

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 218 C.D. 2023

**L.F.V., a minor, by her legal guardians
KIMBERLY VARANO and JOSEPH VARANO, and
KIMBERLY VARANO and JOSEPH VARANO in their own right,**

Plaintiffs-Appellees,

v.

**SOUTH PHILADELPHIA HIGH SCHOOL and
THE PHILADELPHIA SCHOOL DISTRICT,**

Defendants-Appellants.

**BRIEF OF *AMICUS CURIAE* CHILD USA IN SUPPORT OF PLAINTIFF-
APPELLEE**

/s/Jessica Schidlow, Esq.
Jessica Schidlow, Esq.
ID #325245
jschidlow@childusa.org

Counsel for Amicus Curiae CHILD USA

Marci A. Hamilton, Esq.
CEO & Founder, CHILD USA
3508 Market Street, Suite 202
Philadelphia, PA 19104
Tel: (215) 539-1906
marcih@sas.upenn.edu

Carina Nixon, Esq.
Senior Staff Attorney, CHILD USA
cnixon@childusa.org

Do not use without permission of CHILD USA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF CHILD USA AS <i>AMICUS CURIAE</i>	1
ARGUMENT	2
I. THE PLAIN READING AND LEGISLATIVE HISTORY OF THE PSTCA SEX ABUSE EXCEPTION CONFIRM THAT LOCAL AGENCIES CAN BE HELD LIABLE IN NEGLIGENCE FOR CSA COMMITTED BY THIRD PARTIES	2
A. The Plain Reading of the PSTCA Sex Abuse Exception Permits CSA Victims to Bring Negligence Claims Against Local Agencies for Non-Employee Offenses	3
B. The Legislative History of the Sex Abuse Exception Evidences the General Assembly’s Intent to Broaden CSA Victims’ Rights by Allowing All Negligence Claims to Proceed Against Local Agencies	7
1. <i>The General Assembly sought to create equal liability for CSA negligence between public and private institutions</i>	7
2. <i>The General Assembly intended to remove all barriers to holding responsible institutions accountable for contributing to CSA</i>	9
II. THE SEX ABUSE EXCEPTION REFLECTS PENNSYLVANIA’S COMPELLING INTEREST IN PROTECTING CHILDREN	10
A. Child Sex Abuse is a National Public Health Crisis that Affects Local Agencies	11
B. The Sex Abuse Exception Addresses Pennsylvania’s Compelling Interest in Child Protection	13
III. THE NATIONAL TREND EXPANDING CSA VICTIMS’ RIGHTS AGAINST PUBLIC ENTITIES SUPPORTS HOLDING THEM LIABLE IN NEGLIGENCE FOR CSA COMMITTED BY NON-EMPLOYEES	17
CONCLUSION	20

Do not use without permission of CHILD USA.

TABLE OF AUTHORITIES

CASES

<u>Bell v. Board of Education</u> , 687 N.E.2d 1325 (N.Y. 1997).....	18
<u>D.P. v. G.J.P.</u> , 146 A.3d 204 (Pa. 2016)	11
<u>Flagiello v. Pennsylvania Hospital</u> , 208 A.2d 193 (Pa. 1965).....	8, 9, 10
<u>Georgetown College v. Hughes</u> 130 F.2d 810 (D.C. Cir. 1941)	10
<u>Hale v. Murphey School, Inc.</u> , 2014 WL 2119652 (Del. Super. Ct. May 20, 2014)	19
<u>Hutchinson v. Luddy</u> , 946 A.2d 744 (Pa. 2008)	3, 5
<u>In re L.Z.</u> , 111 A.3d 1164 (Pa. 2015).....	4, 5
<u>In re M.Y.C.</u> , 230 A.3d 500 (Pa. 2020)	10
<u>Kush v. City of Buffalo</u> , 449 N.E.2d 725 (N.Y. 1983).....	18
<u>L.E. v. Plainfield Public School Dist.</u> , 194 A.3d 105 (N.J. Super. Ct. App. Div. 2018).....	19
<u>L.W. v. Toms River Regional School Board of Education</u> , 915 A.2d 535 (N.J. 2007)	19
<u>L.Z.</u> , 91 A.3d 208 (Pa. Super. Ct. 2014).....	5
<u>Murray v. Research Foundation of State University of N.Y.</u> , 723 N.Y.S.2d 805 (N.Y. App. Div. 2001)	18
<u>N.N. v. School District of Philadelphia</u> , No. 01055 (Phila C.C.P. Order and Opinion dated March 14, 2022).....	5, 6
<u>Nationwide Mutual Insurance Co. v. Wickett</u> , 763 A.2d 813 (Pa. 2000)	3
<u>Nolan v. Tifereth Israel Synagogue of Mount Carmel, Inc.</u> , 227 A.2d 675 (Pa. 1967)	8
<u>Pittsburgh Action Against Rape v. Department of Public Welfare</u> , 120 A.3d 1078 (Pa. Commw. Ct. 2015).....	10

<u>R.B. v. Bethlehem Area School District</u> , No. C-48-CV-2021-06713 (Northampton C.C.P Order dated April 8, 2022).....	6
<u>R.D. v. Shohola, Inc.</u> , No. 3:16-CV-01056, 2018 WL 5920640 (M.D. Pa. Nov. 13, 2018).....	8
<u>R.L. v. Voytac</u> , 971 A.2d 1074 (N.J. 2009).....	13

