Case No. S S236765

THE SUPREME COURT OF THE STATE OF CALIFORNIA

LIBERTY SURPLUS INSURANCE CORPORATION, et al.

Plaintiffs and Respondents,

v.

LEDESMA AND MEYER CONSTRUCTION COMPANY, INC., et al.

Defendants and Appellants.

After Order Certifying Question by the
U.S. Court of Appeals for the Ninth Circuit

RESPONDENTS' CONSOLIDATED ANSWERING BRIEF TO AMICI CURIAE BRIEFS

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INTRODUCTION

Several amici curiae submitted briefs in this action in support of Appellants Ledesma & Meyer Construction Company, Inc., Kris Meyer, and Joseph Ledesma (collectively, "L&M") and in opposition to Respondents Liberty Surplus Insurance Corporation ("LSIC") and Liberty Insurance Underwriters Inc. ("LIUI") (collectively, "Liberty"). The amici curiae that have filed briefs in support of L&M are United Policyholders ("UP"); Los Angeles Unified School District ("LAUSD"); California Catholic Conference and Association of Christian Schools International (together, "CCC"); Franciscan Friars of California, Inc. and Province of Holy Name, Inc. (together "FFC"); and Steven W. Murray ("Murray") (collectively "amici"). Amici present several overlapping, but ultimately misguided arguments in support of their varied interests in seeing the most expansive coverage possible under the Liberty policies, and presumably other policies. However, amici misconstrue California law.

The insurance policies issued by Liberty to L&M apply to covered "'bodily injury' caused by an 'occurrence.'" The Liberty policies define "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The plaintiff ("Doe") in the underlying action, *Jane JS Doe, et al. v. Ledesma & Meyer Constr. Co., Inc., et al*., San Bernardino County Superior Court, Case No. CIVDS 1007001 ("*Doe* action"), alleged she was sexually

abused and raped by Darold Hecht ("Hecht"), an employee of L&M, in 2006 as a student at Cesar Chavez Middle School. The trial court in the *Doe* action ruled, in response to L&M's motion for summary judgment, that plaintiffs had produced evidence "that Hecht was convicted twice related to sexual misconduct with minors with one prior to his employment and one while still employed with L&M." (2AER 45.) Further, according to the *Doe* court, evidence indicated that L&M "knew of the 1998 incident soon after they hired Hecht" and L&M "were further informed in February 2004 of the second conviction." (2AER 45.) Thus, evidence indicated that "with this knowledge [of Hecht's sex offender status] L&M allowed Hecht to work on the Cesar Chavez project while school children were present...." (2AER 45-46.) Further, the trial court found that "L&M's principals were aware … that [Hecht] was a registered sex offender," and thus L&M could not establish that L&M "lacked knowledge of Hecht's unfitness to work at a school." (2AER 48.)

Certain of amici's briefs adopt as an initial premise that the Court must find coverage for L&M in relation to the *Doe* action, because to find otherwise would render a significant number of potential liabilities uninsurable. This is mistaken. The question before the Court involves the interpretation of the specific language of the Liberty policies in relation to the facts of the *Doe* action, and does not require a pronouncement as to all potential liability insurance coverage. Indeed, there are disparate forms of insurance policies

that include distinct language, thus rendering nonsensical the mistaken "one size fits all" premise.

Amici mistakenly argue that California law requires that insurers look to the alleged source of liability as to its insured, such as alleged negligent hiring or supervision, and not to the injury-causing act itself (here, the molestation and rape) in order to determine whether there has been an "occurrence" triggering coverage. The argument ignores that California courts, including this Court, have consistently focused on the actual cause of the "bodily injury" and whether that cause is accidental. If the cause of the "bodily injury" is not accidental, the "insuring agreement" is not satisfied and coverage is not implicated. This is true even if there are remote, antecedent events that are alleged to have invited the actual cause of the "bodily injury." This is also true if another actor besides the insured seeking coverage engaged in the intentional act that caused the injury.

Amici largely ignore this Court's holding in *Hogan v. Midland National Ins. Co*. (1970) 3 Cal. 3d 553 that addressed the issue and turn to inapposite "concurrent cause" principles and cases in a misguided attempt to invent coverage. Amici are also incorrect in their contention that an "accident" must be determined from the insured's point of view. This Court has rejected such an approach.

Amici's focus on the contention that an "accident" may be found when either conduct or the consequences of that conduct are unintentional is

misplaced. The question is not relevant to the issue before the Court and only reflects amici's own particular policy interests. In any case, amici are incorrect in their suggestion that such a determination would result in coverage for the *Doe* action under the Liberty policies because the conduct and consequence of the sexual assault—the determinative cause of the injury—were both intentional.

Amici are also mistaken in their focus on cases relating to vicarious liability. The fact that liability coverage is not foreclosed in relation to vicarious liability either for an employee's intentional act, or for a public employee's negligent acts, does not inform the present analysis, as the determination turns on California law in light of the allegations and undisputed facts of the *Doe* action and the terms of the Liberty policies. Here, the policy language provides that there is no coverage unless the injury is caused by an "occurrence," which the law indicates is the injury-causing act. Because there was no "occurrence" here, the Liberty policies do not provide coverage.

ARGUMENT

I. The Issue Before the Court Turns on the Specific Language in the Liberty Policies, And Does Not Dictate All Potential Liability Coverage

Much of amici's arguments are premised on the mistaken assumption that, if the Court were to find no "occurrence" as defined under the Liberty policies in the *Doe* action, then employers and other entities would be categorically unable to obtain insurance coverage applicable to similar

scenarios. Within this argument are two incorrect assumptions. First is the assumption that the Liberty policies, governed by the specific language therein, should necessarily extend to the bounds of the insured's potential liability. This concept is plainly not supported by California law. "The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims." (*Camelot by the Bay Condo. Owners' Assn. v. Scottsdale Ins. Co.* (1994) 27 Cal.App.4th 33, 52.) A "general liability" policy does not connote "unlimited coverage. … It is invariably necessary to consult the language of any particular general liability policy to determine what coverages it affords." (*FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, 1146-47, disapproved of on other grounds by *State v. Cont'l Ins. Co*. (2012) 55 Cal.4th 186.) Liability policies generally provide coverage for certain types of risk and do not provide coverage that extends to the boundaries of all of the insured's potential tort liability. (See, e.g., *Miller v. W. Gen. Agency, Inc.* (1996) 41 Cal. App. 4th 1144, 1150 [whether misrepresentations were "intentional or simply negligent, they did not constitute an 'accident' in its plain, ordinary sense"]; *Napa Cmty. Redevelopment Agency v. Cont'l Ins. Companies* (9th Cir. 1998) 156 F.3d 1238 ["'Accident' or 'occurrence'-based liability policies … do not cover intentional or fraudulent behavior, only accidental or negligent [acts]"].)

Second, amici appear to assume that other liability insurance coverage under a different coverage formulation than found in the Liberty policies could not exist to potentially provide coverage. That is simply not the case. In this regard, *United Pac. Ins. Co. v. McGuire Co*. (1991) 229 Cal.App.3d 1560 is instructive.

In *United Pac*., the insured sought coverage for a wrongful termination action under an insurance policy that provided coverage for "bodily injury … caused by an occurrence ...." (*United Pac., supra,* 229 Cal.App.3d at p. 1563.)[1] The insuring agreement defined the term "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured...." (*Id*.) However, the policy also had a "Special Form Comprehensive General Liability Endorsement," "which the insureds purchased for an increased premium." (*Id*.) The endorsement contained an "Extended Definition of Occurrence" which defined "occurrence" to mean "*an accident, an event or a continuous or repeated exposure* to conditions which results, during the policy period, in bodily injury or property damage neither expected nor intended by the insured." (*Id*., emphasis added.)

