

No. S22A1060

In the
Supreme Court of Georgia

Jo-Ann Taylor, Executor
Appellant,

v.

The Devereux Foundation, Inc., et al.
Appellees.

On Appeal from the State Court of Cobb County
Case No. 17A2772

**BRIEF OF CHILD USA AND NCVC
AS AMICI CURIAE IN SUPPORT OF APPELLANT**

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STATEMENT OF INTEREST OF AMICUS CURIAE CHILD USA

Amicus curiae, CHILD USA, is the leading national nonprofit think tank fighting for the civil rights of children. CHILD USA is the leading organization that tracks and studies child sexual abuse (“CSA”) statutes of limitations (“SOLs”) as part of its Sean P. McIlmail SOL Reform Institute. CHILD USA’s Founder, Professor Marci A. Hamilton, is the foremost constitutional law scholar on revival laws, and has advised Congress and state governors, legislatures, and courts on the constitutionality of revival laws for CSA throughout the United States.

CHILD USA is uniquely positioned to provide this Court with current research and analysis on the constitutionality of punitive damage awards in cases involving CSA, the science of trauma and disclosure rates of sexual abuse by victims, and the compelling public interests in deterring and preventing future abuse through civil tort litigation, including awards of punitive damages. CHILD USA hopes that its contribution will aid the Court’s analysis beyond that which the parties’ lawyers provide.

As a nonprofit organization, CHILD USA receives general contributions from interested members of the public. However, no party or party’s counsel contributed money intended to fund the preparation of, or submission of, this brief.¹

¹ Counsel for Amici would like to thank Marci Hamilton, Alice Bohn, and Bridget Brainard of CHILD USA for their significant efforts and indispensable work in the preparation of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE NCVC

The National Center for Victims of Crime (NCVC), a nonprofit organization based in Washington, D.C., is a leading resource and advocacy organization for all victims of crime. The mission of NCVC is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, NCVC, among other efforts, advocates for laws and public policies that create resources and secure rights and protections for crime victims. To that end, NCVC has filed and joined in *amicus curiae* briefs in cases across the country to advance the rights and interests of crime victims, including victims of abuse or sexual assault.

This case involves an issue of great importance to the community of crime victims served by the NCVC; the availability and efficacy of a punitive damage remedy in cases where punitive relief is warranted. For this reason, NCVC wishes to join in the brief on this issue being submitted by or on behalf of CHILD USA, another organization dedicated to defending the rights of crime victims, particularly children.

PRELIMINARY STATEMENT

CHILD USA respectfully submits this brief as *amicus curiae*. Plaintiff-Appellant challenges the lower court's ruling that reduced the jury's verdict on punitive damages to the maximum amount of \$250,000 allowed under O.C.G.A. § 51-12-5.1. CHILD USA agrees with Plaintiff-Appellant that this cap on punitive damages is unconstitutional.

The availability of punitive damages to punish and deter defendants who commit, or permit, sexual abuse is a critical tool to protect children – and not a new one. At common law, punitive damages were not just available, but routinely awarded for civil wrongs of a sexual nature. 3 W. Blackstone, *Commentaries on the Laws of England*, 139 (3d Ed. 1769) (noting in an action for adultery that “the damages recovered are **usually** very large and exemplary” (emphasis added)). That right to recover punitive damages for an egregious civil wrong is bound up in, and protected by, the inviolate right to trial by jury.

It cannot be overstated how badly that remedy is needed to address the gravity and pervasiveness of the harm. CSA is a public policy crisis affecting one in five girls, and one in thirteen boys in this nation.² Historically, most child victims never

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) (finding a 20.4% prevalence rate of child sexual abuse among North American girls); M. Stoltenborgh, et. al., *A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World*, 16(2) CHILD MALTREATMENT 79 (2011) (finding a 20.1% prevalence rate of child sexual abuse among North American girls); N. Pereda, et. al., *The prevalence of child sexual*

go to the authorities, and most claims expire before the victims were able to get into court.³ Of those individuals who do choose to disclose, even fewer seek to hold their perpetrators accountable by filing civil claims. The many challenges associated with first disclosing sexual abuse and then seeking civil action are compounded when states impose tort limits on damages. The civil plaintiffs who somehow manage to avoid falling into these systemic cracks, and who hurdle the necessary obstacles to present a case to a jury, represent a very small part of a tiny fraction of victims whose lives have been shattered by this crisis. Their cases must count.