STATUTES

1 Pa. C.S.A. § 1921.....	3, 7
23 Pa. C.S.A. § 6381.....	4
42 Pa. C.S.A. § 8542.....	2, 3, 5, 6
Del. Code Ann. tit 10, § 4001.....	20
Md. Code Ann., State Gov’t § 12-104.....	20
N.J. Stat. Ann. § 59:2-1.3.....	20
N.Y. Ct. Clms Act § 8.....	20

OTHER AUTHORITIES

<u>At the Heart of Gold: Inside the USA Gymnastics Scandal</u> (HBO 2019).....	158
Bessel A. van der Kolk, M.D. et al., <u>Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society</u> (2006).....	13
D. Finkelhor et al., <u>Prevalence of child exposure to violence, crime, and abuse: Results from the Nat’l Survey of Children’s Exposure to Violence</u> , 169(8) JAMA Pediatrics 746 (2015).....	11
Delphine Collin-Vézina et al., <u>A Preliminary Mapping of Individual, Relational, and Social Factors that Impede Disclosure of Childhood Sexual Abuse</u> , 43 Child Abuse Negl. 123 (2015).....	12
Elizabeth J. Letourneau et al., <u>The Economic Burden of Child Sexual Abuse in the United States</u> , 79 Child Abuse Negl. 413 (2018).....	16

Do not use without permission of CHILD USA.

G. Moody et al., <u>Establishing the international prevalence of self-reported child maltreatment: a systematic review by maltreatment type and gender</u> , 18(1164) BMC Public Health (2018).....	11
G.S. Goodman et al., <u>A prospective study of memory for child sexual abuse: New findings relevant to the repressed-memory controversy</u> , 14 Psychol. Sci. 113–8 (2003).....	12
Gail Hornot, <u>Childhood Trauma Exposure & Toxic Stress: What the PNP Needs to Know</u> , J. Pediatric Healthcare (2015).....	15
I. Angelakis et al., <u>Childhood maltreatment and adult suicidality: a comprehensive systematic review with meta-analysis</u> , Psychological Medicine 1-22 (2019)	15
Jeffrey Epstein: <u>Filthy Rich</u> (Netflix 2020).....	15
M. Hamilton, <u>We Failed Our Children for Too Long: The Case for SOL Reform</u> , The Advocate, J. of the Okla. Ass’n for Just., 23 (Nov. 4, 2016).....	13
M. Stoltenborgh et al., <u>A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World</u> , 16(2) Child Maltreatment 79 (2011)	11
<u>Making the Case: Why Prevention Matters</u> , PreventChildAbuse.org.....	14
Michelle Elliott et al., <u>Child Sexual Abuse Prevention: What Offenders Tell Us</u> , 19 Child Abuse Negl. 579 (1995)	14
<u>Myths and Facts About Sexual Assault</u> , Cal. Dep’t of Just., https://www.meganslaw.ca.gov/mobile/Education_MythsAndFacts.aspx	12
N. Pereda et al., <u>The prevalence of child sexual abuse in community and student samples: A meta-analysis</u> , 29 Clinical Psych. Rev. 328, 334 (2009).....	11
National Child Traumatic Stress Network Child Sexual Abuse Committee, <u>Caring for Kids: What Parents Need to Know about Sexual Abuse</u> , Nat’l Ctr. for Child Traumatic Stress 7 (2009).	12
Perryman Group, <u>Suffer the Little Children: An Assessment of the Economic Cost of Child Maltreatment</u> , (2014).....	15
<u>Preventing Adverse Childhood Experiences</u> , CDC.gov.....	14

Do not use without permission of CHILD USA.

Preventing Child Sexual Abuse, CDC.gov11

Ramona Alaggia et al., Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000-2016), 20 Trauma Violence Abuse 260, 279 (2019).....12

Rebecca Campbell, Ph.D., The Neurobiology of Sexual Assault: Explaining Effects on the Brain, Nat’l Inst. of Justice (2012).....13

REGULATIONS

H.B. 962, 203rd Gen. Assemb., 2019 Reg. Sess. (Pa. 2019)..... 2, 7, 9, 10

OTHER AUTHORITIES

Pa. H.R. Journal, 203d Gen. Assemb., 2019 Reg. Sess., No. 24 (Pa. 2019)7, 9

Do not use without permission of CHILD USA.

STATEMENT OF INTEREST OF CHILD USA AS AMICUS CURIAE

Amicus curiae, CHILD USA, is an interdisciplinary nonprofit think tank fighting for the civil rights of children. Our mission is to pair in-depth legal analysis with cutting-edge social science research to protect children, prevent future abuse and neglect, and bring justice to survivors.

CHILD USA's interests in this case are directly correlated with its mission to protect the rights of children and eliminate barriers to justice for victims of child sexual abuse. CHILD USA is uniquely positioned to provide this Court with current research and analysis regarding Pennsylvania's state tort immunity exception for child sexual abuse claims, the compelling public interest in permitting all sexual assault claims to proceed against local agencies, the public safety impacts of removing state tort immunity for sexual abuse claims, and the national landscape on state tort immunity for sexual abuse claims.

No counsel to the parties authored this brief in whole or in part nor has any person contributed money that was intended to fund in the preparation or submission of this brief.

Do not use without permission of CHILD USA.