[1] The *United Pac.* court put aside the issue of whether "'bodily injury' embrace[d] emotional distress" caused by wrongful termination under California law. (See *United Pac*., *supra*, 229 Cal.App.3d at p. 1563.)

The *United Pac.* court found that, while the wrongful termination may not have been an "accident" under California law, the policy's definition of "occurrence" as modified by the "Extended Definition" was not so limited: "The context does not suggest that the term 'event' is synonymous with 'accident'—and therefore simply redundant—since it appears in a definition purporting to provide additional coverage. ... The word ['event'] has no connotation of fortuity; under any accepted usage, it obviously embraces intentional conduct." (*Id.* at 1565.) As a result, the *United Pac.* court found the insurer had a duty to defend. (See *id.* at 1567.) The significance of the extended definition of "occurrence" in *United Pac.* was affirmed in *Dykstra v. Foremost Ins. Co*. (1993) 14 Cal.App.4th 361, 367 (noting that the policies at issue did "not extend coverage to both 'accidents' and 'events'"); and *Ins. Co. of Penn. v. City Of Long Beach* (9th Cir. 2009) 342 F.App'x 274, 276 ("[T]he policies, by including the term 'events' within an occurrence, cover intentional acts which cause harm unintended by the insured.").

The existence of alternative formulations of liability coverage, such as that in *United Pac*., moots several of amici's arguments. In particular, LAUSD's brief rests on the assumption that the Court's ruling in relation to the language of the Liberty policies at issue here will control broader issues of whether such allegations can be covered, divorced from any analysis of the actual policy language at issue in a given case. (See LAUSD Br., p. 8.) According to LAUSD, California courts have imposed vicarious liability on

public entities like school districts under Gov. Code § 815.2, for the negligent—but not intentional—acts of employees. (See LAUSD Br., p. 6-7.) In doing so, LAUSD notes the Court has examined a number of factors that include the potential availability of liability insurance in determining whether the law should impose vicarious liability upon a party. (See *id*., citing *C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 877.)[2] But LAUSD fails to bridge the gap between an understanding that negligence may be "more readily insurable" than sexual assault, (see LAUSD Br., p. 8.), to the conclusion that LAUSD implicitly seeks: a determination that all liability policies provide such coverage in relation to sexual assault, regardless of policy language. Such a finding is unnecessary to preserve the Court's

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[2] In actuality the Court's exercise in relation to this issue has been somewhat different than LAUSD suggests. As the Court in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112, noted, the general rule in California is that "[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct" and that "a person is liable for injuries caused by his failure to exercise reasonable care ...." It is the potential *departure* from that general rule that requires an examination of the "*Rowland* factors," which LAUSD selectively quotes, and are:

> ... the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

(*Rowland*, *supra*, 69 Cal.2d at pp. 112-13.)

rationale in declining to impose vicarious liability in *C.A.*, and *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438.[3]

Unsurprisingly, amici would prefer the benefit of the more expansive coverage afforded by the *United Pac.* policy, or other similar policies, without being required to actually obtain and pay for policies that incorporate such language (and thus with insurers that contemplated such risk and imposed commensurate premiums). However, the unambiguous language of the Liberty policies control here, and as discussed below, the precedent of this Court reflects that language does not encompass the allegations of the *Doe* action.

In his vindicated dissent[4] to the intermediate appellate court's opinion in *C.A. v. William S. Hart Union High Sch. Dist*. (2010) 189 Cal.App.4th 1166 [117 Cal.Rptr.3d 283], rev'd, (2012) 53 Cal.4th 861 , Judge Mallano observed that "[e]rrors and omissions policies are common in the field of education," noting that they "insure a member of a designated calling against liability arising out of the mistakes inherent in the practice of that particular profession

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[3] It is important to note that insurance policies issued to the San Bernardino County Unified School District ("SBCUSD") are *not* at issue in this case. The language of any policies issued to SBUSD are not before the Court, and thus forcing a ruling, as LAUSD suggest, based on theoretical insurance coverage acquired by public entities would be inappropriate.

[4] This Court reversed the intermediate appellate court in *C.A.* In doing so, the Court adopted much of the same reasoning that animated Judge Mallano's dissent. (See *C.A.*, *supra*, 53 Cal.4th 861, passim.)

or business …. An errors and omissions policy effectively provides malpractice insurance coverage to members of professions other than those in the legal and medical fields." (*C.A.*, *supra*, 189 Cal. App. 4th 1166 [117 Cal. Rptr. 3d 283, 306], Mallano, J., dissenting, quoting *Watkins Glen Cent. v. Nat. Union* (N.Y. App. 2001) 286 A.D.2d 48, 72.) Judge Mallano discussed several cases involving errors and omissions policies issued to educational institutions that reflect that such policies do not rest on the same "occurrence" formulation as is typical in general liability policies. (See *C.A.*, *supra*, 189 Cal. App. 4th 1166 [117 Cal. Rptr. 3d at pp. 305-07], citing *Board of Educ. v. Nat. Union* (Pa.Super.Ct.1988) 709 A.2d 910; *Durham Bd. of Educ. v. Nat. Union* (1993) 109 N.C.App. 152; *Watkins Glen,* 286 A.D.2d 48.) For example, the policy in *Durham* provided coverage for "Wrongful Act[s]," which were defined as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the performance of duties for the School District...." *Durham*, *supra*, 109 N.C. App. at p. 157. The relevant policy provision in Board of Education was identical. (See *Board of Educ.*, *supra*, 709 A.2d at p. 913.) Citing *Board of Educ*., 709 A.2d 910, the *Watkins Glen* court found that the policy before it contained a "nearly identical definition of coverage." (*Watkins Glen*, *supra*, 286 A.D.2d at p. 52, citing *Board of Educ*., *supra*, 709 A.2d at p. 913.)

The type of liability policy that provides coverage for "Wrongful Acts" commonly procured by educational entities, public institutions and other

entities and organizations, is not at issue here. The relatively narrow determination of whether sexual molestation can be considered an "occurrence," defined as an "accident" would not bear on such errors and omissions coverage. LAUSD cites a concern that insurers would "almost certainly use" a determination in Liberty's favor here in an attempt to resist coverage, (LAUSD Br., at 8), but also acknowledges that "the insurance policies at issue in those cases differ from the policy at issue here ..." (LAUSD Br., at 3) and provides no context indicating how or why the Court's decision here would impact distinct insurance policies that reflect different language.

II. This Court's Decisions Do Not Support Amici's Suggestion that Coverage is Coextensive with Potential Liability

A. Amici Misconstrue *Delgado*

Amici present as a major theme of their briefing that the tort concept of causation and the potential for negligence liability should be determinative of whether or not there has been an "occurrence." But this is essentially the reasoning of the intermediate appellate court in *Delgado v. Interinsurance Exch. of Auto. Club of S. California* (2007) 152 Cal.App.4th 671 [61 Cal.Rptr.3d 826], rev'd (2009) 47 Cal. 4th 302 ("*Delgado I*"), which this Court rejected in *Delgado v. Interinsurance Exch. of Auto. Club of S. California* (2009) 47 Cal.4th 302 ("*Delgado II*"). Adopting amici's argument would ask the Court to ignore the reasoning that led it to reverse the lower

court in *Delgado II* and institute a sweeping new rule that is not supported by existing California law.

