecting every provider, even those with high standards and spotless records."

- ***NIAC refusing to insure FFAs across the whole nation:*** "Since the NIAC [California] announcement, the organization's national body, the Nonprofits Insurance Alliance, has extended this state policy nationwide and, as of January 2025, will no longer offer new policies to foster family agencies and will not renew existing umbrella policies."

For these many reasons, even presuming that the Court accepts Appellant's invitation to take sides in the age-old tort reform policy debate of whether limiting — here, eliminating — certain kinds of damage awards are justified based entirely on extra-record authorities,[23] the record here does not support, or at minimum calls into question, Appellant's and its insurer *amici*'s presumption that the "actual knowledge" standard would predictably, comprehensively, and definitively solve the FFA insurance "crisis."

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https://www.aei.org/research-products/report/an-uninsurable-and-unavailable-foster-care-system-how-lawsuits-regulations-social-inflation-and-policy-failures-are-making-the-most-vulnerable-children-uninsurable/

[23] Respectfully, it shouldn't.

IV. Many, Many Policy Alternatives Exist to Stabilize The FFA Insurance Market That Would Not Deny Sexually Abused Foster Children Compensation or Increase Their Exposure To Sexual Abuse Or Rape.

Of course, there is one obvious "public policy" alternative path that would ensure FFA insurers pay fewer claims arising from when FFA foster parents sexually abuse foster children. That alternative path: *reduce the number of children who are sexually abused under the care of FFAs in the first place.*

A place to start would be legislation aimed at ensuring FFAs obey the several regulations the jury found Appellant violated in this case, all of which were promulgated to prevent the exact tragedy and hence lawsuit and hence verdict and hence insurer liability that occurred here. Common legislative options for motivating private actors like FFAs to more ambitiously comply with laws or regulations include: (i) impose or increase civil penalties for violations, (ii) escalate them for multiple violations, and (iii) closer government oversight which, here, could include increasing the training required of FFA screeners, requiring counties to engage in more searching scrutiny of FFAs when contracting with them in the first instance, and increasing the depth and frequency by which counties audit on an ongoing basis FFA compliance with screening regulations.

Another option could include requiring NIAC to be overseen by the Insurance Commissioner like all other admitted liability insurers which would, for example, prevent the insurer from charging "excessive" rates that are too high or "inadequate" rates that are too low, which can permit an

insurer to capture market share and discourage competition by actuarily underpricing its products.[24] (See, Ins. Code § 1861.05(a).) .

The American Enterprise Institute, in the study cited by NIAC (p. 15), offers many constructive legislative options, none of which would increase the exposure of foster children to sex crimes or, except in one instance, where reduced liability is tied to compliance with laws aimed at screening sex abusers, deny them needed compensation:

1. Create a Victims' Fund. Congress has previously established victim assistance funds that provide one-time payments to victims. A program could be established, or an existing program could be amended, to provide foster children who are sexually abused with compensation for the injuries and harms they have suffered.

2. Establish a Risk Pool. One way to reduce risk is to spread it more widely across insured entities. A federal risk pool or federally supported risk pools for foster care could diffuse risk over a greater number of foster care agencies.

3. Condition Federal Funding. Providing foster and residential care to children in state custody requires adherence to state laws and regulations and professional standards of care designed to keep children safe. While attorneys often cite an agency's failure to abide by those safety standards as evidence of liability, compliance alone usually does not provide immunity. Laws could be passed in states to limit liability for those providers who demonstrate they complied with the standards when a child suffered harm. Further, in several areas of law, Congress has conditioned federal funding to states on those states passing certain types of laws. Congress could condition federal funds on states enacting laws that limit jury

[24] "NIAC, the bill's sponsor, is a state-authorized risk pool for a wide range of nonprofit organizations that insures 90 percent of the FFAs in California[.]" Sen. Judiciary Com., Analysis of Assem. Bill No. 2496 (2023-2024 Reg. Sess.) as amended June 10, 2024, p. 1 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB2496

awards when foster agencies comply with appropriate regulations, but an injury or harm still occurs.[25]

4. Safe Provider Discounts. Auto insurance providers, often encouraged by state laws, offer safe driver discounts — especially if you're willing to install a device in your vehicle to monitor your driving. Insurers, regulators, and lawmakers could likewise create a "safe provider" certification for private agencies. A successful audit, followed by annual reviews, could entitle a provider to a discount on liability insurance, a legal cap on damages, or other benefits.

5. Subsidies. The child welfare system has acknowledged that some states cannot carry out their obligations to children in its custody without assistance from the private sector. Often those private providers are nonprofits—unable to survive on contract payments alone—and must raise philanthropic funds to fulfill their mission. If a state is going to ask private agencies to fulfill the state's obligations to care for—and assume liability for harm to—these children, it's reasonable to ask the state to assist in paying for the insurance coverage the agency must have to operate.