ARGUMENT

I. THE PLAIN READING AND LEGISLATIVE HISTORY OF THE PSTCA SEX ABUSE EXCEPTION CONFIRM THAT LOCAL AGENCIES CAN BE HELD LIABLE IN NEGLIGENCE FOR CSA COMMITTED BY THIRD PARTIES

In November 2019, the Pennsylvania General Assembly passed House Bill 962 (“H.B. 962”), which amended several sections of Title 42 of the Pennsylvania Consolidated Statutes, including provisions of the Pennsylvania State Tort Claims Act (“PSTCA”). H.B. 962, 203rd Gen. Assemb., 2019 Reg. Sess. (Pa. 2019). Relevant here is the amendment to PSTCA section 8542, which created an exception to the Commonwealth’s sovereign immunity for sexual abuse as “enumerated under section 5551(7) (relating to no limitation applicable) if the injuries to plaintiff were caused by actions or omissions of the Commonwealth party which constitute negligence.” 42 Pa. C.S.A. § 8542(b)(9) (West 2019) (“sex abuse exception”).

The sex abuse exception affords a victim of child sexual abuse (“CSA”) the ability to hold public institutions accountable for negligence that contributed to the victim’s assault. Importantly, the sex abuse exception *does not hamper this right with additional conditions or limitations*. This allows the statute to protect children from *all* instances of local agency negligence, including those where the perpetrator of the abuse is not an agency employee. In the public-school context, it thus provides an avenue to hold schools accountable, at a minimum, for their negligence in

Do not use without permission of CHILD USA.

allowing minor students to be sexually abused on school grounds by non-employee parents, volunteers, or other students. As discussed below, this conclusion is supported by the plain reading and legislative history of the sex abuse exception.

A. The Plain Reading of the PSTCA Sex Abuse Exception Permits CSA Victims to Bring Negligence Claims Against Local Agencies for Non-Employee Offenses

Pennsylvania's Statutory Construction Act provides a clear directive to courts tasked with interpreting a statute: they must "ascertain and effectuate the intention of the general assembly" and construe the statute "if possible, to give effect to all its provisions." 1 Pa. C.S.A. § 1921(a) (West). Courts should first look to the statute's plain language, as it provides the best indication of the General Assembly's intent. *Id.* at § 1921(b). Moreover, when the statutory language is unambiguous, "the rules of statutory construction do not permit courts to ignore the plain meanings of the words 'in a supposed pursuit of either its spirit or an *unstated legislative intent.*'" Hutchinson v. Luddy, 946 A.2d 744, 752 (Pa. 2008) (citing Nationwide Mut. Ins. Co. v. Wickett, 763 A.2d 813, 818 (Pa. 2000); 1 Pa. C.S.A. § 1921(b)) (emphasis added). As mentioned above, the statutory provision at issue here is section 8542(b)(9), which provides an exception to sovereign immunity for: "Sexual abuse.—Conduct which constitutes an offense enumerated under section 5551(7) (relating to no limitation applicable) if the injuries to the plaintiff were caused by actions or omissions of the local agency which constitute negligence." To determine

Do not use without permission of CHILD USA.

whether this language provides an exception to immunity in the case at hand and in other instances of sexual assault perpetrated by a non-employee on school grounds, it is necessary to determine the plain reading of “actions or omissions.”

Instructive in this regard is In re L.Z., where the Supreme Court of Pennsylvania analyzed a child abuse statute that used the same “acts or omissions” language to establish liability. 111 A.3d 1164, 1170 (Pa. 2015) (interpreting 23 Pa. C.S.A. § 6381(d)). In that case, the question was whether the statute required physical presence at the time of a child’s injury to establish a *prima facie* case that a parent or person responsible caused the abuse. L.Z., 111 A.3d at 1170. In reversing the lower court’s judgment, the Supreme Court found that physical presence was not necessary because “*the plain language of the statute neither mentions nor focuses upon the parent or responsible person’s physical presence at the time of the injury,*” and additionally because “[t]he inclusion of ‘omissions’ encompasses situations where the parent or responsible person is not present at the time of the injury but is *nonetheless responsible due to his or her failure to provide protection for the child.*” Id. at 1184 (emphasis added). The Court further recognized “the Legislature’s wise decision to establish” such a standard, noting its application in child abuse cases that “often involve ‘an apparent conspiracy of silence,’ where all the parents and caregivers refuse to explain who was responsible for the child at the exact moment

Do not use without permission of CHILD USA.

of injury.” Id. at 1171 (quoting Judge Panella’s dissent from the lower court’s majority opinion in L.Z., 91 A.3d 208, 221 (Pa. Super. Ct. 2014)).

This analysis provides a persuasive blueprint for concluding the plain meaning of section 8542(b)(9). Like the statute at issue in L.Z., section 8542(b)(9) “neither mentions nor focuses upon” the requirement Defendants-Appellants assert is necessary to establish liability. L.Z., 111 A.3d at 1184. In L.Z., the purported but statutorily absent requirement was physical presence; here, the purported but statutorily absent requirement is the public agency’s employment of the CSA offender. Accordingly, this Court should follow the Supreme Court’s example in L.Z., and Pennsylvania’s well-established rules of statutory construction, and find that the employment restriction cannot be imposed on section 8542(b)(9) because doing so would amount to ignoring the plain meaning of the words and asserting a “supposed . . . unstated legislative intent.” See Luddy, 946 A.2d at 752.