Importantly, punitive damages in Georgia are statutorily unavailable unless the plaintiff can prove willfulness, malice, fraud, wantonness, oppression, or conscious indifference, and do so by clear and convincing evidence. In other words, punitive damages are available only against defendants whose conduct is particularly egregious, and only then when there is substantial evidence of that horrific conduct. Yet, the statutorily imposed cap protects those whose conduct is extraordinarily egregious and abhorrent, and harms not only the victims of that conduct, but also the future and yet-unknown victims of that same conduct.

abuse in community and student samples: A meta-analysis, 29 CLINICAL PSYCH. REV. 328, 334 (2009) (finding a 7.5% and 25.3% prevalence rate of child sexual abuse among North American boys and girls respectively).

³ CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, CHILDUSA.ORG, 3 (Mar. 2020) available at <https://childusa.org/wpcontent/uploads/2020/04/Delayed-DisclosureFactsheet-2020.pdf>.

Thus, Georgia's cap on punitive damages shields the few perpetrators and enabling institutions who cannot prevent a plaintiff from reaching a jury from being held fully accountable by that jury. It therefore further reduces the limited incentive for them and others to enact child protection measures to ensure that the same abuse does not reoccur in the future.

CHILD USA respectfully requests that this Court recognize that the right to a trial by jury includes the right to recover the amount of punitive damages determined by the jury and hold that the cap on punitive damages in O.C.G.A. § 51-12-5.1 is unconstitutional.



ARGUMENT

“Prior to adoption of the 1798 Constitution, the General Assembly had adopted the common law of England and all statutes in force as of 1776 as the law of Georgia.” *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 733 (2010). The authoritative expression of that law “before and since the Revolution” has been the Commentaries of Sir William Blackstone. *Id.*

In 1776, some universally held principles were very different, but others remain the same to this day. For example, Blackstone noted that “[a]dultery or criminal conversation with a man’s wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater) the law gives satisfaction ... wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances; as the rank and fortune of the plaintiff and defendant ... [read: punitive damages].” 3 W. Blackstone, *Commentaries on the Laws of England*, 139-40 (3d Ed. 1769).

Understandably, quite a few of these ideals and the accompanying laws, both in Georgia and across the country, have changed since then – many by force of the United States Constitution and its Equal Protection Clauses. Women are no longer treated as the property of their husbands or fathers, and thus claims for their injuries no longer belong to their husbands or fathers. However, one thing has not changed:

there “can be no greater ... civil injury” than sexual abuse and violence, and no remedy for that unfathomable wrong is adequate without “the very large and exemplary” damages recoverable at common law. Despite that transcendent reality—embedded in Georgia’s constitutional (and substantive) jury trial right—the General Assembly has passed a law that purports to strip that right away from violated victims, and, in the process, arrogate to itself the judiciary’s power of remittitur to effectively say that no act of sexual violence could ever merit an award more than \$250,000 in punitive damages. That is as constitutionally infirm as it is practically abhorrent.

Caps on punitive damages disrupt the compelling public interests of justice, healing, and prevention that civil litigation of CSA claims should provide. The severity of the harm in these cases, the culpability of the defendants, and the traumatic aftermath for victims make them precisely the types of cases where punitive damages should be awarded. Punitive damages hold the responsible actors accountable and deter a repeat of the same behavior. A cap on punitive damages was implemented under a misguided notion that it was necessary to prevent excessive awards, but it subverts the purposes of civil litigation, unconstitutionally violates the right to trial by jury, and undermines the separation of powers. The net result is reducing the incentive for youth-serving institutions to keep children safe.