A "subsidy" is, in fact, what California ended up enacting, to the tune of $31.5 million for FFAs to pay for higher insurance in the 2025 budget.[26]

Pursuant to AB 2496, the state is also currently conducting its own evaluation of public policy options. After most of NIAC's proposed "gut and amend" legislation was immediately rejected (see discussion, *infra* at p. 38), the language substituted into it includes this binding but uncodified provision:

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[25] Such a law would be inapplicable here because, NIAC's refusal to accept the jury's verdict and its own expert's admissions at trial notwithstanding, the jury found the Appellant violated not one, not two, not three but **four** state foster parent screening regulations imposed to prevent the kind of harms suffered by plaintiffs.

[26] https://www.cacfs.org/news/ca-alliance-statement-2025-2026-budget-agreement#:~:text=%E2%80%9CThe%20California%20Alliance%20of%20Child,training%2C%20and%20supporting%20foster%20families.

> The State Department of Social Services, in coordination with any other relevant state departments or agencies, counties, and stakeholders, shall examine available options to make insurance available to foster family agencies. The department shall update the Legislature on these efforts in conjunction with the 2025-26 fiscal year budget process.[27]

Although Appellant and NIAC do not highlight it, AB 2496 retained one aspect of NIAC's original "gut and amend" proposal. Newly enacted California Code of Civil Procedure § 1062.33(a) prevents an FFA from being held liable for injury caused by a "public entity" — something NIAC argued was an issue.[28]

Lastly, casting further uncertainty about the likely efficacy of Appellant's and insurer *amici's* "public policy" is that what NIAC argues ails our judicial system is, in fact, already forbidden, at least in negligence *per se* cases. According to NIAC:

> What has changed is a demonstrated willingness of some judges and juries to hold foster family agencies responsible for the negligent and criminal actions of others over which foster family agencies had no ability to see or prevent. That is simply not an insurable risk.[29]

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[27] Assembly Bill 2496 (as amended September 23, 2024) https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240AB2496&showamends=false

[28] Compare June 10, 2024 "gut and amend" version of the bill's proposed Cal.Civ.Proc. sec. 1062.33 https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240AB2496&showamends=false with the final version with enacted § 1062.33. https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240AB2496&showamends=false
See also, Exhibit 6 to Table of Exhibits: NIAC's list of reasons for introducing its bill included "FFAs are held responsible for the negligence of counties."

[29] See, Sen. Judiciary Com., Analysis of Assem. Bill No. 2496 (2023–2024 Reg. Sess.) as amended June 10, 2024, at p. 6

Likewise, the insurer argues:

> What has broken this system is holding innocent FFAs responsible for the abuse caused by other parties, when they had no way of anticipating it or preventing it. And that's exactly what the primary opposition to AB 2496 has been defending.

(See, Exhibit 6 to Table of Exhibits.)

Putting aside that it was within the ability of the Appellant not to violate the laws the jury found it violated, what NIAC appears to be arguing is that there was "no way" for Appellant to have foreseen that the laws it was breaking would lead to the sexual assault of the children that occurred, and so there should have been no liability. But this assertion fails to acknowledge that longstanding current law already prohibits juries or judges from imposing liability when there is "no way" to "anticipate" that breaking a law would lead to the kind of injury the law was enacted to prevent. Evidence Code § 669 in pertinent part provides:

> (a) The failure of a person to exercise due care is presumed if:
>
> (1) He violated a statute, ordinance, or regulation of a public entity;
>
> (2) The violation proximately caused death or injury to person or property; [and]
>
> (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; …

All three prongs must be satisfied and the last expressly provides that the harm "proximately caused" by a broken law must be of the kind the law

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https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB2496

was intended to prevent, i.e., if the harm caused by breaking a law could not have been a foreseeable consequence of breaking it, there can be no liability. Thus, current law already addresses what NIAC argues is the flagship problem, at least in negligence *per se* cases. What NIAC cannot apparently accept is that the jury believed the requirements of the statute were met.

From all this, what is self-evident is that there are many ways to reduce the number of claims insurers have to pay for FFA child sex abuse cases that would benefit or at least be far less likely to harm foster children than the "public policy" proposal offered by Appellant and their insurer *amici*. Indeed, Appellant's and insurer *amici's* proposed "public policy" is among the most speculative when it comes to quickly, comprehensively, definitively, and broadly addressing the high cost of FFA insurance.

V. NIAC'S "Gut and Amend" of AB 2496: A Different Perspective.

Appellant's version of AB 2496's history ends with the assertion that NIAC "pulled out" of insuring FFAs "as a result" of the bill being stripped of most of what NIAC proposed. (AOB p. 59). While NIAC's inability to persuade state lawmakers to vote for its last-minute "gut and amend" legislation that, in part, like it and Appellant's "public policy" proposal here, would have established unique liability standards for sexually abused, FFA-involved foster children[30] is not relevant to this appeal, a wider lens on the

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[30] The June 10th "gut and amend" version of the bill provided as follows:
" (a) An FFA shall only be held directly or vicariously liable to the recipient of the FFA's services, to anyone on the recipient's behalf, or to anyone whose neglect or abuse caused the recipient to require or qualify for those services, for acts of their employees, contractors, or volunteers, if the plaintiff shows both of the following:
(1) The FFA failed to substantially comply with the required legal or regulatory standards related to the provision of the services. The determination of which legal or regulatory standards are required to be followed and what level of duty is imposed by those legal and regulatory standards on the FFA is a question of law for the court.

facts surrounding the bill offers an opportunity to reinforce why grounding judicial public policy-based decisions on strategically selected, outside-the-record offerings is unwise.