Moreover, the Pennsylvania Supreme Court’s plain reading of the word “omissions” in L.Z. mirrors the Court of Common Pleas’ interpretation as it is specifically used in section 8542(b)(9). N.N. v. Sch. Dist. of Philadelphia, No. 01055 (Phila C.C.P. Order and Opinion dated March 14, 2022). As noted in this case by the Court of Common Pleas, in N.N., the court addressed a school district’s argument identical to the one at issue here and found that the school district could be held

Do not use without permission of CHILD USA.

liable for CSA perpetrated by a third party. Id. The N.N. court explained that, based on its plain reading of section 8542(b)(9),

“[i]t is clear that the legislature’s intent is to protect children from being sexually abused and *from the inaction by institutions regarding the sexual abuse faced by children.* For Defendants, whose job is to protect, educate, and inspire our youth, *to add language that is simply not there or argue that they have no duty to protect against their agents’ acts of omission in protecting children is extremely problematic.*”

Id. (emphasis added). See also R.B. v. Bethlehem Area Sch. Dist., No. C-48-CV-2021-06713 (Northampton C.C.P Order dated April 8, 2022) (determining that the plain reading of section 8542(b)(9) allows school districts to be found negligent for student-on-student CSA).

Thus, these courts determined that the plain reading of the word “omissions” encompasses *inaction* and the *failure to protect* when used to establish liability for the negligent care of children. This Court should likewise adhere to the Pennsylvania Statutory Construction Act and conclude that the plain reading of section 8542(b)(9) allows CSA victims to hold public agencies accountable for injuries caused both by negligent acts *and their failures to act and provide protection*, regardless of whether the perpetrator of the abuse is an agency employee.

Do not use without permission of CHILD USA.

B. The Legislative History of the Sex Abuse Exception Evidences the General Assembly’s Intent to Broaden CSA Victims’ Rights by Allowing All Negligence Claims to Proceed Against Local Agencies

In the event this Court finds the wording of the sex abuse exception to be insufficiently explicit, it may deduce the General Assembly’s intent by considering various factors, including “the occasion and necessity for the statute,” “the circumstances under which it was enacted,” “the mischief to be remedied,” and “the object to be obtained.” 1 Pa. C.S.A. § 1921(c). Accordingly, an analysis of H.B. 962’s legislative history is instructive in determining the General Assembly’s intent for the sex abuse exception’s application and scope. Especially pertinent are the floor statements that several General Assembly members delivered ahead of votes on H.B. 962.

1. *The General Assembly sought to create equal liability for CSA negligence between public and private institutions*

First and foremost, the chief sponsor of the bill, Representative Mark Rozzi, clearly asserted that the bill’s main objectives were to “waive sovereign immunity for public entities guilty of covering up childhood sexual abuse” and “provid[e] for *absolute parity* in the handling of sexual abuse claims *between public and private institutions.*” Pa. H.R. Journal, 203d Gen. Assemb., 2019 Reg. Sess., No. 24 (Pa. 2019) (emphasis added).

Pennsylvania created similar parity over fifty years ago when it abrogated charitable immunity, allowing all charitable institutions to be sued in negligence for

the actions of third parties in the same way as private institutions. Nolan v. Tifereth Israel Synagogue of Mount Carmel, Inc., 227 A.2d 675, 677 (Pa. 1967) (holding “unequivocally that the doctrine of immunity of charitable institutions from liability in tort no longer exists in the Commonwealth of Pennsylvania); Flagiello v. Pa. Hosp., 208 A.2d 193, 208 (Pa. 1965) (determining that a charitable hospital’s liability for negligence “must be governed by the same principles of law as apply to other [institutions].”) In practice, this abrogation allowed a child victim to hold a summer camp liable for the sexual assault they suffered at the hands of a fellow camper. See R.D. v. Shohola, Inc., No. 3:16-CV-01056, 2018 WL 5920640, at *6 (M.D. Pa. Nov. 13, 2018) (applying Pennsylvania law and asserting that “the public interest would not be advanced by exempting the camp from a general duty of care for the children entrusted to it. Rather, the public interest is best served by imposing a duty upon such a camp to adequately supervise the children it takes into its custody.”).

The only way to achieve the “absolute parity” the General Assembly intended here is to allow local agencies, including public schools, to be held liable for negligence in the same way as private and charitable institutions. As Justice Roberts noted in his concurrence to the Flagiello majority opinion, “[p]ersonal injury is no less painful, disabling, costly or damage-producing simply because negligent harm is inflicted by a charitable institution rather than a non-charitable one. It should be

Do not use without permission of CHILD USA.

no more protected by law.” 208 A.2d at 209. In enacting the sex abuse exception, the General Assembly recognized those words are no less true when applied to the CSA harms negligently wrought by local government agencies.

2. *The General Assembly intended to remove all barriers to holding responsible institutions accountable for contributing to CSA*

In his floor statement, Representative Bryan Cutler expounded on another primary purpose of the General Assembly in drafting H.B. 962:

Our laws exist to protect us—I think we would all agree on that—and to ensure a civil society and justice. *But there are times when our laws by their very nature actually become barriers to actually protecting our citizens and affording them the rights that they are entitled to. And when those barriers become self-evident, I would offer that we have an obligation to remove them.* [H.B. 962] is our best opportunity to address this very serious issue both in our society, not just in the Commonwealth, but all across the nation, and to stand up for those whose voices were kept silent for far too long.

Pa. H.R. Journal, 203d Gen. Assemb., 2019 Reg. Sess., No. 24 (Pa. 2019) (emphasis added). Representative Jim Gregory additionally explained that “[t]he ultimate goal . . . is to provide justice for those who have been harmed and to do what we can to prevent future harm.” *Id.* These statements evidence the General Assembly’s recognition that public agency immunity for CSA negligence hinders justice for victims and the prevention of future abuse, a matter further discussed in Section II.

In this case specifically, limiting the sex abuse exception’s application to school employees would create a dangerous and inequitable loophole in public school

liability and undermine the broad child protection these General Assembly members sought to establish; CSA victims would not have recourse against public schools for peer-on-peer abuse *or for CSA committed by non-employee adult parents, volunteers, and other school visitors*. The General Assembly understood this outcome is dangerous and unacceptable and drafted H.B. 962 to rectify its harm.