I. UNCAPPED PUNITIVE DAMAGES AWARDS ARE ESSENTIAL IN CHILD SEX ABUSE CASES BECAUSE OF THE CULPABILITY OF THE DEFENDANTS AND HARM TO THE VICTIM

Punitive damages serve a critical role in the civil justice system. They deter unsafe practices by imposing financial liability upon bad actors and ensure that those bad actors face the full costs of their dangerous behavior. “Punitive damages” is synonymous with “vindictive damages,” awarded “because of aggravating circumstances in order to penalize, punish, or deter a defendant.” O.C.G.A. § 51-12-5.1(a). The purposes of punitive damages are “(1) to punish the defendant for wrongdoing and (2) to deter the defendant and others from similar conduct in the future.” Restatement (Second) of Torts § 908(1) (1979).⁴

Punitive damages in tort cases are an extraordinary remedy, but an important one for cases where they are appropriate. *See Walker v. Sheldon*, 179 N.E.2d 497, 498-99 (N.Y. 1961) (“Punitive [damages] ... have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him as well as others.”). In

⁴ See also *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); W. Page Keeton et al., *Prosser and Keeton on the law of Torts*, § 2, at 9 (5th ed. 1984) (noting that the main purposes of punitive damages are to punish the defendant and deter both the defendant and others from acting in a similar manner); Linda L. Schleuter, 1 PUNITIVE DAMAGES § 1.4(B), at 16-17 (5th ed. 2005) (observing that the most widely accepted purposes of punitive damages have been punishment and deterrence); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 356- 57 (2003) (stating that courts and academic commentators agree that punishment and deterrence are the two prevailing justifications for punitive damages).

Georgia, they may only be awarded where it is “proven by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.” O.C.G.A. § 51-12-5.1(b).

CSA cases—including those where institutions knew of the abuse and continued to enable the abuse, resulting in further traumatic injuries—are exactly the types of cases where an award of punitive damages is appropriate, and needed, to punish egregious misconduct and prevent future abuse. *See, e.g., Hutchison ex rel. Hutchison v. Luddy*, 2006 PA Super 59, 896 A.2d 1260 (2006) (awarding \$1 million in punitive damages when church officials ignored complaints and evidence of priest pedophilia, and transferred admitted child molesters without warning anyone where they transferred those priests).

A. The Culpability for, and Trauma Caused by, Child Sex Abuse Often Necessitates an Award of Punitive Damages

An extensive body of scientific evidence establishes that childhood sexual abuse survivors are traumatized in a way that is distinguishable from victims of other crimes. As explained by the Center for Disease Control, “Adverse Childhood Experiences” (“ACEs”), like CSA, “have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity.”⁵ Indeed, in

⁵ *The Adverse Childhood Experiences (ACE) Study*, Centers for Disease Control & Prevention, <http://www.cdc.gov/violenceprevention/acestudy/#1>; *see also* Vincent J. Felitti et al., *Relationship*

1998, one of the largest investigations to date of the effects of childhood abuse, including sexual abuse, established a strong relationship between ACEs and negative effects across the lifespan, including: disrupted neurodevelopment; impaired social, emotional, and cognitive development; psychiatric and physical disease; and disability.⁶

Survivors of CSA, therefore, often need decades to process and cope with the abuse they suffered, much less to report it.⁷ In one study, 44.9% of male victims and

of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study, 14(4) AM. J. PREV. MED. 245 (1998); S.R. Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study*, 286 JAMA 24, 3089 (Dec. 2001) (explaining that childhood trauma can lead to negative health outcomes).

⁶ See Felitti, at 245–58; see also R. Anda, et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCH PSYCHIATRY CLIN. NEUROSCIENCE 174, 175 (Nov. 2005) (“Numerous studies have established that childhood stressors such as abuse or witnessing domestic violence can lead to a variety of negative health outcomes and behaviors, such as substance abuse, suicide attempts, and depressive disorders”); M. Merricka., et al., *Unpacking the impact of adverse childhood experiences on adult mental health*, 69 CHILD ABUSE & NEGLECT 10 (July 2017); see also Sachs-Ericsson, et al., *A Review of Childhood Abuse, Health, and Pain-Related Problems: The Role of Psychiatric Disorders and Current Life Stress*, 10(2) J. TRAUMA & DISSOCIATION 170, 171 (2009) (adult survivors are thirty percent more likely to develop serious medical conditions such as cancer, diabetes, high blood pressure, stroke, and heart disease); T.L. Simpson, et al., *Concomitance between childhood sexual and physical abuse and substance use problems: A review*, 22 CLINICAL PSYCHOL. REV. 27 (2002) (adult survivors of child sexual abuse are nearly three times as likely to report substance abuse problems than their non-survivor peers).