A review of the cases is instructive, beginning with a case upon which the intermediate appellate court in *Delgado I* relied heavily, *Gray v. Zurich Ins. Co*. (1966) 65 Cal.2d 263. In *Gray*, the insured was sued for assault and battery while the insured contended he had acted in self-defense. (*Gray, supra,* 65 Cal.2d at p. 267.) The insurer rejected the insured's tender of the defense of the suit based on the contention that the policy excluded coverage for damage "caused intentionally by or at the direction of the insured." (See *id.* at pp. 267, 273.) In *Gray*, this Court found that the insurer had a duty to defend based on two independent reasons. First, and not germane here, the Court reasoned that the exclusionary language was not clear and conspicuous and so should be resolved in the insured's favor. (See *id.* at pp. 272-73.) Second, and more relevant, the Court found that the underlying action "presented the potentiality of a judgment based upon nonintentional conduct, and since liability for such conduct would fall within the indemnification coverage, the duty to defend became manifest at the outset." (*Id.* at p. 276.) The Court noted that the insurer had an obligation to defend the insured against even "groundless, false or fraudulent claims" for "damages because of

bodily injury,"[5] and reasoned that "the basic promise would support the insured's reasonable expectation that he had bought the rendition of legal services to defend against a suit for bodily injury which alleged he had caused it, negligently, nonintentionally, *intentionally or in any other manner*." (*Id.* at pp. 273-74, emphasis added.) The Court noted that the insured "might have been able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit willful and intended injury, but engaged only in nonintentional tortious conduct." (*Id.* at p. 277.) As a result, because of the Court's broad interpretation of the insuring agreement, and the supposed potential for a judgment resulting from nonintentional conduct, the insurer had a duty to defend its insured. (*Id.*)

The Court's decision in *Gray* heavily influenced the intermediate appellate court's decision in *Delgado I*. In *Delgado I*, the underlying complaint alleged two causes of action against the insured: "[t]he first alleged an intentional tort in that [the insured] … physically struck, battered and kicked [the claimant] Delgado. The second cause of action alleged that [the insured] negligently and unreasonably believed he was engaging in self-

[5] Significantly, and discussed further below, the insuring agreement at issue in *Gray* did not contain an "occurrence" requirement, but obligated the insurer to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury ..., and ... defend any suit against the insured alleging such bodily injury ... and seeking damages that are payable under the terms of this endorsement, even if any of the allegations are groundless, false or fraudulent." (*Gray, supra,* 65 Cal.2d at p. 267.)

defense and unreasonably acted in self defense ...." (*Delgado II, supra,* 47 Cal.4th at p. 306.) In addition to an exclusion pertaining to intentional acts, as in *Gray*, the policy in *Delgado I* provided coverage for "[b]odily injury ... caused by an occurrence to which this coverage applies," with "occurrence" defined as "an accident, including continuous or repeated injurious exposure to essentially the same conditions." (*Delgado I*, *supra*, 152 Cal.App.4th 671 [61 Cal.Rptr.3d at p. 835].)

The *Delgado I* court reasoned that the case before it was "similar to [*Gray*][6]" and reasoned that "it is clear that the underlying complaint pled facts showing that a potential for coverage existed under the ... policy. [The claimant,] Delgado's second cause of action against [the insured] alleged that [the insured] acted in self-defense; that is, Delgado's injuries were caused by unintentional conduct." (*Delgado I*, *supra*, 152 Cal.App.4th 671 [61 Cal.Rptr.3d 826 at p. 836].) Similar to the amici in this action, the *Delgado I* court reasoned that, because the insured could be held liable for nonintentional tortious conduct, coverage should apply: "[S]uch conduct is properly

[6] In addition to *Gray*, the *Delgado I* court found the case to be similar to an intermediate appellate case, *Mullen v. Glens Falls Ins. Co*. (1977) 73 Cal. App. 3d 163, which essentially mirrored *Gray*. In *Mullen*, the court found that the alleged injuries "were the result of a fight; for all the insurance company could have known at that time, plaintiff started the fight and was struck by [the insured] in self-defense," which would have rendered the injuries "not 'intended' or 'expected'" and thus implicated a duty to defend. (*Mullen*, *supra*, 73 Cal.App.3d at p. 170.)

characterized as *nonintentional* tortious conduct. It is an act of negligence and necessarily presents an example of an unintended and fortuitous act." (*Delgado I*, *supra*, 152 Cal.App.4th 671 [61 Cal.Rptr.3d at p. 837], emphasis in original.)

This Court, in *Delgado II* considered the *Delgado I* court's reasoning—which mirrors amici's arguments—but rejected it. Because the *Delgado I* court found *Gray* controlling, this Court in *Delgado II* explained at some length its reasoning in finding that *Gray* did not dictate the same outcome. (See *Delgado II*, *supra*, 47 Cal.4th at p. 313.) Distinguishing *Gray*, this Court noted:

> Unlike the case now before us, the policy's coverage clause in *Gray* did not define coverage in terms of injuries resulting from 'an accident.' ... *Gray* and the cases that have cited it pertained to the question of unreasonable use of force or unreasonable self-defense in the context of an insurance policy's *exclusionary* clauses, not as here in the context of a policy's *coverage* clause. At issue here is whether unreasonable self-defense comes within the policy's coverage for 'an accident,' not whether it falls within a particular policy exclusion.

(*Delgado II*, *supra*, 47 Cal.4th at p. 313, emphasis in original, citations omitted.)

Thus, this Court correctly recognized that the determination of whether there has been an "accident" under a coverage grant is fundamentally different than determining whether an exclusion applies to preclude coverage. *Gray* and *Delgado II* both presented very similar facts; and in fact the cases are nearly identical. In both cases the insured allegedly assaulted the claimant, but a mistaken or unreasonable belief for the need for self-defense created the potential for negligence liability. And it was on this basis that the insureds in both cases sought coverage. Both policies contained an exclusion that precluded coverage for intentional acts. The only relevant, substantive difference between the two cases is that the policy in *Delgado II* applied to provide coverage for bodily injury caused by an "occurrence," defined as an "accident." However, this difference was determinative.[7]

The Court in *Delgado II* explained that "the law looks for purposes of causation analysis to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." (*Id.* at p. 315, citations omitted.) Noting that "the term 'accident' *unambiguously* refers to the event causing damage, not the earlier event

[7] This key difference that the Court found dictated the outcome explains why amici miss the mark in citing to various cases that examined "expected or intended injury" or similar exclusions, rather than the meaning of the term "occurrence." This Court, in *Minkler v. Safeco Insurance Co. of America* (2010) 49 Cal.4th 315, 324-25 , discussed at length in Liberty's principle brief, (see Liberty Br., at pp. 30-32), affirmed that the issues required separate and distinct analyses.

creating the potential for future injury," (*id.* at p. 316 (emphasis added), quoting *Maples v. Aetna Casualty & Surety Co*. (1978) 83 Cal.App.3d 641, 647-648), the Court explained, to "look to acts within the causal chain that are antecedent to and more remote from the assaultive conduct would render legal responsibilities too uncertain." (*Delgado II*, *supra*, 47 Cal.4th at 316.)[8] The Court made clear that the law requires an examination of the injury-causing act—which in the *Doe* action is sexual molestation and rape—and then a determination of whether the act is an "accident." (*Id.* at pp. 315-16.) Such act does not satisfy the "occurrence" definition, which in turn means there is no duty to defend or indemnify under the Liberty policies in relation to the *Doe* action.

B. *Delgado* Does Not Allow the "Occurrence" Analysis to Turn on Remote Acts in the Causal Chain

Amici incorrectly suggest that Liberty argues for an invented "immediate cause" standard that is unsupported. In fact, Liberty has simply applied this Court's reasoning in *Delgado II* to the question: Does the *Doe* action allege injury caused by an "occurrence," which is defined under the

[8] Thus, this Court has determined the "occurrence" term "unambiguous." As a result, the plain language of the policy controls. (See, e.g*., Rosen v. State Farm Gen. Ins. Co.* (2003) 30 Cal. 4th 1070, 1073, citing Cal. Civ. Code § 1644). As a result, FFC's argument—that the term "occurrence" must be read in favor of the insured because it is ambiguous—fails at the first hurdle. (See FFC Br., p. 8-10.) This Court "do[es] not rewrite any provision of any contract, including [an insurance policy], for any purpose." *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal. 4th 945, 960.