Like the General Assembly, this Court should recognize that public agencies must be held accountable for *all* negligence related to CSA, as “immunity tends to foster neglect while liability tends to induce care and caution.” Flagiello, 208 A.2d at 202 (quoting Justice Rutledge’s opinion in Georgetown Coll. v. Hughes 130 F.2d 810, 824 (D.C. Cir. 1941)). Regarding the sexual abuse of Pennsylvania’s children, care and caution are the least we should demand of local agencies.

II. THE SEX ABUSE EXCEPTION REFLECTS PENNSYLVANIA’S COMPELLING INTEREST IN PROTECTING CHILDREN

In Pennsylvania, it is well established that the Commonwealth has a compelling interest in protecting its children. This Court has itself noted that, “[t]hrough the enactment of various legislation, our General Assembly has articulated that the Commonwealth as a predominant public policy and compelling interest in protecting children from abuse.” Pittsburgh Action Against Rape v. Dep’t of Pub. Welfare, 120 A.3d 1078, at fn 2, (Pa. Commw. Ct. 2015). See also In re M.Y.C., 230 A.3d 500, 510 (Pa. 2020) (explaining that “the state, acting pursuant to its *parens patriae* power, has a compelling interest in safeguarding children from

various kinds of physical and emotional harm and promoting their wellbeing.”) (quoting D.P. v. G.J.P., 146 A.3d 204, 211 (Pa. 2016)). The sex abuse exception to the PSTCA acknowledges that CSA victims suffer severe trauma at the hands of abusers and their abusers’ enablers. By allowing victims to hold public agencies accountable for their role in enabling abuse, the sex abuse exception corrects the injustice of Pennsylvania’s state tort immunity doctrine that historically blocked child victims’ claims and kept the public uninformed about dangerous predators within public agencies.

A. Child Sex Abuse is a National Public Health Crisis that Affects Local Agencies

In the United States alone, 3.7 million children are sexually abused every year.¹ This national public health crisis is indiscriminate and pervasive, affecting one in five girls and one in thirteen boys.² An extensive body of evidence establishes that childhood sex abuse survivors are traumatized in a way that is distinguishable from victims of other crimes. Indeed, many child victims of sex abuse suffer in

¹ See Preventing Child Sexual Abuse, CDC.gov, available at <https://www.cdc.gov/violenceprevention/pdf/can/factsheetCSA508.pdf>; D. Finkelhor et al., Prevalence of child exposure to violence, crime, and abuse: Results from the Nat’l Survey of Children’s Exposure to Violence, 169(8) JAMA Pediatrics 746 (2015).

² G. Moody et al., Establishing the international prevalence of self-reported child maltreatment: a systematic review by maltreatment type and gender, 18(1164) BMC Public Health (2018); M. Stoltenborgh et al., A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World, 16(2) Child Maltreatment 79 (2011); N. Pereda et al., The prevalence of child sexual abuse in community and student samples: A meta-analysis, 29 Clinical Psych. Rev. 328, 334 (2009).

silence for decades before they speak to anyone about their traumatic experiences. As children, sex abuse victims often fear the negative repercussions of speaking out, such as disruptions in family stability, loss of close relationships, or involvement with the authorities.³ This is a crime that typically occurs in secret, and many victims of sexual violence assume no one will believe them.⁴ Additionally, CSA victims may struggle with psychological barriers such as shame and self-blame, as well as social factors like gender-based stereotypes or the stigma of sexual victimization.⁵ Victims may also develop a variety of coping strategies—such as denial, repression, and dissociation—to avoid recognizing or addressing the harm they suffered.⁶ They disproportionately develop depression, substance abuse, Post-traumatic Stress Disorder (“PTSD”), and challenges in personal relationships.

Within the institutional context, this trauma is compounded by cultures of secrecy and statutory immunity, which shield organizations from public scrutiny and

³ Delphine Collin-Vézina et al., A Preliminary Mapping of Individual, Relational, and Social Factors that Impede Disclosure of Childhood Sexual Abuse, 43 *Child Abuse Negl.* 123 (2015), available at <https://pubmed.ncbi.nlm.nih.gov/25846196/>.

⁴ See Myths and Facts About Sexual Assault, Cal. Dep’t of Just., https://www.meganslaw.ca.gov/mobile/Education_MythsAndFacts.aspx (last visited Nov. 9, 2023); National Child Traumatic Stress Network Child Sexual Abuse Committee, Caring for Kids: What Parents Need to Know about Sexual Abuse, Nat’l Ctr. for Child Traumatic Stress 7 (2009), available at https://www.nctsn.org/sites/default/files/resources/fact-sheet/caring_for_kids_what_parents_need_know_about_sexual_abuse.pdf.

⁵ Ramona Alaggia et al., Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000-2016), 20 *Trauma Violence Abuse* 260, 279 (2019), available at <https://pubmed.ncbi.nlm.nih.gov/29333973/>.

⁶ G.S. Goodman et al., A prospective study of memory for child sexual abuse: New findings relevant to the repressed-memory controversy, 14 *Psychol. Sci.* 113–8 (2003), available at <https://pubmed.ncbi.nlm.nih.gov/12661671/>.

further discourage victims from reporting abuse. For instance, the Boston Globe's 2002 Spotlight investigative report uncovered rampant sexual abuse in the Catholic Church that went undisclosed and unanswered for decades. An alarming number of institutional scandals have since emerged, with more institutions—public and private—named each year.⁷

In sum, sexual abuse reaches children in all corners of society and inflicts its trauma in serious and wide-ranging ways.⁸ By passing the sex abuse exception, the Pennsylvania General Assembly recognized this harsh reality is exacerbated by local agency statutory immunity and took a reasonable step to address this issue, providing long-denied justice to CSA victims and greatly reducing the present danger to Pennsylvania's children.

