1:20-cv-02522-SEB-MPB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

TERIN HUMPHREY Creditor/Appellant, vs. USA GYMNASTICS Debtor, and TORT CLAIMANTS COMMITTEE Appellee/Sole-Objecting Party.	: : : : : : : : : : : : :	1:20-cv-02522-SEB-MPB

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION
CASE NO. 18-09108-RLM-11 [DOC. 1213]

CHILD USA'S MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

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CHILD USA'S
MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

NOW COMES CHILD USA,[1] a 501(c)(3) nonprofit think tank based in Philadelphia, Pennsylvania, by and through its counsel Shaunestte N. Terrell, of Cohen & Malad, LLP, and moves this Honorable Court for leave to file an Amicus Curiae Brief in support of Creditor/Appellant Terrin Humphrey in this matter. In support of its Motion for Leave to Participate as Amicus Curiae, CHILD USA states:

1. Creditor/Appellant Terrin Humphrey is 2-time Olympic silver medal award-winning gymnast, who is a survivor of childhood sexual assault by Larry Nassar, who has filed a claim against USA Gymnastics in bankruptcy court.
2. Humphrey became aware of her claim after the bankruptcy bar date and seeks to have her claim permitted as timely.
3. Under Virginia law, Humphrey's claim is within the child sex abuse statutes of limitations.
4. USA Gymnastics did not object to Humphrey's Motion to Allow Late Filed Claim to Be Treated as Timely Filed, but an objection was filed by the Additional Tort Claimants Committee of Sexual Abuse Survivors.
5. The Bankruptcy Court denied Humphrey's Motion.
6. The instant case presents significant legal constitutional issues that impact the rights of survivors of childhood sexual assault across the country.
7. The instant case presents questions regarding the impact of bankruptcy proceedings on state efforts to deter and remedy child sex abuse and the due process rights of survivors of childhood sexual assault.

[1] *See* https://childusa.org/.

8. The instant case presents questions regarding the constitutionality of the federal bankruptcy system foreshortening state-determined statutes of limitation.

9. These questions are central to CHILD USA's mission to advocacy for children's rights and abuse prevention across the nation.

10. CHILD USA is a 501(c)(3) non-profit think tank that conducts evidence-based legal, medical, and social science research to identify laws and policies affecting child protection.

11. CHILD USA supports legal reform to prevent child abuse across the country through cutting edge legal, medical, and legal analysis.

12. Professor Marci Hamilton, University of Pennsylvania, is the Founder, CEO, and Legal Director of CHILD USA.

13. Professor Hamilton is the leading expert in the United States on child sex abuse statutes of limitations reform, and a distinguished church/state scholar. She is also the Fels Institute of Government Professor of Practice, where she teaches public policy and public law, and a Fox Family Distinguished Scholar in Residence at the University of Pennsylvania.

14. Before founding CHILD USA, Professor Hamilton held the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University. She is the author of Justice Denied: What America Must Do to Protect Its Children (Cambridge University Press 2008) and God vs. the Gavel: The Perils of Extreme Religious Liberty (Cambridge University Press 2014).

15. Professor Hamilton clerked for Associate Justice Sandra Day O'Connor of the United States Supreme Court and Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit. She received her J.D., magna cum laude, from the University of Pennsylvania Law School, where she served as Editor-in-Chief of the University of

Pennsylvania Law Review. She also received her M.A. in Philosophy and M.A., high honors, in English from Pennsylvania State University, and her B.A., summa cum laude, from Vanderbilt University. She is a member of Phi Beta Kappa and Order of the Coif.

16. Professor Hamilton is a national expert on child sex abuse; the statutes of limitations that make it difficult for victims to pursue justice; and defenses that may lead to the neglect of children. Hamilton has filed countless pro bono amicus briefs for the protection of children at the Supreme Court of the United States and the state supreme courts, and has submitted testimony and advised legislators in every state where significant statute of limitation reform has occurred.

17. In 2020 alone, CHILD USA has filed amicus briefs in the Supreme Court of the United States in *Fulton, et al. v. City of Philadelphia, Pennsylvania, et al.*, Case No.: 19-123, *Trump, et al. v. Pennsylvania, et. al.*, Case No.: 19-454, and *Our Lady of Guadalupe School, et al. v. Biel*, Case Nos.: 19-267 and 19-348. Additionally, CHILD USA has also filed amicus briefs in numerous state and federal appellate courts in 2020.[2]

18. Professor Hamilton and CHILD USA representatives have testified across the nation on issues affecting the health and well-being of children. For example, recent testimony has been provided to legislatures in South Dakota (2020), New Hampshire (2020), Kansas (2020), Hawaii (2020), Pennsylvania (2019), Vermont (2019), Connecticut (2019), Rhode Island (2019), New Jersey (2019), California (2019), Maryland (2019), New York (2019), Chile (2018), Georgia (2018), and Michigan (2018).

19. CHILD USA believes and advocates that children's healthcare is a legal duty. Sexual abuse and the maltreatment of children have an all too frequent impact on children's health. These

[2] *See* https://childusa.org/amicus-advocacy/.

acts often occur in secret, behind closed doors, but have public consequences. Survivors, their families, and the public pay a high price even decades after the violence ends. CHILD USA is a child abuse nonprofit that cuts through the shame and the secrecy to gather and analyze the data behind abuse and neglect.

20. As a child abuse nonprofit dedicated to protecting kids and preventing abuse, CHILD USA conducts research, compiles evidence, promotes ideas, and proposes the most effective policies to prevent childhood abuse and neglect.

21. CHILD USA is divided into three departments: Social Science, Legal, and Administrative.

22. CHILD USA draws on the combined expertise of the nation's leading medical, social science, and legal academics to reach evidence-based solutions to persistent and widespread child abuse and neglect.