Liberty policies as an "accident"? *Delgado II* clearly—and correctly—indicates the answer is "no."

In *Delgado II*, the Court considered whether the insured's mistaken understanding as to the need for self defense was "unforeseen and unexpected from the perspective of the insured, making the insured's responsive acts unplanned and therefore accidental." (*Delgado II, supra,* 47 Cal.4th at p. 314.) The Court rejected this argument as well, explaining that "the law looks for purposes of causation analysis to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." (*Id.* at p. 315.) "In a case of assault and battery, it is the use of force on another that is closely connected to the resulting injury." (*Id.* at pp. 315-16.) To "look to acts within the causal chain that are antecedent to and more remote from the assaultive conduct would render legal responsibilities too uncertain." (*Id.*) To that end, the Court noted that "the term 'accident' unambiguously refers to the event causing damage, not the earlier event creating the potential for future injury." (*Id.,* quoting *Maples*, 83 Cal.App.3d at pp. 647-48.)[9] The Court provided an illustrative example of its reasoning:

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[9] Amici suggest that cases related to "timing" of an "occurrence," such as *Maples* cannot inform the analysis here. Clearly, as reflected in *Delgado II*, this Court has not chosen to so limit the influence of *Maples*, but rather relied on it and its reasoning to formulate its holding. (See *Delgado II*, *supra*, 47 Cal.4th at p. 316.)

> When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury—hitting the other car—was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident.

(*Delgado II, supra,* 47 Cal.4th at p. 316, quoting *Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50.)

The *Merced* court, from which *Delgado II* draws the example, continued the illustration: "On the other hand, where the driver was speeding and deliberately hit the other car, the act directly responsible for the injury—hitting the other car—would be intentional and any resulting injury would be directly caused by the driver's intentional act." (*Merced*, *supra*, 213 Cal.App.3d at p. 50.) Thus confirming that under California law determination of whether there has been an "occurrence" focuses on the "the act directly responsible for the injury" and not antecedent events.

C. *State v. Allstate* and *Partridge* Do not Support Amici

In addition to misreading *Delgado*, amici rely upon this Court's opinion in *State v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, to mistakenly suggest that liability coverage is necessarily coextensive with potential negligence liability. Amici's treatment of *State* is superficial and does not accurately reflect its holding, and thus a closer examination of the opinion is instructive.

As explained in *State*, the State of California operated a hazardous waste facility and obtained liability insurance in connection with its operation. (*State, supra,* 45 Cal.4th at p. 1014.) The relevant liability policies all contained similar pollution exclusions, but several policies contained an exception for "sudden and accidental" discharges as to "land or air", but excluded coverage absolutely for "pollution to watercourses and bodies of water." (*Id.* at p. 1016.) It was discovered that the waste containment facility had not been constructed on suitable ground and the waste eventually contaminated groundwater that flowed under the site. (*Id*.) Further, there were "two major overflow episodes" in 1969 and 1978 in which the waste ponds overflowed, sending polluted water down the canyon outside the facility. (*Id*.) Coverage thus turned on whether the pollution was "sudden and accidental" and whether it implicated only water contamination, or also contamination of land. (See *id.* at pp. 1022-27.) The Court found that issues of material fact existed as to whether the exclusion and/or its exception was triggered. (See *id.* at pp. 1023-24, 1027.)

The insurers had also argued that, even if coverage existed as to certain events and damages, the insured bore the burden of demonstrating covered damages, which would not include the gradual exposure and seepage of waste material over time. (See *id.* at p. 1028.) As the Court noted, "the State admitted it could not differentiate the property damage caused by the 1969 and 1978 releases from that caused by the gradual leakage of wastes …. [and]

could not differentiate between the 'work performed to date' to remedy the property damage caused by the various sets of releases." (*Id*. at p. 1028.) And in fact, on summary judgment, "the trial court ruled … the State could recover nothing because it could not prove how much of the property damage was caused by sudden and accidental releases." (*Id*.)

The intermediate appellate court reversed the trial court, and this Court affirmed the appellate court "at least as to the result on summary judgment." (*Id.* at p. 1029.) In its opinion in *State*, this Court noted that "[t]he 1969 and 1978 releases would have rendered the State fully liable for the contamination of soils and groundwater below the [site] without consideration of the subsurface leakage, if they were substantial factors in causing the contamination." (*Id.* at p. 1031.) In its discussion of whether the insured was responsible for establishing allocation of damages to covered causes (the narrative on which amici place their focus) the Court found that coverage applied to indivisible injuries, if a covered occurrence is a "substantial cause" even if excluded causes are also present and damage cannot be allocated between the two. (*Id.* at pp. 1035-38.) The Court in *State* did not decide or even opine on what might constitute an "occurrence" or "accident" under a third party liability policy. (See *id*., passim.) Rather, *State* simply stands for the principle that a covered, independent "concurrent cause" can implicate coverage under a third-party liability policy even when an excluded cause is also present.

In doing so, the Court disapproved of *Golden Eagle Refinery Co. v. Associated Int'l Ins. Co.* (2001) 85 Cal.App.4th 1300.[10] Amici place special emphasis on selected quotes in the *State* opinion criticizing *Golden Eagle*. In *Golden Eagle*, the appellate court found that the insured had the burden of apportioning damages between covered and uncovered causes.[11] (*Golden Eagle*, *supra*, 85 Cal.App.4th at p. 1313-14.) The *Golden Eagle* court reasoned that the measure of damages for the breach of the insurance contract was contractual in nature, and so the insured would have to use a contractual standard to establish covered damages. (*Id.* at p. 1314.) Because the injury was apparently indivisible, the insured could not do so. (See *id.*)

The Court in *State* criticized *Golden Eagle* and concluded that finding a covered cause was a "substantial factor" in the damage to property was sufficient to trigger coverage, even where another excluded cause also contributed to the single, indivisible injury. (See *State, supra,* 45 Cal.4th at p. 1035.) In doing so, *State* relied heavily on *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, discussed further below, to find that the "sudden and accidental" discharges were an independent, concurrent proximate cause of the damage. (See *State*, supra, 45 Cal.4th at pp. 1031-32.)

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[10] Though Murray mistakenly claims *State* "reversed" *Golden Eagle*. (See Murray Br., p. 11.)

[11] Like in *State*, the ostensibly "covered" causes of damage were "sudden and accidental" releases of contaminants. (See *Golden Eagle, supra,* 85 Cal.App.4th at 1312.)

As the Court in *State* noted, *Partridge* "concluded that when multiple acts or events 'constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy.'" (*State, supra,* 45 Cal.4th at p. 1036, quoting *Partridge, supra,* 10 Cal.3d at p. 102.) Amici suggest that *Partridge* and the "concurrent cause" doctrine indicate that coverage should apply in this case. Amici are mistaken. An analysis of *Partridge* and its progeny reflect that the "concurrent cause" doctrine is not applicable in this instance.

In *Partridge*, the underlying liability arose due to two independent acts of the insured, each of which separately created liability: the insured had "filed the trigger mechanism of his pistol to lighten the trigger pull so that the gun would have 'hair trigger action;" (*Partridge*, *supra*, 10 Cal. 3d at p. 97); and the insured drove his vehicle off the pavement into rough terrain, hitting a bump and causing the gun to fire. (*Id.* at p. 98). The insured had a homeowner's policy that excluded coverage for injury arising out of the use of an automobile and an auto policy. (*Id.* at p. 98). The insurer, which issued both policies, argued that because the use of the car played some causal role in the accident in question, the injuries "arose out of the use of the car" within the meaning of the homeowner's exclusionary provision, and thus that only the automobile policy (which happened to have a lower limit) provided coverage for the injuries. (*Id.* at pp. 98-99.) The Court noted that, in determining both policies applied, "[t]he trial court [in the coverage action]

first found that the insured, Partridge, had been negligent both in modifying the gun by filing its trigger mechanism and in driving his vehicle off the paved road onto the rough terrain, and *that these two negligent acts were independent, concurrent proximate causes* of [the claimant's] injuries." (*Id.* at p. 99, emphasis added.) This Court agreed with the reasoning and found that when a covered risk and an excluded risk *"constitute concurrent proximate causes of an accident*, the insurer is liable so long as one of the causes is covered by the policy." (*Id.* at p. 102, emphasis added.) Thus, a concurrent cause exists when a loss occurs because of two independent causes, one of which is covered and another excluded. (See *id*.)