B. The Sex Abuse Exception Addresses Pennsylvania's Compelling Interest in Child Protection

The sex abuse exception serves three important public purposes: it (1) identifies previously unknown child predators; (2) shifts the cost of abuse from the victims to those responsible; and (3) educates the public to prevent future abuse.

⁷ M. Hamilton, We Failed Our Children for Too Long: The Case for SOL Reform, *The Advocate*, J. of the Okla. Ass'n for Just., 23 (Nov. 4, 2016).

⁸ Rebecca Campbell, Ph.D., The Neurobiology of Sexual Assault: Explaining Effects on the Brain, Nat'l Inst. of Justice (2012), available at [https://upc.utah.gov/materials/2014Materials/2014sexualAssault/TonicImmobility Webinar.pdf](https://upc.utah.gov/materials/2014Materials/2014sexualAssault/TonicImmobility%20Webinar.pdf); R.L. v. Voytac, 971 A.2d 1074 (N.J. 2009); Bessel A. van der Kolk, M.D. et al., Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society (2006).

First, the sex abuse exception facilitates the identification of previously unknown child predators⁹ and the organizations that shield them, who would otherwise remain hidden. Statutory immunity from CSA claims gives public agencies wide latitude to suppress the truth to the detriment of children, parents, and the public. Unfortunately, unidentified predators and enablers continue abusing children; for example, one study found that 7% of offenders sampled committed offenses against forty-one to 450 children, and the longest time between offense and conviction was thirty-six years.¹⁰ Through the sex abuse exception, the General Assembly empowered victims to identify Pennsylvania's public agencies that endanger children. This, in turn, prevents those agencies from continuing to cover up sexual abuse and serves as a catalyst for the development of policies, procedures, and laws that prevent abuse from occurring in the long-term.¹¹

Second, the sex abuse exception has helped educate the public about the dangers of sex abuse within local agencies and how to prevent such abuse. When predators and organizations are exposed, particularly high-profile ones like Larry Nassar, Jeffrey Epstein, the Boy Scouts of America, and the Catholic Church, the

⁹ Michelle Elliott et al., Child Sexual Abuse Prevention: What Offenders Tell Us, 19 Child Abuse Negl. 579 (1995).

¹⁰ Id.

¹¹ See generally, Making the Case: Why Prevention Matters, preventchildabuse.org, <https://preventchildabuse.org/resource/why-prevention-matters/> (last visited Nov. 9, 2023); Preventing Adverse Childhood Experiences, CDC.gov, available at <https://www.cdc.gov/violenceprevention/pdf/preventingACES.pdf>.

media publish investigations and documentaries that enlighten communities about the insidious ways child molesters operate to sexually assault children, as well as the organizational failures that enabled their abuse.¹² Because the sex abuse exception permits an increased number of child victims to come forward, it sheds light on the prevalence of child sex abuse, which allows parents and guardians to become better equipped with the tools necessary to identify abusers and responsible organizations, while empowering the public to recognize grooming and abusive behavior. Indeed, eliminating immunity for CSA not only provides access to justice previously withheld from child victims of sexual abuse; it also prevents further abuse by fostering social awareness while encouraging public institutions to implement accountability and safety practices.

Third, the cost of child sexual abuse to victims is enormous¹³ and they unjustly carry the burden of this expense. The lifetime cost per non-fatal female victim was estimated to be \$282,734 in 2015.¹⁴ Average costs per victim include, but are not

¹² E.g., Jeffrey Epstein: Filthy Rich (Netflix 2020); At the Heart of Gold: Inside the USA Gymnastics Scandal (HBO 2019).

¹³ See M. Merricka. et al., Unpacking the impact of adverse childhood experiences on adult mental health, 69 *Child Abuse & Neglect* 10 (July 2017); I. Angelakis et al., Childhood maltreatment and adult suicidality: a comprehensive systematic review with meta-analysis, *Psychological Medicine* 1-22 (2019); Gail Hornot, Childhood Trauma Exposure & Toxic Stress: What the PNP Needs to Know, *J. Pediatric Healthcare* (2015); Perryman Group, Suffer the Little Children: An Assessment of the Economic Cost of Child Maltreatment (2014), available at <https://www.perrymangroup.com/media/uploads/report/perryman-suffer-the-little-children-11-2014.pdf>.

¹⁴ Elizabeth J. Letourneau et al., The Economic Burden of Child Sexual Abuse in the United States, 79 *Child Abuse Negl.* 413 (2018).

limited to, \$14,357 in child medical costs, \$9,882 in adult medical costs, \$223,581 in lost productivity, \$8,333 in child welfare costs, \$2,434 in costs associated with crime, and \$3,760 in special education costs.¹⁵ Costs associated with suicide deaths are estimated at \$20,387 for female victims.¹⁶ These staggering expenses gravely affect victims.¹⁷ CSA cases that result in awards and settlements equitably shift some of these costs away from victims and onto the abusers and enablers.