23. All child survivors deserve justice, and CHILD USA aims to find the path for them.

24. To further CHILD USA's mission, CHILD USA has, among others, the following initiatives that affect children and survivors of childhood sexual abuse across the country:

    a. Statute of limitations reform.[3]

    b. Abuse and neglect of athletes by and through the "Game Over Commission."[4]

    c. Family court reform.[5]

    d. Conversion therapy reform.[6]

    e. Medical neglect and vaccination reform.[7]

[3] *See* https://childusa.org/sol/.
[4] *See* https://childusa.org/abuse-neglect-of-athletes/.
[5] *See* https://childusa.org/familycourts/.
[6] *See* https://childusa.org/conversion-therapy/.
[7] *See* https://childusa.org/medicalneglect/.

f. Amicus advocacy.[8]

g. Child marriage reform.[9]

h. Childhood sexual abuse reform.[10]

25. CHILD USA Ambassadors help support CHILD USA's advocacy efforts across the nation and include Ambassadors such as Leah Remini (National Ambassador for Child and Family Protection), Justin Conway, Corey Feldman (National Ambassador for SOL Reform), Lyndsey Gamet, Danielle Pollack, and Vinka Jackson (International Ambassador).[11]

26. CHILD USA's Social Science Department is engaged in valuable research into the causes and effects of childhood sexual abuse across the world.[12] The parties to this matter, without the assistance of CHILD USA as amicus curiae, are unable to provide insight into the latest scientific research regarding childhood sexual abuse.

27. The issues in this matter are of great concern and importance to the goals of CHILD USA.

28. CHILD USA is in perhaps the best position of any national childhood abuse advocacy group to assist this Honorable Court in addressing the issues raised in this matter and respectfully requests that it be granted the opportunity to file an amicus curiae brief in this matter.

[8] *See* https://childusa.org/amicus-advocacy/.
[9] *See* https://childusa.org/child-marriage/.
[10] *See* https://childusa.org/child-sex-abuse/.
[11] *See* https://childusa.org/ambassadors/.
[12] *See* https://childusa.org/social-science/.

WHEREFORE, CHILD USA respectfully requests that this Honorable Court grant it permission to file an amicus curiae brief in this matter, a proposed draft of which is attached hereto as Exhibit A.

Respectfully Submitted,

Date: December 1, 2020

/s/ Amina A. Thomas

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PROOF OF SERVICE

I hereby certify that on December 1, 2020, a copy of CHILD USA's Motion for Leave to Participate as Amicus Curiae was filed electronically. Notice of this filing will be sent to all counsel of record through the Court's Electronic Case Filing System.

Date: December 1, 2020

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

TERIN HUMPHREY	:	
Creditor/Appellant,	:	
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vs.	:	
	:	
USA GYMNASTICS	:	
Debtor,	:	1:20-cv-02522-SEB-MPB
	:	
and	:	
	:	
TORT CLAIMANTS	:	
COMMITTEE	:	
Appellee/Sole-Objecting Party.	:	

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION
CASE NO. 18-09108-RLM-11 [DOC. 1213]

BRIEF OF *AMICUS CURIAE* CHILD USA IN SUPPORT OF CREDITOR/APPELLANT TERRIN HUMPHREY

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STATEMENT OF INTEREST OF AMICUS CURIAE

CHILD USA is the leading national nonprofit think tank working to end child abuse and neglect in the United States. CHILD USA pairs the best social science research with the most sophisticated legal analysis to determine the most effective public policies to end child abuse and neglect. CHILD USA produces evidence-based solutions and information needed by courts, policymakers, organizations, the media, and society as a whole to increase child protection and the common good. This case presents questions involving whether standing issues may preclude parents from advocating for their child's best interests, especially when the child is unable to do so themselves, and the weight to be given to a child's disclosure of sexual abuse and the methods for determining whether such discloser is sufficient evidence to support the termination of parental rights. This Court's decision in this case will have a significant impact on child welfare cases throughout the state of Michigan and beyond. Therefore, the questions presented in this case are central to CHILD USA's mission of advocacy for children's rights and abuse prevention across the nation.

ARGUMENT

I. INTRODUCTION

"The powers reserved to the several States will extend to all the objects which in the ordinary course of affairs, concern the lives and liberties, and properties of the people, and the internal order, improvement and prosperity of the State."

THE FEDERALIST NO. 45 (James Madison)

This case is about whether federal bankruptcy law can foreshorten state statutes of limitations for child sex abuse by instituting a bar date that forces victims to come forward before

their claims expire. According to medical and social science, survivors of childhood sex abuse come forward later in life, if at all, due to the impact of trauma. In response to this growing body of research, certain states are leading the way to turn back this scourge. There is a nationwide trend to lengthen, eliminate, and revive civil statutes of limitations for child sex abuse claims to hold institutions and perpetrators to account. Marci A. Hamilton, Justice Denied: What America Must Do to Protect Its Children (Cambridge University Press 2008, 2012. The bar date is operating in some of these bankruptcies to stymy state progress on this difficult issue, to re-traumatize victims, and to deter the public from learning the information it needs to understand the prevalence and dangers of child sex abuse in institutions. The bar date in this case was wielded to nullify Virginia's statute of limitations reform for victims and to re-traumatize a victim whose claim is live in the state but barred by an arbitrary bar date.

Childhood sexual abuse within institutions has been rampant, and many of those institutions maintain cultures and internal policies that foster and fail to deter such abuse. There is a nationwide movement to turn the tide on child sex abuse, and federal law is unwittingly throwing barriers in front of victims seeking justice through their state civil SOLs. This abuse is enormously costly to survivors and to the public, both as a quantifiable monetary cost and a social and moral price that the public cannot afford to pay. As such, states allow survivors to seek civil redress not only from their individual assailants, but also from the institutions who offered those assailants welcoming atmospheres in which to prey on innocent children.

