

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT**

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J.D.,

Plaintiff-Respondent,

**Docket Nos. 2021-03975  
2021-03978**

**Kings County Index No.  
519856/19**

– against –

ROMAN CATHOLIC DIOCESE OF BROOKLYN  
and ST. FRANCIS OF ASSISI ROMAN CATHOLIC  
CHURCH, BOROUGH OF QUEENS, CITY OF  
NEW YORK,

Defendants-Appellants,

– and –

BISHOP NICHOLAS DIMARZIO,

Defendant.

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**NOTICE OF MOTION BY CHILD USA FOR LEAVE TO FILE *AMICUS  
CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-RESPONDENT**

PLEASE TAKE NOTICE, that upon the affirmation of Jennifer Freeman Esq., sworn to on September 1, 2021, and all exhibits attached thereto including a copy of the proposed brief of amicus curiae, the undersigned will move this Court at 45 Monroe Place, Brooklyn, New York, on September 17, 2021, at 10:00 a.m., or as soon thereafter as is practicable, for an order granting leave to CHILD USA to file

with this Court a brief of amicus curiae in support of Plaintiff-Respondent J.D., in the above-captioned action.

Pursuant to CPLR 2214(b), answering papers shall be served on or before 7 days before the return date, and any reply shall be served on or before 1 day before the return date.

Dated: September 1, 2021  
New York, New York

Respectfully submitted,



Jennifer Freeman  
James R. Marsh  
Tatiana Akhund  
Marsh Law Firm PLLC  
31 Hudson Yards, 11<sup>th</sup> Floor  
New York, NY 10001-2170  
Phone: 212-372-3030  
[jenniferfreeman@marsh.law](mailto:jenniferfreeman@marsh.law)

*Counsel of Record*

Marci A. Hamilton, Esq.  
CEO, CHILD USA  
Fels Institute of Government  
Professor of Practice  
University of Pennsylvania  
3508 Market Street, Suite 202  
Philadelphia, PA 19104  
Tel: (215) 539-1906  
[Marcih@sas.upenn.edu](mailto:Marcih@sas.upenn.edu)

Jessica Schidlow, Esq.  
Staff Attorney, CHILD USA  
[jschidlow@childusa.org](mailto:jschidlow@childusa.org)

*Attorneys for Amicus Curiae  
CHILD USA*

To: JANET, JANET & SUGGS LLC  
Andrew Janet  
4 Reservoir Circle, Suite 200  
Baltimore, MD 21208  
(410) 653-3200  
(410) 653-9030 (fax)  
[asjanet@jjsjustice.com](mailto:asjanet@jjsjustice.com)

*Attorneys for Plaintiff-Respondent*

SCAHILL LAW GROUP, P.C.  
1065 Stewart Avenue, Suite 210  
Bethpage, New York 11714  
(516) 294-5200  
[frank@scahillpc.com](mailto:frank@scahillpc.com)

*Attorneys for Defendants-Appellant  
St. Francis of Assisi Roman Catholic Church,  
Borough of Queens, City of New York*

SHAUB, AHMUTY, CITRIN & SPRATT, LLP  
1983 Marcus Avenue, Suite 260  
Lake Success, New York 11042  
(516) 488-3300  
[rortiz@sacslaw.com](mailto:rortiz@sacslaw.com)

*Attorneys for Defendant-Appellant  
Roman Catholic Diocese of Brooklyn*

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT**

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J.D.,

Plaintiff-Respondent,

**Docket Nos. 2021-03975  
2021-03978**

**Kings County Index  
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– against –

ROMAN CATHOLIC DIOCESE OF BROOKLYN  
and ST. FRANCIS OF ASSISI ROMAN CATHOLIC  
CHURCH, BOROUGH OF QUEENS,  
CITY OF NEW YORK,

Defendants-Appellants,

– and –

BISHOP NICHOLAS DIMARZIO,

Defendant.

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**AFFIRMATION OF JENNIFER FREEMAN IN SUPPORT OF MOTION  
BY CHILD USA TO FILE *AMICUS CURIAE* BRIEF**

Jennifer Freeman, an attorney admitted to practice before the courts of New York and Florida, affirms the following to be true under penalty of perjury:

1. I am an attorney with the Marsh Firm Law Firm PLLC. I am licensed to practice law in New York and Florida.
2. I submit this affirmation in support of the motion for leave to file the attached brief as *amicus curiae* in support of Plaintiff-Respondent J.D.

3. This case raises an important issue of whether the Plaintiff- Respondent may pursue a cause of action for breach of fiduciary duty pursuant to the Child Victims Act without violating Defendants-Appellants' First Amendment rights.

4. *Amicus curiae* CHILD USA is a leading national non-profit think tank working to end child abuse and neglect in the United States. CHILD USA seeks to pair social science research with legal analysis to determine the most effective public policies to end child abuse and neglect. Distinct from an organization engaged in the direct delivery of services, CHILD USA develops evidence-based solutions and information useful for policymakers, youth-serving organizations, courts, media, and the public to increase child protection. CHILD USA's interests in this case are directly correlated with its mission to eliminate barriers to justice for child sex abuse victims who have been harmed by individuals and institutions.

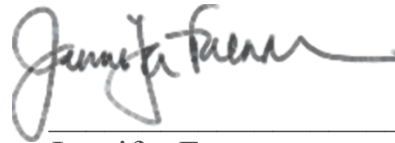
5. CHILD USA seeks to participate as *amicus curiae* in this case because of the important public policy issues to better allow child sex abuse victims to proceed on their tort claims against institutions that enable and cover-up abuse and to expand access to justice for child sex abuse survivors.