Applied in this context, the question then becomes: does the alleged negligent hiring/supervision/retention constitute an "independent, concurrent proximate cause" of the injury? In order for the concurrent-cause principle "to apply there must be two negligent acts or omissions of the insured, one of which, *independently of the excluded cause*, renders the insured liable for the resulting injuries." (*Daggs v. Foremost Ins. Co*. (1983) 148 Cal.App.3d 726, 730, emphasis added.)

The negligent hiring/supervision/retention claims against L&M here do not create an "independent" cause of the injury; without the molestation by Hecht, the negligent hiring or supervision would not itself have caused injury to Doe. Rather, it is properly considered a precipitating or dependent "cause." California courts have consistently found that precipitating, dependent causes

such as negligent supervision do not act to independently trigger coverage under the "concurrent cause" doctrine. (See *Farmers Ins. Exch. v. Superior Court* (2013) 220 Cal.App.4th 1199, 1210, as modified on denial of reh'g (Oct. 28, 2013) [negligent supervision not a proximate, independent, concurrent cause of injury]; *National American Ins. Co. v. Coburn* (1989) 209 Cal.App.3d 914, 921–922 [same]; *Safeco Ins. Co. v. Gilstrap* (1983) 141 Cal.App.3d 524, 528 [negligent entrustment not an independent, concurrent cause of injury].) Thus, application of the "concurrent cause" doctrine under *Partridge* does not bring the *Doe* action under coverage because the alleged injury was not caused by an "occurrence" constituting an "independent, concurrent, proximate cause."

Amici mistakenly suggest that *State* and *Partridge require* there to be coverage under the Liberty policies because L&M faced potential liability under a negligence theory in relation to Doe's sexual molestation. But this is simply an attempt to restore the reversed holding of *Delgado I*, dressing it up in alternative "concurrent cause" garb. Understandably, the appellate court in *Delgado I* did not rely on *Partridge* or *State*, (see *Delgado I*, *supra*, 152 Cal.App.4th 671 [61 Cal.Rptr.3d 826], passim), because the "concurrent cause" doctrine would not have applied to the precipitating, dependent cause alleged, even if that dependent cause carried with it the potential for liability. This Court understood that as well; it did not cite *Partridge* or *State* in any relevant substantive way in its *Delgado II* opinion. (See *Delgado II*, *supra*, 47

Cal.4th 302 , passim.)[12] *Partridge*, *State*, and the "concurrent cause" doctrine provide no support for L&M and amici here.[13]

D. *Safeco Ins. Co. v. Robert S.* Provides No Support for a Finding of an "Occurrence" Here

One of the amici, Murray, argues that the Liberty policies necessarily provide coverage because "[t]his Court has previously determined a very similarly worded 'occurrence' definition in a liability includes negligent conduct," citing *Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758. (Murray Br., p. 8.) Respectfully, this is entirely beside the point; Liberty has never argued that the Liberty policies exclude coverage for negligent conduct, only that the injury-causing act itself must be an "occurrence." Additionally, the holding of *Safeco* has no relevance. In *Safeco*, the Court rendered invalid an "illegal act" exclusion because it could not "reasonably be given meaning

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[12] In *Delgado II*, this Court cited *State* once for the simple, general concept that "[i]nsurance policies are read in light of the parties' reasonable expectations and, when ambiguous, are interpreted to protect the reasonable expectations of the insured." (*Delgado II* at 311, citing *State* at 1018.) *Delgado II* did not cite *Partridge* at all. (See *Delgado II*, passim.)

[13] Liberty discussed inapplicability of the "concurrent cause" approach in its principle brief. (See Liberty Br., pp. 33-37.) In particular, we note that the court in *Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co*. (1996) 42 Cal.App.4th 121, explained how negligent hiring or retention could not be a "concurrent cause" in relation to an intentional act under *Partridge*. (See *Century Transit*, *supra*, 42 Cal.App.4th at p. 128, fn. 6.) Where an employer allegedly negligently hired an employee who then intentionally fired a gun in employer's store, "liability for negligent hiring was wholly dependent upon an injury caused by excluded event and was not a true 'independent' cause of the plaintiff's injury." (*Id*., citations omitted.)

under established rules of construction of a contract...." (*Safeco*, *supra*, 26 Cal.4th at p. 766.) The Court did so in part by reasoning that negligent acts were "illegal acts," i.e., in violation of *civil* law, and thus an "illegal act" exclusion (as opposed to a "*criminal* act" exclusion) would exclude *all* negligence. (See *id.* at p. 765.) The same reasoning cannot be applied to the Liberty policies here.

III. This Court's Precedent Does Not Limit Determination of an "Accident" or "Occurrence" to the Insured's "Point of View"

Amici argue that *Delgado II* requires that only the insured's "point of view" be considered in determining whether there has been an "occurrence," defined as an "accident." But, in doing so, amici ignore two things: the context of this Court's decision in *Delgado II*, and this Court's previous decision that addressed this precise topic in *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553. First, the facts in *Delgado II* presented a different scenario. The insured was the actor that committed the alleged assault. Thus when the Court noted "an injury-producing event is not an 'accident' within the policy's coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor," the "actor" and the "insured" were one in the same. (*Delgado II*, 47 Cal.4th at pp. 311-312, citing *Hogan*, 3 Cal.3d at p. 560.) As a result, there was no need to consider that the injury-causing act separate and distinct from the acts of the insured.

In deciding to focus on the "objective" of the "actor," the Court understandably cited *Hogan* because in *Hogan* this Court squarely addressed the subject.[14] It is telling that none of the amici, save one,[15] cite *Hogan*, let alone attempt to discuss or distinguish it. The reason is simple: *Hogan* reflects that this Court has already considered and rejected amici's core argument.

In *Hogan*, this Court considered whether two distinct injuries were covered under a policy that provided coverage for "injury to or destruction of property … *caused by accident* ...." (*Hogan, supra,* 3 Cal.3d at p. 558, italics added by the Court.) In *Hogan*, the insured (Diehl) manufactured and sold wood processing machinery, "insuring it against liability for property damage caused by accident." (*Id.* at p. 557.) The underlying claimant, Kaufman, purchased a saw manufactured by Diehl and began to use it in September

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[14] This Court also cited *Hogan*, along with *Delgado II*, in *Minkler v. Safeco Insurance Co. of America*, 49 Cal.4th 315, 324-25 (2010) suggesting those cases would dictate the analysis in its footnote stating:

> [The insurer] does not assert that [the claimant's] claims related to his alleged molestations by [an insured] are beyond the scope of this basic coverage because the molestations were not "accident[s]," and we have not been asked to address that issue. We therefore do not do so. (But see *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal. 4th 302, 308-17, 97 Cal.Rptr.3d 298, 211 P.3d 1083; *Hogan v. Midland National Ins. Co.* (1970) 3 Cal. 3d 553, 560, 91 Cal.Rptr. 153, 476 P.2d 825.)

(*Minkler*, *supra*, 49 Cal.4th at p. 322, fn. 3.)

[15] Only the brief submitted by CCC briefly discusses Hogan. CCC's attempt to distinguish *Hogan* is discussed further below.