Many of those institutions have sought sanctuary in the federal bankruptcy system to limit their retribution for the wrongs done to the children they are charged with protecting. Chapter 11 bankruptcy allows organizations to avoid dissolution while they shift attention to the organization's needs and away from the horrific harms they have inflicted on children. In creating

the bankruptcy system, Congress intended to assist honest businesses who had incurred overwhelming business debts, but youth-serving organizations have exploited it to limit their exposure to civil claims from the adult survivors of the sexual assault the organization made possible, to avoid in-depth discovery regarding their bad acts, and to force victims to come forward regardless of their legal rights or whether they are psychologically prepared to do so. Permitting this practice to continue not only offers undue protection to negligent organizations, it also usurps a historically state-held power and permits a federal system to curtail efforts to make responsible institutions accountable by setting bankruptcy bar dates without reference to the relevant state SOLs. Those dates are too often solely for the benefit of the organization and they short-circuit the justice that the state intended for the victim and the public accountability to the larger public. Those bar dates that blindly nullify state SOLs for child sex abuse in effect permit the federal system to set SOLs rather than the states, and often to devalue claims. This is a violation of federalism and an irrational federal policy that permits the secrecy that endangers children to fester and results in less justice and more trauma for victims.

II. CHILD SEX ABUSE COSTS THE ENTIRE SOCIETY AND THE STATES HAVE INSTITUTED SOL REFORM TO SERVE THREE COMPELLING STATE INTERESTS

Child sexual abuse is a pervasive evil in the United States that costs the entire society. It is critically important that victims have access to justice, and many states are improving their statutes of limitations for child sex abuse. Statute of limitations reform like Virginia's in this case has been proven to achieve three compelling state interests: it identifies unknown child predators, shifts the cost of abuse from the victim and taxpayers to the ones who caused it, and educates the public.. *Current Laws for Child Protection*, CHILDUSA.ORG (last visited November 29, 2020), available at https://childusa.org/law/. Settled research has established that most victims experience

traumatic effects that delay disclosure for decades and, for many, permanently. For those who do come forward, the average age of disclosure is 52 years-old. N. Spröber et al., *Child sexual abuse in religiously affiliated and secular institutions*, 14 BMC PUB. HEALTH 282, 282 (Mar. 27, 2014)(hereinafter Spröber). States have the inherent authority to set the civil SOLs, not the federal government. Forcing victims to come forward before the state's SOL expires interferes with the state power essential to ending the scourge of institution-based child sex abuse.

A. Sexual Abuse Is A Public Health Pandemic that Remains Largely Hidden Due to the Reality of Delayed Disclosure of Abuse

Child sexual abuse is a public health epidemic: it affects 1 in 5 girls, and 1 in 13 boys in this nation. Moody, G., et al., *Establishing the international prevalence of self-reported child maltreatment*, 18 BMC PUB. HEALTH 1164, 1174 (2018); Pereda, N., et al., *The prevalence of child sexual abuse in community and student samples: A meta-analysis*, 29 CLINICAL PSYCH. REV. 328, 329 (2009); Stoltenborgh, M., et al., *A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World*, 16(2) CHILD MALTREATMENT 79, 84 (2011). Historically, 90% of child victims never go to the authorities and the vast majority of claims have expired before the victims were capable of getting to court. U.S. Dep't Health & Human Services, *The Adverse Childhood Experiences (ACEs) Study* CENTERS FOR DISEASE CONTROL & PREVENTION (1997) available at https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/ (hereinafter "ACE Study"); *see also*, U.S. Dep't of Health and Human Services Administration for Children and Families, Administration on Children, Youth and Families, and Children's Bureau, CHILD MALTREATMENT 2017, available at https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf. There is an extensive body of scientific evidence establishing that childhood sexual abuse victims are traumatized and harmed in a way that makes it difficult or impossible to process and cope with the abuse, or to self-report it. Victims often need decades to do so. 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; *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). Based on the best science, age 52 is the average age of disclosure for victims of child sex abuse, if they ever come forward. Spröber, at 282. Still, approximately 3.7 million children are sexually abused in the United States every year. *Preventing Child Sexual Abuse*, CDC.GOV (last visited Jan. 24, 2020), available at https://www.cdc.gov/violenceprevention/pdf/can/factsheet CSA508.pdf; *see also*, Finkelhor, D., Turner H. A., Shattuck, A., & Hamby, S.L., *Prevalence of child exposure to violence, crime, and abuse: Results from the Nat'l Survey of Children's Exposure to Violence*, JAMA PEDIATRICS 169(8), 746-54 (2015).

Intense feelings of fear, shame, and embarrassment associated with these heinous acts often dwarf victims' desires to disclose abuse. Hunter, S., *Disclosure of child sexual abuse as a life-long process: Implications for health professionals*, 32(2) AUSTRALIAN & NEW ZEALAND J. OF FAM. THERAPY 159, 164 (2011). As a result, victims often remain in the shadows, afraid to come forward. At least one-third of victims never disclose their abuse. See MARY-ELLEN PIPE, et. al., CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 32 (2013). Of those victims who *do* disclose, most are so disabled by the trauma they endure that they are unable to do so until much later in life. *See generally* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2014); P. Trickett et al., *The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study*, 23 DEV'T & PSYCHOPATHOLOGY 453 (2011); S. J. Berkowitz et al., *The Child and Family Traumatic Stress Intervention: Secondary Prevention for Youth at Risk Youth of Developing PTSD*, 52 J. CHILD

PSYCHOL., 676 (2011). The best available science suggests that the average age of disclosure of child sexual abuse is 52 years old. *See* 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-Disclosure-Factsheet-2020.pdf (citing Spröber).