First, NIAC's "gut and amend" version of AB 2496 enjoyed a large number of supporters. A review of the support shows them to be FFAs and insurers who, of course, had only heard from NIAC.[31] It is also unclear whether the FFAs understood that by endorsing AB 2496 they were endorsing legislation that would have established uniquely burdensome time-limited demand rules that would have impaired — at best complicated — FFA's ability to sue NIAC for bad faith.[32] ("Jeff Wiemann, the executive director of Angels Foster Family Network in San Diego County, which originally supported AB 2496, said he felt that the bill was a 'bait and switch,' that the alliance inaccurately portrayed what the proposal was truly about. 'I'm frustrated with (the Nonprofit Insurance Alliance),' he said.")[33]

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(2) The law or regulation that the FFA failed to substantially comply with was designed to prevent the specific type of harm that occurred, and the failure was a proximate cause of the actual harm."

[31] Sen. Judiciary Com., Analysis of Assem. Bill No. 2496 (2023–2024 Reg. Sess.) as amended June 10, 2024, at pp. 7-16 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB2496

[32] For one example, under AB 2496's "gut and amend" proposed section 1062.39, if the plaintiff — someone over whom the FFA has no control — failed to follow the requirements for time limited demands in proposed Cal. Code of Civ. Proc. § 1062.35 (e.g., failing to "label" it a "time limited" demand), then the FFA would be barred from suing NIAC, no matter how egregious the insurer engaged in bad faith. (See, proposed § 1062.39 ["(a) A time-limited demand that does not comply with the terms of this chapter shall not be considered to be a reasonable offer to settle the claims against the tortfeasor for an amount within the insurance policy limits"].) (The entire bill including many new requirements for time limited demands was in that new chapter.)

[33] https://capitolweekly.net/the-california-foster-care-crisis-you-know-nothing-about/ The news article is by Brian Joseph, is a winner of the prestigious Polk Award for Investigative Journalism.

Second, NIAC does not mention the opposition of either CAI or the Children's Law Center of Los Angeles (see Exhibits 2 and 3 to Table of Exhibits[34]) nor the "concerns" of the County Welfare Directors Association (Exhibit 4 to Table of Exhibits).

Third, NIAC does not mention that what it proposed never even got a hearing because requiring special liability rules applicable only to foster children randomly assigned to FFAs (plaintiff's burden to show "substantial" noncompliance with laws; jury determination forbidden) was described as a "drastic" remedy — albeit a remedy not as drastic in its harmful consequences for foster children and sexually abused foster children as the "actual knowledge" remedy the Appellant and insurer *amici* press here. As the Senate's Judiciary Committee wrote:

> The bill currently in print, sponsored by NIAC, is a gut and amend that was amended on June 10, 2024. Because of the scope of the bill and its serious implications for children in foster care, the author has agreed to remove the most drastic portions of the bill and instead move this bill as a vehicle for a possible negotiated solution. The author, sponsor, and stakeholders—including executive-branch departments that have not yet weighed in on the issue—will continue discussions throughout July.[35]

(https://www.liu.edu/polk-awards/past-winners#2003) Of the numerous news articles cited to the court by Appellant and insurer *amici*, this one was omitted.

[34] See also, Sen. Judiciary Com., Analysis of Assem. Bill No. 2496 (2023–2024 Reg. Sess.) as amended June 10, 2024, at p. 16 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB2496

[35] Sen. Judiciary Com., Analysis of Assem. Bill No. 2496 (2023–2024 Reg. Sess.) as amended June 10, 2024, p. 5 https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB2496

CONCLUSION

For the foregoing reasons, CAI respectfully requests that this Court not resurrect the "actual knowledge" foreseeability standard in FFA-involved, foster care sex abuse screening cases as proposed by Appellant and its *amici*.

Dated: September 22, 2025 Respectfully Submitted,

By: 

Ed Howard
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief is set using 13-point Times New Roman font. According to Microsoft Word for Office 365, this brief contains 9,862 words, excluding the cover, tables, signature block, and this certificate. I certify that this brief complies with Rule 8.204(b) of the California Rules of Court.

Ed Howard

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5998 Alcala Park, San Diego, California 92110.

On the date set forth below, I served the foregoing document(s) described as follows: **APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS; BRIEF OF AMICI CURIAE CHILDREN'S ADVOCACY INSTITUTE; TABLE OF EXHIBITS IN SUPPORT THEREOF UNDER SEPARATE COVER**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

☒ BY ELECTRONIC SERVICE VIA TRUEFILING Based on a court order, I caused the above-entitled document(s) to be served through TrueFiling at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the TrueFiling Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

☒ STATE I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 22, 2025, at San Diego, California.

s/ Katie Gonzalez
Katie Gonzalez

SERVICE LIST

C.F., et al. v. Alternative Family Services, Inc.

(A170226 | SCV264540)

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