1961. (*Id.*) The saw was allegedly defective causing lumber to be cut in widths that were too narrow. (*Id.* at p. 558.) After customers had rejected the lumber because it had been cut too narrow, "to avoid complaints in the future, Kaufman deliberately cut lumber wider than specified in orders," beginning after April 24, 1962. (*Id.* at p. 559.)

Based on the resulting losses, Kaufman initiated a liability action against the saw manufacturer. (*See id*. at 557.) Diehl called upon its insurer to defend the liability action, but the insurer denied coverage and refused to defend. (*Hogan v. Midland Nat. Ins. Co*. (1969) 2 Cal. App. 3d 761 [82 Cal. Rptr. 865, 866], vacated, (1970) 3 Cal.3d 553.) Diehl hired its own attorney and defended the action, which resulted in a judgment in Kaufman's favor. (*Id*.) Diehl paid the judgment, and assigned to Hogan[16] its claim against its insurer arising from the failure to defend the Kaufman action. (*Id*.)

In the ensuing coverage action, the insurer argued that damage to the boards resulting both from cutting the widths too narrow and too wide were not the result of "an accident." (See *Hogan, supra,* 3 Cal.3d at p. 559.) The Court determined that there was "no merit" to the insurer's "assertion that damages resulting from undercutting were foreseeable under [*Geddes*]." (*Id.* at p. 560.) However, the Court determined that "[t]he circumstances, and the

[16] The relationship between Hogan and Kaufman, if any, is not discussed in either the intermediate appellate court's or this Court's opinion.

legal consequences, differ[ed] as to the boards cut too wide." (*Id.*) Even though, after April 24, 1962, Kaufman cut boards extra wide to compensate for the defective saw, the Court concluded that "[w]hatever the motivation, there is no question that these boards were *deliberately* cut wider than necessary; the conduct being calculated and deliberate, no *accident* occurred ...." (*Id.*, emphasis in original.)

Again, the saw manufacturer Diehl, and not Kaufman, was the insured. (See *id.* at p. 557.) The policy insured *Diehl* "against liability for property damage caused by an accident." (*Id.*) In *Hogan* this Court did not discuss in any way whether the under- or overcutting was "accidental" from the point of view of the *insured*, *Diehl*. (See *id.,* passim.) It was simply not relevant to the analysis. The only question was whether the injury-causing act itself was deliberate. (See *id.* at pp. 560-61.) This Court reasoned: "The deliberate nature of *Kaufman's act* (i.e., he contemplated the result of his act before he cut the boards) prevented the overcutting from constituting an accident…." (*Id.* at p. 560, italics added.)

CCC attempts to distinguish *Hogan* in their brief, but fail to raise any real barrier to its application here. Amici suggest that *Hogan* is inapplicable here because it was the "*claimant* [that] deliberately made the over-width cuts ...," but they fail to explain why that should matter to the analysis. (CCC Br. at 22, emphasis in original.) In fact, it does not. As the Court explained in *Hogan*, "there is no question that these boards were deliberately cut wider than

necessary" and thus "no *accident* occurred ...." (*Hogan, supra,* 3 Cal.3d at p. 560, italics in original.) The focus is on the act itself, even if the actor *is not the insured*. The Court in *Hogan* did not place any significance in the fact that the claimant was the one who had acted deliberately. In fact, the Court's reasoning indicates the same result would obtain had the claimant been a customer seeking redress for the overcut boards, and for the same reason."[17]

Amici also argue that "the only claimed 'damage' [in relation to the over-cut boards] was ... economic loss .... [and] [t]he lack of resulting damage explains why undercut lumber (which was not accidental) was different from intentionally overcut wood (which was not)." (CCC Br., at p. 23.) In doing so, CCC incorrectly suggests that the *Hogan* ruling was based on the alternative ground that claimed damages in relation to the overcut boards did not constitute "property damage" under the policy. CCC's insinuation does not, however, reflect the reasoning behind the Court's analysis and holding. While the Court noted the different formulation of damages as awarded in relation to the overcut boards, (see *Hogan, supra,* 3 Cal.3d at p. 560), the Court did not discuss whether or not those items could be considered

[17] CCC attempts to further minimize this Court's decision in *Hogan* by positing an entirely inapposite theoretical scenario and concluding, without any support whatsoever, that "the result likely would have been different." (CCC Br., at p. 23.) By inventing an entirely different factual scenario in order to speculate about a more favorable conclusion that would support its agenda, CCC effectively admits that *Hogan* does not support its position.

"property damage" under the policy. (See *id.* at pp. 560-61.) The Court simply did not reach the issue; it was unnecessary after having determined the overcutting was not the result of an "accident."

Hogan is important in another respect. In *Hogan*, the plaintiff argued—much like amici here—that an insured's precipitating negligence should be the focus of the analysis, rather than the actual cause of the harm. (See *id.* at p. 561.) In *Hogan*, the plaintiff argued that "Diehl's reasonable expectations were that the policy would cover claims for negligence, breach of warranty or strict liability in tort," and that the insurer's position would mean that "Diehl would have obtained nothing of value for its premium dollar." (*Id*.) In *Hogan*, this Court conceded that "[i]t was established in the prior action that, *due to Diehl's improper conduct in delivering a defective saw*, Kaufman deliberately cut boards too wide." (*Id.* at p. 560, italics added.) But, the Court did not view the term "accident" as coextensive with the insured's potential negligence (or strict) liability. Rather the Court found:

> There was no evidence in the record as to the expectations of the parties and no indication that Diehl anticipated coverage for liability not attributable to accident. The basic coverage for property damage liability due to accident is common in products liability policies…. One who purchases an insurance policy against liability for property damage due to accident cannot

reasonably expect to obtain coverage for consequences clearly outside the scope of the definition of accident.

(*Hogan*, *supra,* 3 Cal.3d at p. 561, citations omitted.)

Thus *Hogan* makes clear that the determination of an "accident" rests on the injury-causing conduct (i.e., the deliberate overcutting of the lumber) and not any antecedent act that precipitated the injury. Applied here, the Court's decision in *Hogan* explains that the sexual molestation itself is the focus of the "occurrence" inquiry.

Further, changes to the ISO "occurrence" form make explicit this focus on an "objective" standard, as with the forms present in the Liberty policies. The language of the Liberty policies themselves indicate an objective focus on the injury-causing act to determine an "occurrence," with a focus on the act, not the actor. As noted in Liberty's principle brief, the 1966 ISO CGL policy form introduced the "occurrence" coverage trigger, which required that damage or injury be caused by an "occurrence." (See *Aerojet-Gen. Corp. v. Transp. Indem. Co*. (1997) 17 Cal.4th 38, 49.) In the 1966 form, "occurrence" was defined as an "accident, including injurious exposure to conditions, which results during the policy period in [bodily injury or property damage] neither expected nor intended from the standpoint of the insured." (See *id*.) After an earlier change in 1973, the 1986 form subsequently again changed the definition of "occurrence," but this time removed the clause relating to the point of the view of the insured, leaving an objective definition: "an accident,

including continuous or repeated exposure to substantially the same general harmful conditions," (*Cypress Point Condo. Ass'n, Inc. v. Adria Towers*, L.L.C., (2016) 226 N.J. 403, 417), as reflected in the Liberty policies. (See 3AER 289, 4AER 431.)