B. Childhood Sexual Abuse Impacts Victims for Life and Is Costly

The average lifetime cost of child maltreatment is $830,928.00 per victim. CHILD USA, *What's the cost of child sex abuse?* childusa.org (last visited Nov. 29, 2020), available at https://childusa.org/wp-content/uploads/2020/05/Copy-of-Whats-the-cost-0f-child-sex-abuse_-2-2-pdf.jpg. Child maltreatment includes: physical abuse, sexual abuse, emotional abuse (psychological abuse), and neglect. The toxic stress and trauma associated with childhood sexual abuse are even higher for those victims than those who experience other forms of child maltreatment. *See* M. Merricka, et. al., *Unpacking the impact of adverse childhood experiences on adult mental health*, CHILD ABUSE AND NEGLECT (2017) (hereinafter Merricka); Angelakis, I., Gillespie, E.L., Panagioti, M., *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). While 1 in 3 New Yorkers receive Medicaid, it is likely that sex abuse survivors disproportionately receive support due to the crippling effect of trauma. Dan Clark, *One in three people in New York is on Medicaid*, POLITIFACT.COM (Jul. 21, 2017 at 4:04 PM), available at https://www.politifact.com/newyork/statements/2017/jul/21/john-faso/one-three-people-new-york-are-medicaid/.

The effects of child sexual abuse can be profound, extensive, and lasting. Trauma affects childhood victims of sexual abuse or assault in a way that is wholly distinguishable from victims of other crimes. As explained by the Center for Disease Control, Adverse Childhood Experiences "have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity." ACE Study; *see also* Felitti, et al., *Relationship 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). The ACE Study is one of the largest investigations of the effects of childhood abuse, definitively shows a strong correlation between ACEs and negative effects across the lifespan, including, disrupted neurodevelopment; impaired social, emotional, and cognitive development; psychiatric and physical disease; and disability. *See, e.g.,* Felitti, at 245-58; R. Anda, et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARACH 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"); See Merricka; *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) (explaining that 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) (finding that adult survivors of child sexual abuse are nearly three times as likely to report substance abuse problems than their non-survivor peers).

Beyond the short and long-term effects to the individual victim, child sexual abuse also puts a significant economic strain on society at large. The negative effects over a survivor's lifetime generate many costs that impact the nation's health care, education, criminal justice, and welfare systems. Fang, et al., *The Economic Burden of Child Maltreatment in the United States & Implications for Prevention,* 36 CHILD ABUSE & NEGLECT 156 (2012) (explaining that the estimated average lifetime cost per victim of nonfatal child sexual abuse includes, in part: $32,648 in childhood health care costs, $10,530 in adult medical costs, $144,360 in productivity losses, $7,728 in child welfare costs, $6,747 in criminal justice costs, $7,999 in special education costs; the estimated average lifetime cost per death includes: $14,100 in medical costs, and $1,258,800 in productivity losses). Estimates based on investigated cases place the economic burden of abuse at nearly $2 trillion annually. See CHILD USA, *Fiscal Impact of SOL Reform,* (2018) available at https://www.childusa.org/fiscalimpact. That number is likely significantly higher considering the high incidence of unreported cases of child sexual abuse. *Id*. (noting nearly 1/3 of cases are never reported). As a result, society pays a hefty price when courts discredit veritable allegations of sexual abuse and fail to protect children from their alleged perpetrators.

III. CHAPTER 11 DISCHARGE PRINCIPLES CANNOT PREEMPT VIRGINIA LAW WHERE THERE ARE ACTIVE CLAIMS FOR CHILD SEX ABUSE

Congress cannot undermine State rights to set statutes of limitations for tort laws like child sexual abuse, particularly when they serve compelling state interests. Even if Congress had that authority, it has not preempted the Virginia statute of limitations applicable to Plaintiff.

A. The Tenth Amendment Reserves to States the Authority and Power to Legislate Statutes of Limitations for Child Sexual Abuse Crimes and Torts

The federal government is a government of enumerated, not plenary power. *Printz v. United States*, 521 U.S. 898, 911, 117 S. Ct. 2365, 2373, 138 L. Ed. 2d 914 (1997); *U.S. v. Lopez*, 514 U.S. 549, 551, 115 S.Ct. 1624 (1995). The Framers intentionally reserved power to the states. Congress has authority under the Bankruptcy Clause of the United States Constitution to enact uniform laws governing bankruptcy procedures. U.S. CONST. art. I, § 8, cls. 1, 4. However, Congress' authority is not without limit, and the establishment of statutes of limitations for child sex abuse belongs to the states.

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. CONST. Amend. X. States retain a "residuary and inviolable sovereignty" in all matters where Congress has not been given authority to legislate. *Printz*, 521 U.S., at 919 (citing The Federalist No. 39, at 245 (J. Madison)). Indeed, the structure of the federal government exists as it does to protect the States from federal overreaching. See *Garcia v. San Antonio Metro. Trans. Auth.,* 469 U.S. 528, 550-51, 105 S.Ct. 1005 (1985); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407-08 (1871) ("[i]n their laws, and mode of enforcement, neither [sovereign] is responsible to the other. How their respective laws shall be … carried into execution; and in what tribunals … are matters subject to their own control, and in the regulation of which neither can interfere with the other"). Although Congress has broad powers to enact laws, it can only do so where it has been given the authority; the States have authority over all other areas of law. *Garcia*, 469 U.S. at 550, see also *New York v. U.S.*, 505 U.S. 144, 156, 112 S.Ct. 2408 (1992) ("The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal

Government.") (citing *Garcia,* 469 U.S. at 549). The States are, in fact, "residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748, 119 S.Ct. 2240 (1999).

States have even more autonomy in areas of historical, traditional authority. *Lopez*, 514 U.S. at 561-62. The Supreme Court has specifically stated that such areas of traditional authority include 1) family law, *Egelhoff v. Egelhoff ex rel. Breiner,* 532 U.S. 141, 151 (2001), 2) "historic police powers of the States," *Arizona v. United States,* 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), and 3) "state regulation of matters of health and safety," *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996). "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *U.S. v. Morrison*, 529 U.S. 598, 617, 120 S.Ct. 1740 (2000). The Supreme Court "can think of no better example of a police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims." *Morrison*, 529 U.S. at 618. The States unequivocally have the power to determine the statutes of limitations for child sexual abuse crimes and torts occurring in those States.