⁷ Rebecca Campbell, Ph.D., *The Neurobiology of Sexual Assault: Explaining Effects on the Brain*, NAT’L INST. OF JUSTICE (2012), [https://upc.utah.gov/materials/2014Materials/2014sexualAssault/TonicImmobility Webinar.pdf](https://upc.utah.gov/materials/2014Materials/2014sexualAssault/TonicImmobility%20Webinar.pdf) (hereinafter “Campbell”); *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).

25.4% of female victims of CSA delayed disclosure by more than 20 years.⁸ CSA victims may struggle to disclose their experiences due to the effects of trauma and psychological barriers such as shame, self-blame, or fear, as well as social factors, such as gender-based stereotypes or stigma regarding victimization.⁹ An estimated 70% of child sexual assault victims never contact police to report their abuse.¹⁰

With overwhelming social science research detailing the severe harm that CSA-related trauma is known to cause throughout a victim's life, as well the proven conscious indifference to the risk of child victimization, institutions like Defendant-Appellees are especially culpable and deserving of the imposition of substantial punitive damages, as determined and awarded by the jury.

B. Punitive Damage Awards in Cases Involving Institutional Abuse in Residential Treatment Facilities Are Appropriate and Essential

CSA is a public policy and public health crisis, with approximately 3.7 million children sexually abused in the United States every year.¹¹ It affects one in five girls

⁸ Patrick J. O'Leary & James Barber, *Gender Differences in Silencing following Childhood Sexual Abuse*, 17 J. Child Sex. Abuse 133 (2008).

⁹ 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).

¹⁰ David Finkelhor et al., *Sexually Assaulted Children: National Estimates and Characteristics*, US Dept. of Justice, Office of Justice Programs (2008), <https://www.ojp.gov/pdffiles1/ojdp/214383.pdf> (Based on an analysis of an estimated 285,400 child sexual assault victims, researchers found that only 30% of cases involved police contact.).

¹¹ See *Preventing Child Sexual Abuse*, CDC.gov (last visited Nov. 29, 2021), available at <https://www.cdc.gov/violenceprevention/pdf/can/factsheetCSA508.pdf>; see also 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 (Aug. 2015), <http://unh.edu/crcr/pdf/CV331.pdf>.

and one in thirteen boys in this nation.¹² Heartbreakingly, research has shown that sexual abuse within residential treatment facilities— like here—is even more frequent, and even more prevalent. A study in the Netherlands found that children in residential care had a 9-fold increase in the risk of CSA in 2010 compared to children aged 12 or older in the general Dutch population.¹³

In addition to the severely harmful effects of CSA as outlined above, institutional sexual abuse in settings like residential treatment facilities is particularly concerning. Victims suffer a distinct harm, known as “institutional betrayal,” upon learning that an entity responsible for their care knowingly allowed their abuse to happen.¹⁴ This discovery is strongly linked to poorer outcomes for

¹² 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) (finding a 20.4% prevalence rate of child sexual abuse among North American girls); M. Stoltenborgh, et. al., A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World, 16(2) CHILD MALTREATMENT 79 (2011) (finding a 20.1% prevalence rate of child sexual abuse among North American girls); 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) (finding a 7.5% and 25.3% prevalence rate of child sexual abuse among North American boys and girls respectively).

¹³ Saskia Euser et al., *The Prevalence of Child Sexual Abuse in Out-of-Home Care: A Comparison Between Abuse in Residential and in Foster Care*, CHILD MALTREATMENT (May 2013).

¹⁴ Elizabeth Oddone Paolucci et al., *A Meta-analysis of The Published Research on the Effects of Child Sexual Abuse*, 135 J. PSYCH. 17 (Jan. 2001).

victims.¹⁵ In fact, the negative effects of institutional betrayal exacerbate and often exceed those associated with the primary abusive experience.¹⁶

The severe traumatic effects of CSA, particularly in residential treatment facilities, and the evidence of disclosure rates of abuse that often spans decades, show that punitive damage awards are a crucial tool in combatting and deterring egregious societal misconduct. But importantly for the Court’s analysis in this case, institutional abuse cases often involve the degree of culpability that has allowed a jury to award punitive damages to the plaintiff since the early 1700s – consciously disregarding a known risk of extreme harm to a vulnerable person. 3 W. Blackstone, *Commentaries on the Laws of England*, at 139 (noting that in an action for sexual misconduct “the damages recovered are **usually** very large and exemplary” (emphasis added)); 220 (“very exemplary damages will probably be given” for continuing failing to correct known hazard that threatens safety of others); *see also Tullidge v. Wade*, 95 E.R. 909, 910 (K.B. 1769) (approving of exemplary damages in father’s action for seduction of his daughter and noting that “if [the daughter] brings another action against defendant, for breach of promise of marriage, so much

¹⁵ Carly P. Smith & Jennifer J. Freyd, *Insult, then Injury: Interpersonal and Institutional Betrayal Linked to Health and Dissociation*, 26 J. OF AGGRESSION, MALTREATMENT, AND TRAUMA 1117 (June 19, 2017).