Nevertheless, the PSTCA previously constituted an oppressive barrier to justice because it denied CSA victims the ability to bring to court the public agencies that negligently endangered them and allowed their abuse to occur. The General Assembly's enactment of the sex abuse exception not only reasonably remedies the long-standing injustice to CSA victims barred from bringing their claims, but also serves Pennsylvania's public policy interests in keeping its children safe, preventing future child sexual abuse, and shifting the economic impacts of abuse from the victim onto the perpetrators and enablers.

Narrowly construing the sex abuse exception to exclude public agency negligence in acts committed by non-employees would establish an additional layer of protection for institutional CSA enablers, as well as another nearly insurmountable hurdle for victims. This effectively ensures institutions that

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

negligently endanger children would not be held accountable in a vast number of cases. Doing so would place more children at risk of sexual abuse and reward institutional cover-up in Pennsylvania.

As the foregoing makes abundantly clear, this case is not simply about statutory construction; it is about giving child victims of sexual abuse a voice and a chance to prevent their abusers—or their abuser’s enablers—from harming more children. In essence, Defendants-Appellants are asking the Court to sanction negligence that contributes to CSA by placing a higher value on a local agency’s right to immunity than on the Commonwealth’s compelling interest in protecting children. Affirming their position would be a grave miscarriage of justice.

III. THE NATIONAL TREND EXPANDING CSA VICTIMS’ RIGHTS AGAINST PUBLIC ENTITIES SUPPORTS HOLDING THEM LIABLE IN NEGLIGENCE FOR CSA COMMITTED BY NON-EMPLOYEES

In passing the sex abuse exception to the PSTCA, Pennsylvania joined a growing list of states that have waived immunity for claims against institutions arising from CSA. The amendment of outdated immunity statutes has grown in popularity as legislatures recognize the public interest in protecting children from sexual predators and honoring justice for CSA victims.

Today, Pennsylvania stands alongside at least thirty-six states and territories that have amended their state immunity statutes to permit CSA claims. Notably, it joins neighboring states New York, New Jersey, and Delaware in allowing victims

to pursue negligence claims against local government agencies for abuse by non-employees, including as against school districts. E.g., Bell v. Bd. of Ed., 687 N.E.2d 1325, 1326-27 (N.Y. 1997) (finding the school district negligent for the rape of a student by non-student minors that occurred during school hours after a school fieldtrip to a nearby park, concluding that “the foreseeable result of the danger created by defendant’s alleged lack of supervision was the injury such as occurred here,” explaining that “when the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs.”); Murray v. Rsch. Found. of State Univ. of N.Y., 723 N.Y.S.2d 805, 807-08 (N.Y. App. Div. 2001) (finding a middle-school student who was sexually abused by a non-school employee could hold the school district liable for negligence because “the criminal intervention of third parties may . . . be a ‘reasonably foreseeable’ consequence of circumstances created by the defendant,” which in this case, occurred when the school allowed the student “to meet alone with a coordinator of a program in which he was not enrolled, in a room with a closed door.”) (quoting Kush v. City of Buffalo, 449 N.E.2d 725, 729 (N.Y. 1983)); L.E. v. Plainfield Pub. Sch. Dist., 194 A.3d 105, 111-14 (N.J. Super. Ct. App. Div. 2018) (holding government immunity did not apply and a jury may reasonably find the school district negligent for student-on-student sexual assault that occurred on school grounds) (citing L.W. v. Toms River

Do not use without permission of CHED USA.

Reg'l Sch. Bd. of Educ., 915 A.2d 535 (N.J. 2007) (concluding that schools may be found negligent in instances of student-on-student harassment); Hale v. Murphey Sch., Inc., 2014 WL 2119652 at *5 (Del. Super. Ct. May 20, 2014) (finding the Delaware Tort Claims Act did not prevent a school district from being found negligent for a student's sexual assault of a student with special needs, despite the assault occurring after school hours and off school grounds). Additionally, L.E. provides an overview of other states that have held school districts liable in negligence for student sexual harassment by non-employees. 194 A.3d at 112 (listing cases from California, Florida, and South Carolina).

Modern laws do not distinguish between private and public defendants when permitting claims against institutions arising from CSA. This is because legislatures recognize the public interest in preventing institutions from enabling and covering up CSA is equally compelling within public agencies as it is in the private sphere. Indeed, Pennsylvania's neighboring states have relied upon similar statutory language like that created by the Pennsylvania General Assembly to permit CSA claims against institutions. See Md. Code Ann., State Gov't § 12-104(a)(2)(iii); N.J. Stat. Ann. § 59:2-1.3; N.Y. Ct. Clms Act § 8; Del. Code Ann. tit 10, § 4001.

Here, the Pennsylvania General Assembly was careful to specifically include language in the PSTCA that permits claims of child sexual abuse to proceed, *without limitation*, against local public agencies that negligently contributed to the victim's

abuse. An interpretation that limits the sex abuse exception to negligence claims against public agencies for abuse committed only by agency employees would violate the clear language of the sex abuse exception and the directive of the General Assembly. The Court should defer to the General Assembly's purposeful judgment to enact a broad child sex abuse exception to the PSTCA that gives *all* victims abused in public agencies by *all types* of perpetrators the ability to bring their abuser's enablers to justice and to help eradicate child sex abuse in Pennsylvania and interpret the sex abuse exception accordingly.

CONCLUSION

For the foregoing reasons, Amicus Curiae CHILD USA requests that this Court deny Defendants-Appellants request and uphold the Philadelphia Court of Common Pleas' December 1, 2022, Order.