Virginia "has a compelling interest, one central to its right to survive, in protecting its children from treatment it determines is physically or psychologically injurious to youth." *Freeman v. Commonwealth*, 223 Va. 301, 309, 288 S.E.2d 461, 465 (1982); *see also Caswell v. Lang*, 757 F.2d 608, 610 (4th Cir. Mar. 19, 1985) ("Virginia has a strong and compelling interest in protecting the welfare of its dependent citizens); *Knox v. Lynchburg Div. of Soc. Serv.*, 228 S.E.2d 399, 404 (Va. 1982) ("[T]he protection of children from harm, whether moral, emotional, mental, or physical, is a valid and compelling state interest"); *Nkopchieu v. Minlend*, 59 Va.App.

299, 309 (Va. Ct. App. Dec. 20, 2011); *Commonwealth v. Simone*, No. 03-0986, 2003 WL 22994238, *11 (Va. Cir. Ct. Oct. 10, 2003). In 2002, the Supreme Court of Virginia found that "[i]t is a newsworthy event and a matter of public interest when a physician is accused by his patients of sexually assaulting them." *WJLA-TV v. Levin*, 264 Va. 140, 161, 564 S.E.2d 383, 395 (2002).

In 2011, in line with this interest and in a proper exercise of its state power, the Virginia Legislature passed a law, 95-0, that gives victims of child sex abuse until they are age 38 or, 20 years after they discover their abuse the power to sue institutions that have caused their abuse. HB 1476, 2011 Reg. Sess. Vote, Feb. 24, 2011, available at https://lis.virginia.gov/cgi-bin/legp604.exe?111+vot+HV1468+HB1476. *See also* VA. CODE ANN. §§ 8.01-243, 8.01-229, 1-204, 8.01-249. By extending their statute of limitations from age 20 to age 38, Virginia was acting within its unique rights to protect the health and safety of its citizens.

B. Chapter 11 Procedure May Not Preempt Virginia Law Establishing the Statute of Limitations for Child Sexual Abuse

There is a "presumption against preemption" that is founded on the basic assumption that "Congress did not intend to displace state law," *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981) because the "exercise of federal supremacy is not lightly to be presumed." *N.Y. State Dep't. of Soc. Servs. v. Dublino,* 413 U.S. 405, 413 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 203 (1952)); *Integrated Sols., Inc. v. Serv. Support Specialties, Inc.*, 124 F.3d 487, 493 (3d Cir. 1997). "This assumption provides assurance that 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States v. Bass,* 404 U.S. 336, 349 (1971)). "Whenever [a State's limitations] law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of

application is a State or a federal court." *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 112 (1945).

The Supreme Court has characterized the presumption as a "cornerstone" of its preemption jurisprudence, *Wyeth v. Levine,* 555 U.S. 555, 565 (2009) (quoting *Medtronic,* 518 U.S. at 485), and it continues to be relied upon in Supreme Court decisions. *See, e.g.*, *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (regarding state laws governing domestic relations, there is a "'presumption against preemption"'); *Arizona,* 132 S. Ct. at 2501 (2012) (stating that courts should not assume that historic state police powers are preempted unless that was the clear and manifest intent of Congress); *Wyeth*, 555 U.S. at 565 (stating that courts should not assume that historic state police powers are preempted unless that was the clear and manifest intent of Congress); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (stating that courts should not assume that historic state police powers are preempted unless that was the clear and manifest intent of Congress).

The presumption against preemption is particularly applicable to areas of traditional state legal authority. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *S. Blasting Servs., Inc. v. Wilkes Cty., NC*, 288 F.3d 584, 590 (4th Cir. 2002). "Federal bankruptcy preemption is more likely... where a state statute is concerned with economic regulation rather than with protecting the public health and safety." *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353, Bankr. L. Rep. (CCH) P 76065 (9th Cir. 1994). State tort law falls into the category of being a matter of "health and safety" to which courts apply a presumption against preemption. See *Wyeth*, 555 U.S. at 565, n.3 (finding that the presumption applied and federal legislation did not preempt state tort law claim); *Medtronic*, 518 U.S. at 485 (applying presumption in finding that state tort law claims were not preempted); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-53 (1984) (stating Congress enacted legislation under the assumption that state tort law would apply).

Statutes of limitations for state tort law claims are similarly protected from federal intervention. State statutes of limitations, "constitute a part of the lex fori … they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction which must materially affect both legislative and judicial independence." *Hawkins v. Barney's Lessee,* 30 U.S. 457, 466, 5 Pet. 457 (1831).

The Bankruptcy Code may not expressly or impliedly preempt Virginia's statute of limitations for child sexual abuse. Not allowing Plaintiff's claim to proceed would thwart the purposes of Virginia's law.

C. Even If Congress Had the Authority to Preempt State Statutes of Limitations for Child Sex Abuse Claims, the Bankruptcy Code Does Not Preempt Virginia's Law

The three types of preemption in the federal context are 1) express preemption, 2) conflict preemption, and 3) field preemption. *In re Bestwall LLC*, 06 B.R. 243, 251 (W.D.N.C. July 29, 2019). Congress may either preempt a state law expressly, through a statement in a statue or impliedly, through legislating in conflict with existing state law. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014 (1982).

1. *There Is No Express Preemption of Va. Code Ann. § 8.01-243(D)*

Although Congress has broad powers to legislate in bankruptcy, it does not expressly override state statutes of limitations for tort claims in the Bankruptcy Code. In fact, Congress provided express protections to creditors with tort claims in section 108(c)(1) of the Bankruptcy Code, creating a provision ensuring that active claims arising in nonbankruptcy law settings would be tolled until after the bankruptcy, in the case that a statute of limitations would otherwise run on those claims. This section shows Congress' express intention to honor state statutes of limitations in the bankruptcy context.