¹⁶ *Id.*

the better; he ought to be punished twice.”). Depriving a victim of the historical remedy of a sufficient punitive award is as unconstitutional as it is unjust.

II. GEORGIA’S CAP ON PUNITIVE DAMAGES SUBVERTS THE PURPOSES OF CIVIL LITIGATION TO HOLD RESPONSIBLE ENTITIES ACCOUNTABLE AND PREVENT FUTURE ABUSE

Civil litigation helps CSA victims in ways that the criminal justice system cannot. It can relieve victims of the financial burdens of abuse as well as provide a forum in which to hold perpetrators and culpable third parties directly accountable to the victim for the harms that they caused. Georgia’s arbitrary cap on punitive damages for civil tort claims thwarts the important public interests of holding responsible perpetrators and the institutions that enabled them accountable, deterring others from the same egregious misconduct, and incentivizing behavior and policies that protect children.

A. Civil Litigation, Including Punitive Damage Awards, Deters Future Abuse and Incentivizes Increased Child Protection Policies

Historically, a wall of ignorance and secrecy has been constructed around CSA, which has been reinforced by state tort statutes of limitations that have deterred or completely disabled victims from filing claims. Yet, it is in society’s interest to have sex abuse survivors identify hidden child predators to the public and hold them, and the institutions that enable them, accountable. Civil litigation has been key to uncovering the extent of sexual abuse within the Catholic Church and the subsequent

cover up by Church officials, as well as the implementation of enhanced child protection measures like mandated reporting of abuse to law enforcement.¹⁷

Punitive damages play a unique and critically important role in civil litigation to deter future abuse. Punitive damages are “the expression of public censure in private law.”¹⁸ Notably, punitive damages are “often more effective than criminal laws in protecting the public from dangerous products and practices.”¹⁹ Caps on punitive damages not only protect perpetrators of CSA, but they also disincentivize institutions from regulating employees who pose a risk to children and from adopting policies and procedures that protect children. Limiting punitive damages to a set amount of money “undermines their deterrent force in the civil justice system.”²⁰ Specifically, “[l]imiting punitive damages to a predictable amount of money allows for profit-maximizing behavior,” meaning that there is a disincentive to enact needed changes if doing so costs more than the maximum punitive exposure. Rather, punitive damages award amounts should depend (as they did at common law) on the

¹⁷ See generally *Reports of Attorneys General, Grand Juries, Individuals, Commissions, and Organizations*, BISHOPACCOUNTABILITY.ORG (last visited July 1, 2022), <https://www.bishop-accountability.org/AtAGlance/reports.htm>; *Vatican laws changed to toughen sexual abuse punishment*, BBC (June 1, 2021), available at <https://www.bbc.com/news/world-europe-57318959>.

¹⁸ Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079 (1989).

¹⁹ Thomas H. Koenig and Michael L. Rustad, “The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers,” 42 Am. U. L. Rev. 1269, 1324 (Summer 1993).

²⁰ Emily Gottlieb, *What You Need to Know About... Punitive Damages*, Center for Justice & Democracy (Sept. 2011), available at <https://centerjd.org/system/files/PunitiveDamagesWhitePaper2011.pdf> (hereinafter “Gottlieb”).

various factors that are considered on a case-by-case basis, including the specific misconduct involved. This forces institutions to consider the possibility of injury and drives companies to prioritize safety.²¹

A punitive damage award of \$18.5 million against the Boy Scouts of America in April 2010 illustrated the importance of educating the public of the widespread abuse and coverup by the Scouts, holding the organization accountable, deterring other child-focused organizations from the same misconduct, and demanding improved child protection policies. During the trial, more than 1,000 files kept on suspected child molesters from 1965-1985 were introduced detailing numerous instances across the country where troop leaders or volunteers were allowed to continue working with children after sexual abuse complaints without notifying parents or law enforcement.²² Until that time, most abuse cases involving the Scouts ended in private confidential settlements, and the public had not been informed about how much the organization paid to victims.²³ After the verdict in 2012, the Boy Scouts were ordered to release the sexual abuse files it had maintained for

²¹ *Id.*

²² William Yardley, *\$18.5 Million in Liability for Scouts in Abuse Case*, THE NEW YORK TIMES (Apr. 23, 2010), <https://www.nytimes.com/2010/04/24/us/24scouts.html>.