Respectfully submitted,

/s/ Jessica Schidlow, Esq.
Jessica Schidlow, Esq.
ID #325245
jschidlow@childusa.org

Counsel for Amicus Curiae CHILD USA

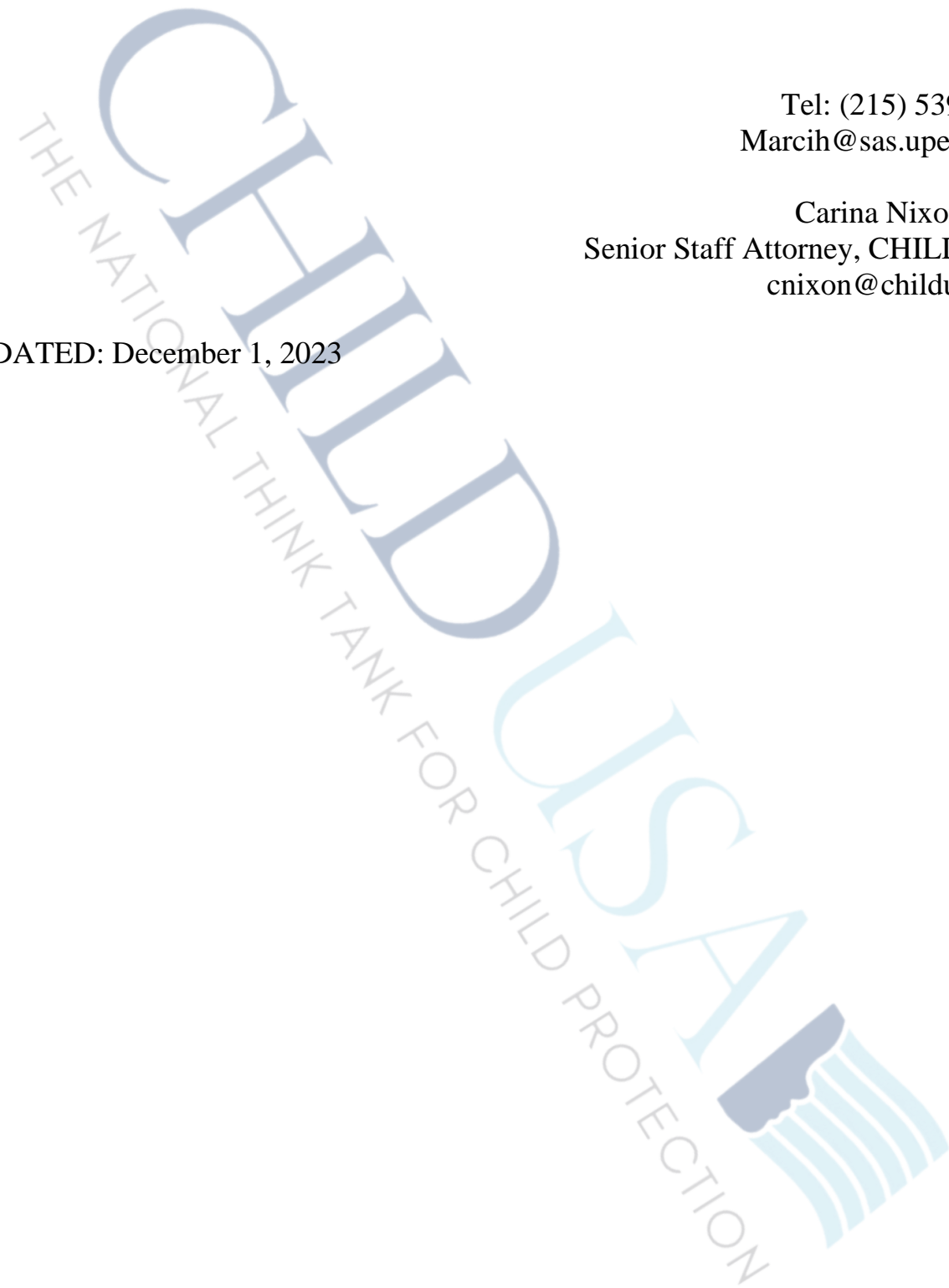
Marci A. Hamilton, Esq.
CEO & Founder, CHILD USA
3508 Market Street, Suite 202
Philadelphia, PA 19104

Do not use without permission of CHILD USA

Tel: (215) 539-1906
Marcih@sas.upenn.edu

Carina Nixon, Esq.
Senior Staff Attorney, CHILD USA
cnixon@childusa.org

DATED: December 1, 2023



Do not use without permission of CHILD USA.

CERTIFICATE OF COMPLIANCE UNDER Pa.R.A.P. 2171

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Signed,

/s/ Jessica Schidlow, Esq.
Jessica Schidlow, Esq.
ID #325245
jschidlow@childusa.org

Counsel for Amicus Curiae CHILD USA

DATED: December 1, 2023

Do not use without permission of CHILD USA.

WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the 7,000 word count limit of Pa.R.A.P. 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 2,770 words.

Signed,

/s/ Jessica Schidlow, Esq.
Jessica Schidlow, Esq.
ID #325245
jschidlow@childusa.org

Counsel for Amicus Curiae CHILD USA

DATED: December 1, 2023

Do not use without permission of CHILD USA.

CERTIFICATE OF SERVICE

I, Jessica Schidlow, Esq., do hereby certify that I have this day caused to be served the foregoing Amicus Curiae Brief by electronic service via PACFile

Signed,

/s/ Jessica Schidlow, Esq.
Jessica Schidlow, Esq.
ID #325245
jschidlow@childusa.org

Counsel for Amicus Curiae CHILD USA

DATED: December 1, 2023

Do not use without permission of CHILD USA.