2. *There Is No Conflict Preemption of Va. Code Ann. § 8.01-243(D)*

Federal laws implied preempt state tort laws where 1) it is impossible to comply with both laws because their overlap is too significant or 2) the state law stands against Congress' intent. *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81, 107 S.Ct. 683 (1987); *Altria Grp,* 555 U.S. at 76 (quoting *Medtronic,* 518 U.S. at 485). Essentially, state laws that conflict with federal bankruptcy laws are "without effect" *Altria Grp*, 555 U.S. at 76, where they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1, 29 (1995) (citing *Louisiana Public Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986)).

Congress did not intend to thwart the state statutes of limitations for torts when it enacted chapter 11 of the Bankruptcy Code. Congress was concerned for "honest but unfortunate debtor" who has experienced "business misfortunes." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934). To that end, Congress included provisions designed to "give [honest] debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" Michelle M. Harner, *Rethinking Preemption and Constitutional Parameters in Bankruptcy*, 59 WM. & MARY L. REV. 147, 194 (2017) (citing *Local Loan Co.*, 292 U.S. at 244) (hereinafter Harner); *see also* 11 U.S.C. §§ 363(f), 1141. When Congress legislated the Bankruptcy code, it contemplated an honest debtor, not an institution so rife with tortious claims based on sexual abuse that it was facing liquidation. Congress did not design chapter 11 reorganization in order to shield institutions that would otherwise fall due to their own tortious behavior, but that is how it is now being used.

The Supreme Court has affirmed that Congress has the power to determine what claims will be discharged during a chapter 11 reorganization. *Pobreslo v. Joseph M. Boyd Co.*, 526, 53 S.Ct. 262, 77 L.Ed. 469 (1933); *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265, 49 S.Ct. 108, 73 L.Ed. 318 (1929); *Stellwagen v. Clum*, 245 U.S. 605, 615, 38 S.Ct. 215, 62 L.Ed. 507 (1918). However, that power is limited and does not extend to extinguish the statutes of limitations for child sex abuse crimes. In *Schwinn Cycling & Fitness Inc. v. Benonis*, the court found that Pennsylvania's successorship liability laws were not preempted by the bankruptcy code to limit post-plan claims. 217 B.R. 790, 796 (N.D.Ill. Dec. 18, 1997). The court recognized that "extinguishing state law rights in order to increase the value of debtors' property 'would not only [] harm [] third parties . . . but [would provide an] incentive to enter bankruptcy for reasons that have nothing to do with bankruptcy.'" *Schwinn*, 217 B.R. at 796. Unlike *Schwinn*, Plaintiff's awareness of her claim arose before the bankruptcy plan was confirmed, but she her rights to bring that claim are effectively being extinguished. The Supreme Court has not given Congress the power to undermine the States' decisions about how long a tort claimant has to bring their claims.

"The Bankruptcy Code can of course override by implication when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 546, 114 S. Ct. 1757, 1765–66, 128 L. Ed. 2d 556 (1994). States have a long-establish tradition of regulating the statute of limitations for crimes like child sexual abuse. These determinations are even more important where States have educated themselves on the reality of delayed discovery and disclosure of abuse. Moreover, it is possible to comply with federal bankruptcy law while honoring the state law in this case: the bankruptcy court need only set the bar date for bankruptcy filings as the date that creditors' claims for child sex abuse will expire under the Virginia state law.

Plaintiff asks not that Virginia law determine what is considered a claim in bankruptcy, but rather that she be given the time allotted to her under state law to file that claim with the bankruptcy court.

3. *There Is No Field Preemption of Va. Code Ann. § 8.01-243(D)*

Field preemption is rare, occurring where Congress' regulation is "so pervasive . . . that Congress left no room for the States to supplement it," or where the "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 132 S.Ct. at 2495, (citing *Rice*, 331 U.S. at 230). In *In re Bestwall LLC*, the bankruptcy court found that there was no field preemption in an asbestos-related case where section 524(g) of the Bankruptcy Code was the only section that specifically addressed asbestos claims in bankruptcy. *In re Bestwall LLC*, 06 B.R. at 251. Unlike *Bestwall*, there are no sections of the Bankruptcy Code specifically addressing the statutes of limitations for child sex abuse claims. Moreover, courts routinely consider the state statutes of limitations in their decisions, showing a deference for those limitations. See generally *In re Lockwood,* 414 B.R. 593 (Bankr. N.D. Cal. 2008); *Matter of Princeton-New York Investors, Inc*., 219 B.R. 55 (D.N.J. 1998).

State tort claims give plaintiffs who have incurred significant damages time to recover from defendants who sanctioned their abuse. "[N]o one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions--in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 381 (2d ed. 1988). Congress did not intend to thwart the state statutes of limitations for child sex abuse crimes when it enacted the Bankruptcy Code, nor has it legislated in a way that makes it impossible to honor Congress' intent and Virginia's desire to give victims the time they need to file a claim

for child sexual abuse. This Court should defer to the timeframes set forth in Virginia's law to evaluate whether Plaintiff's claim is timely for the purposes of the bankruptcy. Virginia provides its residents with at least 20 years to bring their claims, and the federal law cannot, and does not, interfere with that right.

IV. DENIAL OF A CLAIM IN A FEDERAL BANKRUPTCY AS UNTIMELEY WHERE THE CLAIMANT HAS A LIVE CLAIM UNDER THE STATE STATUTE OF LIMITATIONS AMOUNTS TO AN UNCONSTITUTIONAL VIOLATION OF THE CLAIMAINT'S DUE PROCESS RIGHTS

Virginia law provides a cause of action for survivors of sexual assault if that action is filed within prescribed limitations. VA. CODE ANN. § 8.01-249. Virginia limits a survivor's ability to seek redress via a statute of limitations ("SOL") that begins to run when "the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist." *Id*. For Terrin Humphrey, Claimant, (hereinafter "Humphrey"), this communication occurred in June of 2020. (Transcript of Record at 11, *In re: USA Gymnastics, Debtor*, United States Bankruptcy Court, Southern District of Indiana, (No. 1809108-RLM-11). Virginia has set its SOL at 20 years after accrual, meaning that she had until 2040 to bring a claim under the law set by Virginia.[1] VA. CODE ANN. § 8.01-243. However, the federal bankruptcy court entered an order on February 25, 2019, setting April 29, 2019 as the bar date for general claims and claims asserting sexual abuse. Humphrey brought her claim in bankruptcy on July 30, 2020 and filed a Motion to Allow Late Filed Claim to Be Treated as Timely Filed ("Motion"). The bankruptcy court denied Humphrey's Motion, determining that her claim was untimely. Virginia state law provides Humphrey with a 20-year period to bring a claim, and she brought a claim within that timeframe, but federal law usurped Virginia's SOL determination

[1] Virginia allows 20 years for claims accruing prior to July 1, 2020. VA. CODE ANN. § 8.01-243.

and denied an otherwise viable claim. This amounts to a violation of Humphrey's procedural due process rights.