²³ *Boy Scouts Must Pay \$18.5M in Punitive Damages*, ASSOCIATED PRESS (Apr. 23, 2010), <https://www.cbsnews.com/news/boy-scouts-must-pay-185m-in-punitive-damages/> (The victim's attorney, Paul Mones, commented, "They've always settled. And they're silent. No one hears because it does not see the light of day. What we saw here... really pulled back the covers on the Boy Scouts of American, and what it did to cover up.").

approximately 90 years to the public.²⁴ In the years following the release, prestigious institutions, including Penn State University, elite private schools like Horace Mann, and Olympic sporting programs like USA Gymnastics and USA Swimming, have been exposed as protecting their employees and volunteers accused of sexual abuse at the expense of child safety.²⁵ In sum, uncapped punitive damages awards are essential to compel large organizations to behave appropriately, rather than calculating the harm to human dignity and health as a budgeted risk on the profit/loss statement.

Moreover, Georgia's cap on punitive damages undermines the entire purpose for those damages. Because the law restricts these judgments to a mere \$250,000, bad actors are "on notice" of the maximum amount they will have to pay if they are found liable, and therefore, can prepare for that liability as "the cost of doing business." In cases involving CSA, the incentives for institutions like Defendant-Appellee and others to implement increased child protection measures are severely lacking. Georgia's cap on punitive damages replaces the constitutional right to the enlightened conscience of the jury with an arbitrary amount that runs afoul of its

²⁴ Kirk Johnson, *Oregon Justices Approve Release of Boy Scouts' 'Perversion Files,'* THE NEW YORK TIMES (June 14, 2012), <https://www.nytimes.com/2012/06/15/us/court-approves-release-of-boy-scouts-perversion-files.html>.

²⁵ See Paul Mones, *Boy Scouts bankruptcy a warning to others who have ignored sexual abuse,* USA TODAY (Feb. 18, 2020), <https://www.usatoday.com/story/opinion/2020/02/18/boy-scouts-abuse-bankruptcy-day-reckoning-group-failed-boys-column/4795945002/>.

deterrence purpose and thwarts the goal of civil litigation in holding responsible institutions accountable and preventing future abuse. The imposition of punitive damages, as in this case, sends a message to would-be perpetrators and enablers that abuse will not be tolerated in Georgia. Organizations must root out sexual abuse, not budget for it.

B. Capping Punitive Damages Serves No Legitimate Purpose Because Awards Are Only Allowed with Proof of Sufficiently Culpable Behavior, They Are Proportional to the Defendant’s Behavior and Harm, and There Are Tools for Review Within the Judicial Branch

Although other state legislatures have imposed or attempted to impose restrictions on punitive damages, empirical research suggests that punitive damages do not threaten the civil litigation system. Scholars have found that “punitive awards have not increased in frequency over time; most awards are modest in size and show a reasonable proportionality between harm and potential harm of conduct; juries pay particular attention to the reprehensibility of conduct; and there is little evidence supporting the claim that juries are biased against businesses.”²⁶

Specifically, studies have consistently shown that punitive damages are rarely awarded, with rates of about 3 to 5 percent of plaintiff trial wins.²⁷ Long-term data

²⁶ N. Vidmar & M. Holman. (2010). *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts: A New Audit*. Suffolk University Law Review, XLIII:855 (Jan. 2010).