Exemplifying the "objective" approach required by the 1986 ISO "occurrence" definition is *Farmer v. Allstate Ins. Co*. (C.D. Cal. 2004) 311 F. Supp. 2d 884, aff'd (9th Cir. 2006) 171 Fed. App'x 111, discussed in Liberty's principle brief. In *Farmer*, the policy at issue provided coverage to the insured for liability arising out of an "occurrence," which was defined objectively as "an accident … resulting in bodily injury or property damage," reflecting the 1986 ISO form, and mirroring the language in the Liberty policies. (*Id.* at p. 887.) The district court examined coverage for an in-home day care operator (Mrs. Varela) in relation to an alleged molestation by her husband (Mr. Varela). (*Id.* at p. 886.) The district court noted that the alleged molestation "was not an 'occurrence' because child molestation cannot be an 'accident.'" (*Id.* at p. 891.) The *Farmer* court reasoned that it was "inclined to find that Mrs. Varela's negligent supervision does not qualify as an "occurrence." … In the instant case, the injury causing events were clearly Mr. Varela's molestations of Plaintiff—without such behavior, Plaintiff would not have brought the underlying action against the Varelas. In that Mrs. Varela's negligence enabled Mr. Varela to molest Plaintiff, Mrs. Varela's conduct only

created the potential for Plaintiff's injuries." (*Id.* at p. 893.)[18] Like this Court's analysis in *Delgado II*, *Farmer* thus reflects—correctly—that the focus of the "occurrence" analysis is the injury-causing molestation, and not dependent, precedent events like alleged negligent supervision.

IV. Amici's Request that Court Define an Accident to Embrace Either the Conduct or the Consequences of Conduct May Reflect Amici's Policy Objectives, But Does Not Dictate the Result in this Action

Like L&M, amici argue that the unintended result of deliberate acts may constitute an "occurrence." The theme is misplaced because it places the cart before the horse: *Delgado* instructs that the injury-causing act, and not remote, precipitating factors determine whether an injury is "caused by an 'occurrence.'" Amici would prefer the Court look at all number of allegedly causative factors, no matter how remote, and as to each one ask the question of whether the conduct or the consequences of that conduct were accidental. According to amici, if the answer is "yes" to either question, then there has been an injury "caused by an 'occurrence.'" This is not the question before the Court in this case. Rather, it reflects a strawman creation of amici: the question they would prefer the Court to focus on, rather than the direct

[18] While the *Farmer* court correctly applied an objective standard under California law in its discussion indicating that the alleged "bodily injury" was not caused by an "occurrence," the court ultimately based its finding of no coverage on other provisions in the policy. (See *Farmer*, *supra*, 311 F.Supp.2d at 893.)

question of whether injury caused by sexual molestation can be considered "caused by an 'occurrence'" under the Liberty policies.

An examination of UP's theoreticals (UP Brief, p. 33) is instructive and reveals that the theme does not address the issue before the Court. The first theoretical consists of an insured tossing a lit match on the ground, ignorant of gasoline that is also there, which in turn ignites and causes damage. (See *id.*) The second theoretical is similar, and reflects an insured swinging a golf club, and unaware of the person behind him, hits that person during the swing. (See *id*.) UP argues that in both instances, Liberty's position requires that there is no "occurrence" and thus no coverage under an "occurrence"-type liability policy. This is simply not the case, and does not reflect Liberty's position. In neither instance is an actor (whether the insured or another actor) engaged in conduct that by definition is intended to injure (e.g., sexual assault), and thus the theoreticals (like L&M's "baseball" theoretical, see L&M Br., p. 41), do not address the issue before the Court.

UP also presents as a "theoretical" the scenario of *Partridge* itself, and mistakenly suggest that Liberty's position is that there would no "occurrence" there either. (See UP Br., p. 34.) Liberty has made no such suggestion, and the reading of the requirement that an injury be "caused by an 'occurrence'" as informed by *Delgado*, and that Liberty has relied upon, would not preclude a finding of an "occurrence" in the *Partridge* fact pattern. No actor in *Partridge* acted to intentionally injure the claimant, and so the same analysis would not

apply, independent from the fact that the hiring and supervision here are dependent, not independent causes of the bodily injury.

Finally, and somewhat closer to the issue before the Court is UP's third theoretical in which a "disgruntled chef" deliberately taints food, and the injured patrons then sue the restaurant owner "for negligent supervision or for the restaurant's vicarious liability." (UP Br., p. 34.) As an initial matter, the restaurant owner may be subject to vicariously liability because the act of food preparation is in the course and scope of a chef's employment and thus may subject the restaurant to liability under a respondeat superior theory. In contrast, California courts have repeatedly found that sexual assault cannot be considered to be in the "course and scope" of employment. (See, e.g., *Z.V. v. Cty. of Riverside* (2015) 238 Cal. App. 4th 889, 896, review denied (Sept. 23, 2015); *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal. App. 4th 222, 227.) But, to the extent liability is claimed under a negligent supervision theory for the employee's deliberate act to intentionally injure a person(s), then the same analysis under *Delgado* that Liberty advocates here would apply.[19]

[19] Of course, there is generally no vicarious liability for sexual assault because sexual assault would almost never be considered in the "course and scope" of one's employment. (See, e.g., *Lisa M. v. Henry Mayo Newhall Mem'l Hosp*. (1995) 12 Cal.4th 291, 302-04.)

V. Amici's Argument that the Existence of Coverage in Certain Cases of Vicarious Liability Implicates Coverage Here is Misplaced

Several amici argue that the potential for liability coverage in relation to vicarious liability for an employee's intentional torts requires a finding of coverage here. UP mistakenly suggests that Liberty argues that vicarious liability cannot trigger coverage under a liability policy. (See UP Br. at p. 44, n. 12.) However, an examination of Liberty's argument reveals this is inaccurate. The portion of Liberty's brief to which UP refers states: "Without making the argument explicit, L&M suggests that an employer's vicarious liability for an employee's intentional tort should be considered the accident for the purposes of liability coverage. … However, where an intentional act is the immediate cause of the injury, the mere fact that the insured's liability is vicarious does not mean the injury is caused by an 'occurrence.'" (Liberty Br. at p. 19, citing *Dyer v. Northbrook Prop. & Cas. Ins. Co*. (1989) 210 Cal.App.3d 1540, 1551-53.) Though Liberty clearly and explicitly rooted its reasoning in the "occurrence" requirement, UP seeks to fault Liberty for not citing the case *Lisa M. v. Henry Mayo Newhall Mem'l Hosp*., 12 Cal. 4th 291 (1995), which (a) was not an insurance coverage case, and (b) did not discuss in any way the meaning of "occurrence" as used in a liability policy.

Tellingly, UP selectively quotes from *Lisa M*., but does not provide the context of the case, which in fact does not support UP's position and does not inform the "occurrence" analysis. Briefly, *Lisa M.* involved an alleged

molestation by a hospital employee of a patient during an ultrasound examination. (See *Lisa M., supra,* 12 Cal. 4th at p. 295.) The patient sued the hospital, arguing that the hospital was liable for her injury under a theory of vicarious liability and respondeat superior, among others. (See *id.* at p. 296.) On appeal, this Court addressed only the question of whether the employee's intentional tort was within the scope of his employment such that the hospital could be liable under a theory of vicarious liability. (See *id.* at pp. 299-306.) The Court concluded that, in fact, the hospital *could not* be held vicariously liable for the molestation. (See *id.* at p. 306.)[20] In doing so, the Court examined a number of "policy goals" that underlie the respondeat superior doctrine, including the goal of ensuring compensation for injury. (See *id.* at 305.) On this topic, the Court stated:

> As for ensuring compensation, the briefing does not enable us to say with confidence *whether or not insurance is actually available to medical providers for sexual torts of employees* and, if so, whether coverage for such liability would drastically

[20] Thus, while UP pins much of its argument for coverage here on the premise that employers may potentially be vicariously liable for the intentional torts of their employees, *Lisa M.* reflects that L&M *could not* be held vicariously liable for Hecht's molestation in this instance. As the Court concluded in *Lisa M.*, the hospital "by employing the technician and providing the ultrasound room, may have set the stage for his misconduct, but the script was entirely of his own independent invention." (*Lisa M.*, *supra*, 12 Cal. 4th at p. 306.) The same reasoning would apply to Hecht's molestation.