Virginia's statute of limitations for child sex abuse is supported by the state's compelling interest in identifying perpetrators, making institutions accountable by shifting the cost of the abuse to them, and educating the public. Humphrey had a right to seek redress in Virginia state court any time within 20 years of accrual of her claim in June of 2020. The Fifth and Fourteenth Amendments to the U.S. Constitution "impose constraints on governmental decisions which deprive individuals of "liberty" or "property" interests." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18 (1976). The bankruptcy court deprived Humphrey of her interest in a right to seek redress within the Virginia SOL when it denied her Motion, amounting to a violation of her due process rights guaranteed by the Fifth and Fourteenth Amendments.

Humphrey's claim in bankruptcy court was denied as untimely because she filed her claim after the bankruptcy bar date, although the Virginia SOL had not yet run. That bar date fell well before expiration of the SOL – in fact, the bar date foreclosed Humphrey's claim before the Virginia SOL even began to run – at the time the causal connection between her injury and the sexual assault was communicated to her by her doctor in June of 2020. Denial of a claim as untimely even when filed prior to the state-determined statute of limitations is a clear violation of procedural due process rights. It is undisputed that states have the power to determine statutes of limitations for sexual assault claims. Virginia did set an SOL, and Humphrey identified her claim and sought justice and relief prior to that SOL expiring and as noted, prior to that SOL beginning to run. Humphrey did so by filing in bankruptcy court, a federal system that foreshortened the state's SOL by setting a shorter bar date and denied her claim as untimely. Humphrey, and others with live claims in Virginia or any other state, are denied due process when the federal bankruptcy

system unilaterally curtails state SOLs and denies claimants the opportunity to seek relief. Allowing the federal bankruptcy system to foreshorten the state-determined SOLs and deprive survivors of childhood sexual assault with otherwise live civil claims of the opportunity to seek appropriate redress usurps states of power in an area where they have historically and traditionally operated with immutable sovereignty. S*ee generally, Lopez*, 514 U.S. at 561-62, *Egelhoff,* 532 U.S. at 151, *Arizona,* 132 S. Ct. at 2501, *Medtronic*, 518 U.S. at 485.

A. The Bankruptcy System Was Designed for Honest Debtors, Not for Those Businesses that Endanger Children through Their Own Bad Acts

The Bankruptcy Code is designed to provide a debtor reprieve from debilitating debt, enabling organizations to remain operational through structured debt consolidation and repayment plans guided by a neutral arbiter. Absent a streamlined process through which to collect, organize, and discharge debts, debt-ridden individuals and businesses would be without a method of climbing out of debt and avoiding irreversible failure or dissolution. The original Bankruptcy Act dealt only with contractual obligations and unproven tort claims were not subject to discharge or restructuring plans.[2] Unproven tort claims came under the purview of the Bankruptcy laws via the Chandler Act of 1938. This Act "gave the court the authority to consider tort claims in reorganizations, regardless of their provability." *Relief from Tort Liability Through Reorganization* 131 U. PA. L. REV. 1227, 1230 (1983) (hereinafter Relief). Congress expanded bankruptcy purview to include tort claims "to facilitate rehabilitation of embarrassed corporations by a scaling or rearrangement of their obligations and shareholders' interests, thus avoiding a winding up, a sale of assets, and a distribution of the proceeds." *City Bank Farmers Tr. Co. v. Irving Tr. Co.*, 299 U.S. 433, 438, 57 S. Ct. 292, 294–95, 81 L. Ed. 324 (1937). Since that time, it

[2] Tort claims reduced to judgments were considered quasi-contractual obligations and were subject to these laws. Relief, at 1230.

has become a common practice for institutions to petition for bankruptcy when their tortious conduct has invited a lot of potential tort claims, to avoid being crushed under multiple civil claims. See Wade Goodwyn, *Boy Scouts of America Sexual Abuse Victims Seek Justice in Bankruptcy Court*, NPR, (Nov. 13, 2020, 8:01 p.m.), https://www.npr.org/2020/11/13/933924470/boy-scouts-of-america-sexual-abuse-victims-seek-justice-in-bankruptcy-court, Kim Christensen, *Thousands File Sexual Abuse Claims Against Boy Scouts as Deadline in Bankruptcy Looms,* L.A. TIMES, (Oct. 22, 2020, 5:00 a.m.), https://www.latimes.com/california/story/2020-10-22/boy-scouts-sexual-abuse-claims-bankruptcy, Michael Gold, *Facing 200 Abuse Claims, Diocese Becomes U.S.'s Largest to Seek Bankruptcy,* N.Y. TIMES, (Oct. 5, 2020), https://www.nytimes.com/2020/10/01/nyregion/rockville-centre-diocese-bankruptcy.html, BISHOP ACCOUNTABILITY, http://www.bishop-accountability.org/bankruptcy.htm (last visited Nov. 24, 2020).