²⁷ Eisenberg, Theodore; Heise, Michael; Waters, Nicole L.; and Wells, Martin T., “The Decision to Award Punitive Damages: An Empirical Study” (Fall 2010). *Cornell Law Faculty Publications*. 185; see also Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 965 (2007) (“The bottom line is that from the perspective of the tort system overall, punitive

from the U.S. Department of Justice also found that punitive damages were sought in only 12 percent of all civil trials in state courts, with only 10 percent of tort trials in 2005.²⁸ They are also shown to be relatively modest on average, with the median overall punitive damage amount awarded to plaintiffs in civil cases at \$64,000.²⁹

And when juries determine that the conduct of a defendant warrants an award of punitive damages, judicial review will ensure that the damages are both warranted by the evidence and constitutionally appropriate. The proper judicial tools for ensuring a punitive damages award is not excessive, or in conflict with due process, are well known to Georgia Courts. *See Fassnacht v. Moler*, 358 Ga. App. 463, 476-81 (2021) (evaluating punitive damages award under federal due process jurisprudence, including *BMW v. Gore* and *State Farm v. Campbell*, and reviewing excessiveness under Georgia law). CHILD USA agrees with Plaintiff-Appellant that those powers are properly committed to the judiciary and that the legislature's attempt to impose a one-size-fits-all remittitur of punitive damages awards is an unconstitutional arrogation of power away from the judiciary to the indiscriminate harm of sexual abuse survivors, and to the benefit of an organization that perpetuated and knowingly permitted the sexual abuse of the most vulnerable among us.

damages have been rare and there does not seem to be any risk of them becoming less rare, even had there been no tort reform.”).

²⁸ Gottlieb at 9-10 (citing U.S. Department of Justice, Bureau of Justice Statistics, *Punitive Damage Awards in State Courts*, 2005, NCJ 233094 (March 2011) (Table 1)).

²⁹ *Id.*

It is an essential right embedded within constitutionalized common law that the jury determine “what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case,” O.C.G.A. § 51-12-5.1(d)(2), and review of that finding may properly be had only by the judicial branch and only for excessiveness and compliance with due process. *Fassnacht*, 358 Ga. App. at 476-81; *see also Time Warner v. Six Flags*, 254 Ga. App. 598, 601 (2002).

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to find that the cap on punitive damages in child sexual abuse cases under O.C.G.A. § 51-12-5.1(g) is unconstitutional in violation of the jury trial right and separation of powers.

Respectfully submitted this 7th day of September 2022.

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CERTIFICATE OF SERVICE

I CERTIFY that there is a prior agreement with opposing counsel to allow documents in a .pdf format sent via email to suffice for service, and that I thus served a PDF copy of this BRIEF OF AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANT to counsel as follows:

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SUPREME COURT OF GEORGIA
Case Nos. S22A1060; S22X1061;
S22A1161; S22X1097

July 22, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JO-ANN TAYLOR, EXECUTOR v. THE DEVEREUX
FOUNDATION, INC. et al.
THE DEVEREUX FOUNDATION, INC. et al. v. JO-ANN TAYLOR,
EXECUTOR

MICHELLE MCKINNEY, ADMINISTRATOR v. GWINNETT
OPERATIONS, LLC et al.
GWINNETT OPERATIONS, LLC et al. v. MICHELLE MCKINNEY,
ADMINISTRATOR

In each of these cases, the trial court entered an order reducing the jury's punitive damages award for the plaintiff to a total of \$250,000 under OCGA § 51-12-5.1 (g). On appeal, each plaintiff reasserts her argument, which the trial court rejected, that OCGA § 51-12-5.1 (g)'s punitive damages cap violates the Georgia Constitution. Oral argument in each case has been set for the October 2022 calendar. In addition to the briefs of the parties, the Court invites the Solicitor General's Unit of the Office of the Attorney General of Georgia, the Georgia Trial Lawyers Association, and the Georgia Defense Lawyers Association to file briefs of amicus curiae expressing their views on the following questions:

Does the punitive damages cap in OCGA § 51-12-5.1 (g) violate the Georgia Constitution, either facially or as applied?

What relevant causes of action existed and provided for punitive damages before the adoption of the Georgia constitutional right to a trial by jury, and how, if at all, does this answer inform analysis of the constitutionality of OCGA § 51-12-5.1 (g)? See *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 733-737 (691 SE2d 218) (2010).

Any brief of amici curiae filed pursuant to this order shall comply with the page limits set forth in Supreme Court Rule 20 (4).

Any amicus briefs from the amici listed above, and any other amici curiae who wish to express their views on this question—whether in support of an appellant, of an appellee, or of neither party—shall be filed on or before September 7, 2022.

The Court discourages any requests for extension of time to file amicus briefs.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

 , Clerk