> increase the insurance costs—or, if not, the uninsured liability costs—of nonprofit providers such as Hospital.

(*Id.* at p. 305, emphasis added.) The Court then added a footnote of dicta to that discussion, which UP quotes only in part. The footnote (including the portion selectively omitted by UP) states:

> Whether a health care professional's sexual misconduct is covered under the professional's malpractice policy[21] is "a much litigated issue," depending in part on the exact factual relationship between the misconduct and the professional services for which the professional was engaged. But even where the misconduct is not sufficiently related to the provision of professional services to be covered under malpractice insurance, the hospital or other institutional provider may be covered for its vicarious liability under a commercial general liability policy. Neither Insurance Code section 533 nor related policy exclusions for intentionally caused injury or damage preclude a California insurer from indemnifying an employer held vicariously liable for an employee's willful acts.

[21] The policies before the Court here are not professional's malpractice policies.

(*Id.* at p. 305, n. 9.) The *Lisa M.* footnote does not indicate a finding of coverage, nor does it even suggest that policies will necessarily cover the type of injury at issue. Rather, the Court's footnote only reflects that neither Ins. Code § 533 nor certain common policy exclusions necessarily preclude such coverage. This is a relatively unremarkable statement, and Liberty has never suggested otherwise in this litigation.

In fact, if one were to take the dicta in the Court's *Lisa M.* footnote as controlling authority as to liability insurance coverage in relation to negligent hiring/supervision (as UP appear to propose), one would simply wind up with this Court's opinion in *Gray*. In *Gray*, this Court found that an exclusion for injury "caused intentionally by or at the direction of the insured" did not preclude coverage, where negligence may have precipitated an intentional tort. (*See Gray, supra,* 65 Cal.2d at p. 276.) Of course, this Court encountered a virtually identical fact pattern to *Gray* in *Delgado*, and came to the opposite conclusion. The key difference was the "occurrence" requirement in the relevant insurance policy, which was not triggered in the first instance.

Relying in part on *Lisa M.*, amici also suggest that law developed in relation to Ins. Code § 533 indicates that coverage should apply here. But, this too misses the mark. In explaining the result in *Gray*, this Court in *Delgado II* noted that "[a] policy clause excluding intentional injury, such as the one in *Gray*, is treated as having the same meaning as the language in Insurance Code section 533, which provides that an insurance company is not liable for a

loss caused by a willful act of the insured." (*Delgado II*, *supra*, 47 Cal.4th at pp. 331-14.) Thus, in *Delgado II* this Court recognized that the scope and impact of a coverage provision that limited the grant of coverage in the first instance to an "accident" was fundamentally different in scope to an exclusion, or Ins. Code § 533. Thus, it is irrelevant that § 533 or certain exclusions may not prohibit insurance coverage in this instance. In *Delgado II*, this Court has already considered the argument and rejected it. Where there is no "occurrence," there is no coverage, whether or not § 533 would independently act to remove coverage.

VI. Cases Cited by Amici are Inapposite and Do Not Reflect that California Law Requires a Finding of Coverage Here

Amici argue that some California courts have found that there can be an "occurrence" where an employee commits an intentional tort and the employer was allegedly negligent in its supervision or hiring of that employee, and that this in turn suggests the Court must do so here. (See UP Br., p. 45.)[22] But, the

[22] UP mistakenly states "Liberty implies that only one California case has addressed whether insurance coverage is available for a negligent supervision claim." (UP Br., p. 45, citing Liberty Br. at p. 43.) This is flatly untrue. The portion of Liberty's brief referenced by UP states: "*Of the cases cited by the district court*, only *Bay Area Cab Lease* involved an underlying claim of negligent supervision." (Liberty Br., p. 43, emphasis added.) In context, Liberty was responding to L&M's criticism of certain cases cited by the district court, and discussing only those cited cases. Liberty was correct in its characterization *of the cases cited by the District Court* in its opinion. UP's mischaracterization of Liberty's brief reflects, at best, an unfortunate, superficial understanding of this case and Liberty's position.

cases that amici cite are, at best, superficial, conclusory and are simply not rooted in California law.

Amici rely on *Fireman's Fund Ins. v. Nat. Bank for Cooperatives* (N.D. Cal. 1994) 849 F.Supp. 1347, and *Westfield Ins. Co. v. TWT, Inc*. (N.D. Cal. 1989) 723 F.Supp. 492, both of which predate *Delgado II*. In *Westfield Ins. Co*., the district court did not engage in any analysis or cite any California law related to its finding that where there were allegations of intentional fraud along with allegations of antecedent negligent supervision, an "occurrence" could have been alleged. (See *Westfield Ins. Co*., *supra*, 723 F.Supp. at p. 492.) The court in *Fireman's Fund* simply adopted the holding in *Westfield Ins. Co*., which like *Fireman's Fund Ins.* was a claim against a financial institution involving alleged misrepresentations, to conclude without analysis that "negligent supervision could constitute an 'occurrence' under the policy language." (*Fireman's Fund. Ins., supra*, 849 F.Supp. at p. 1368.)

Amici also cite *Keating v. National Union Fire Ins. Co*. (C.D. Cal. 1990)754 F.Supp. 1431, rev'd, (9th Cir. 1993) 995 F.2d 154. The district court's opinion in *Keating* is similarly flawed. While the Ninth Circuit reversed the district court in *Keating*, the district court suggested that negligent supervision could constitute an "accident" under a general liability policy. In support of the proposition, the *Keating* court cited only *State Farm Fire & Cas. Co. v. Westchester Inv. Co*. (C.D. Cal. 1989) 721 F.Supp. 1165 and one Florida case. (See *Keating*, *supra*, 754 F.Supp. at pp. 1440-41.)

Understandably, amici do not cite *Westchester* at his stage, as it provides no reasoned support for their position. In the brief *Westchester* opinion, the district court makes a conclusory statement that negligent supervision may constitute an "occurrence" in the context of a Fair Housing claim. (See *Westchester*, *supra*, 721 F. Supp. at p. 1168.) However, the *Westchester* court cites no authority for the statement, and provides no reasoning in support. (See *id*.) Thus, there is no indication that the opinion reflected California law at the time, even less so now as *Westchester* predates *Delgado*. In turn, there is no indication that *Keating*, now reversed, ever reflected California law, and certainly does not today.

CONCLUSION

Liberty respectfully submits that the Court should answer the certified question in the negative in the context of the undisputed facts of this action, and find that the *Doe* action does not allege an "occurrence" within the meaning of the Liberty policies.

Dated: July 17, 2017

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CERTIFICATE OF WORD COUNT

The text of this Answering Brief to Amici Curiae contains 11,238 words, according to the word count generated by the word-processing program used to prepare the brief.

Dated: July 17, 2017

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PROOF OF SERVICE

STATE OF OHIO, COUNTY OF HAMILTON

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 Hamilton, State of Ohio. My business address is 312 Walnut Street, Suite 1050, Cincinnati, Ohio, 45202.

On July 17, 2017, I served true copies of the following document(s) described as **RESPONDENTS' CONSOLIDATED ANSWERING BRIEF TO AMICI CURIAE BRIEFS** on the interested parties in this action as follows:

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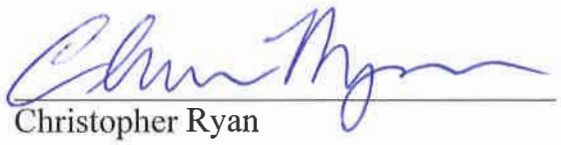
I declare under penalty of perjury under the laws of the State of Ohio that the foregoing is true and correct.

Executed on July 17, 2017, at Cincinnati, Ohio.



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