Bankruptcy proceedings with an end goal of business reorganization differ from liquidation proceedings in that the goal of debt discharge for business reorganization "is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. REP. NO. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179, Harner, at 181. Further expansion of bankruptcy laws via the Bankruptcy Reform Act of 1978 created Chapter 11 bankruptcy and retained permissible consideration of tort claims and was designed to make reorganization "a quicker, more efficient procedure." *Relief*, at 1230. Chapter 11 bankruptcy assists the business to emerge from the proceedings operational as opposed to moving through liquidation proceedings and dissolving the organization, which Congress believed was preferable as it "benefits the debtor, the creditors, and

the economy as a whole." Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369, 1389 (1985).

This process, however, was intended to offer relief from the consequences of "business misfortunes" to an "honest debtor." *Local Loan Co.*, 292 U.S. at 244. The protection of an "honest debtor" principle is further exemplified where debts incurred via "false pretenses, a false representation, or actual fraud", are exempted from discharge. 11 U.S.C.A. § 523. Bankruptcy laws are designed to give an "honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co.*, 292 U.S. at 244. Rather than prioritizing the interests of creditors, business reorganization bankruptcy procedures are "oriented toward assisting a company whose poor business performance has placed it in a precarious financial position. Consideration of tort claims remains only incidental to the task of restoring viability to the financially distressed firm. Comprehensive relief requires comprehensive consideration of claims against the debtor, and out of that need, tort claims are allowed a role." Relief, at 1230. Prioritizing business continuation over the interests of creditors may be appropriate in some contexts, but it is a perversion of the bankruptcy process to offer such protection to guilty organizations. Institutions that foster sexual assault are undeserving of protection of their business practices, and public interest is best served if they are allowed to suffer the natural dissolution consequences of their harmful conduct. Conversely, sexual assault survivor "creditors" are victims of institutional abuse of power and are owed the full protections of their state's civil claims statutes.

B. By Permitting Organizations to Force Victims into Bankruptcy Proceedings Before Their Claims Have Expired Under State Law Unfairly Immunizes Bad Actors while It Re-Traumatizes Victims

Organizations such as the Catholic Church, Boy Scouts of America, USA Gymnastics, and others have remained complicit in sexual assault of children by maintaining policies that fail to deter abuse and sweep assault under the rug. See, e.g., Marci A. Hamilton, Esq., et al., *Survey and Analysis of the Written Child Protection Policies of the 32 U.S. Roman Catholic Archdioceses* (2020), available at https://childusa.org/wp-content/uploads/2020/10/Archdiocesan_Policies_WhitePaper_10-1-20s.pdf, Joan McPhee & James P. Dowden, Ropes & Gray, LLP, *Report of the Independent Investigation: The Constellation of Factors Underlying Larry Nassar's Abuse of Athletes* at 167 (2018), available at file:///C:/Users/14845/AppData/Local/Temp/Ropes-Gray-Full-Report-1.pdf (hereinafter McPhee). Organizations like these are in a position to institute strict internal policies to protect children, but historically fail to do so, leaving the children they serve vulnerable to attacks by predators who snake their way into positions of power in welcoming institutions. When survivors of institutional abuse find themselves able to hit back against the organizations that created a welcoming atmosphere for their assailants, we should not protect the organizations from their victims and shield them from dissolution if valid claims of negligence resulting in sexual assault are so voluminous that the organization cannot remain standing. To protect guilty organizations is an affront to sensible public policy and a slap in the face to their victims. We should be protecting children from the institutions that allow pedophiles and rapists to prey on them, rather than protecting the reckless institutions from the justice they have earned brough upon them by those they harmed.

Several institutions, and USA Gymnastics in particular, have a history of internal policies and procedures that place children at risk. According to an independent report investigating how such widespread sexual assault could thrive within the organization, "USAG erected numerous

procedural obstacles in the complaint resolution process that kept USAG from effectively addressing serious, credible allegations of child sexual abuse. These obstacles included requiring a complaint to come from a survivor or a survivor's parent; refusing to investigate complaints where the reporting party wished to remain anonymous to the perpetrator; refusing to investigate complaints where the reporting party did not submit a signed, written complaint; limiting available sanctions if the alleged conduct was not "criminal" in nature; failing to follow up on complaints of misconduct; and losing track of important information about accused coaches." McPhee at 167. The same report identified an "acute danger of sexual misconduct" within gymnastics, noting that USAG was uniquely positioned to protect its child athletes, but elected not to do so. McPhee at 173.

To deter these negligent internal procedures, dangerous institutions need to be held legally accountable for their negligent and harmful conduct. The financial and organizational consequences of civil liability are necessary to discourage institutions future misconduct, and to fosters organizational reform to encourage more proactive protection of vulnerable children. The best way to deter reckless policies and irresponsible inaction is demanding accountability and permitting organizations to fail if their conduct is severe enough to break them under the weight of credible accusations of perpetuated sexual assault. Research supports the position that civil liability serves as a profound deterrent for undesirable behavior and motivator for systemic change. By creating greater awareness of systemic problems, putting pressure on stakeholders, and using the court to promote change, civil litigation has served as a catalyst for significant child welfare reform. Farber, et. al., *Strengthening the Child Welfare Workforce: Lessons from Litigation*, 4 J. PUBLIC CHILD WELFARE 132-157 (2010). Conversely, protecting negligent organizations from state civil claims shields them from public scrutiny.

As Kentucky Franklin Circuit Court Judge Philip Shepherd aptly states, "there can be no effective prevention when there is no public examination of the underlying facts." Holbrook Mohr & Garance Burk, *AP IMPACT: Abused kids die as authorities fail to protect*, Associated Press, December 18, 2014 available at https://apnews.com/1014e8fcc2b5432685111e567c403262/ap-impact-abused-kids-die-authorities-fail-protect. Allowing such a lack of accountability risks further eroding citizen's trust and basic understanding of the rule of law. *See, e.g*, Smith, *Abstention in a Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018) ("When a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness")**.**

CONCLUSION

For the foregoing reasons, *amicus curiae* requests this Court to find that the bar date as applied in this case is unconstitutional and cannot bar Plaintiff from participating in the current bankruptcy proceedings.

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Respectfully submitted,

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