6. The proposed brief of *amicus curiae* is attached to this affirmation as **Exhibit A**. This brief supplements Plaintiff- Respondent's brief by providing insight to the Court on the compelling public interests in holding perpetrators and

institutions accountable for their harms against children, and by framing the breach of fiduciary claim in historical context under the First Amendment.

7. For these reasons, on behalf of CHILD USA, I respectfully seek the Court's permission to file the attached amicus curiae brief.

Dated: September 1, 2021  
New York, New York



\_\_\_\_\_  
Jennifer Freeman



# EXHIBIT A

Do not use without permission of CHILD USA.

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NEW YORK SUPREME COURT  
APPELLATE DIVISION – SECOND DEPARTMENT  
Docket Nos. 2021-03935, 2021-03978

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In the Matter of  
J.D.,

*Plaintiff-Respondent,*

– against –

ROMAN CATHOLIC DIOCESE OF BROOKLYN  
and ST. FRANCIS OF ASSISI ROMAN CATHOLIC CHURCH,  
BOROUGH OF QUEENS, CITY OF NEW YORK,

*Defendants-Appellants,*

– and –

BISHOP NICHOLAS DIMARZIO,  
*Defendant.*

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

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Marci A. Hamilton, Esq.  
CEO, CHILD USA  
Fels Institute of Government  
Professor of Practice  
University of Pennsylvania  
3508 Market Street, Suite 202  
Philadelphia, PA 19104  
Tel: (215) 539-1906  
[Marcih@sas.upenn.edu](mailto:Marcih@sas.upenn.edu)

Jessica Schidlow, Esq.  
Staff Attorney, CHILD USA  
[jschidlow@childusa.org](mailto:jschidlow@childusa.org)

James R. Marsh  
Jennifer Freeman  
Tatiana Akhund  
Marsh Law Firm PLLC  
31 Hudson Yards, 11<sup>th</sup> Floor  
New York, NY 10001-2170  
Phone: 212-372-3030  
[jenniferfreeman@marsh.law](mailto:jenniferfreeman@marsh.law)  
[jamesmarsh@marsh.law](mailto:jamesmarsh@marsh.law)  
[tatianaakhund@marsh.law](mailto:tatianaakhund@marsh.law)



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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

CHILD USA is the leading national non-profit 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. Distinct from an organization engaged in the direct delivery of services, CHILD USA develops evidence-based solutions and information needed by policymakers, youth-serving organizations, courts, media, and the public to increase child protection and the common good. CHILD USA's interest in this case is directly related to its mission to end child sexual abuse by holding perpetrators and their aiding and abetting institutions accountable for the secular torts committed against children in their care and ensuring access to justice for victims whose claims were unfairly blocked by too-short statutes of limitation that played into the hands of perpetrators.

### ARGUMENT

This Court should deny Defendants' appeal and affirm the order of the Supreme Court, Kings County, permitting Plaintiff's breach of fiduciary duty claim to proceed in light of the compelling interests in addressing institutional child sexual abuse and where adjudication of the claim does not violate Defendants' First Amendment or Equal Protection rights.

## POINT I

### **THE CHILD VICTIMS ACT REVIVAL WINDOW IS A REASONABLE REMEDY TO THE INJUSTICE OF BARRING CHILD SEXUAL ABUSE CLAIMS WITH UNREASONABLY SHORT STATUTES OF LIMITATION**

Child sexual abuse is a public policy crisis, with approximately 3.7 million children sexually abused in the United States every year. *See* Preventing Child Sexual Abuse, CDC.GOV (last visited Jan. 24, 2020), 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 (2015). This crisis has created an emergency for lawmakers and policymakers to redress, halt, and prevent. Historically, a wall of ignorance and secrecy has been constructed around child sex abuse, which has been reinforced by short statutes of limitation ("SOLs") that kept victims out of the legal system. Short SOLs for child sex abuse have played into the hands of the perpetrators and the institutions that coverup for them. The research has proven that the overwhelming majority of victims cannot bring their claims within the short timeframe allotted by most SOLs like those in New York before the Child Victim's Act, and that mere knowledge of an abusive act is insufficient for a victim to bring their claim. N. Spröber et al., Child sexual abuse in religiously affiliated and secular institutions, 14 BMC PUB. HEALTH 282, 282 (2014) (hereinafter "Spröber"). Revival laws such as



those passed by the New York General Assembly recognize that society for too long did not understand the plight of those sexually abused as children and unfairly extinguished their rights long before they had the ability to report or seek justice for their abuse. By passing the Child Victims Act, the New York General Assembly took a proactive stance to address access to justice for victims whose claims expired and, in so doing, greatly reduced the present danger to New York's children. Now, Defendants seek to undermine the Act's worthy cause and circumvent judicial oversight of their tortious actions. Yet revival laws are the only way to restore justice to adult victims of child sex abuse and give them the opportunity to file civil lawsuits if they so choose and serve important public purposes. The pervasiveness of child sexual abuse and its impact on victims and society underscore the importance of judicial intervention to ensure institutions are held accountable for creating or facilitating the harm to children.

#### **A. Child Sexual Abuse And Its Effects Are Pervasive**

Child sexual abuse is a public health crisis affecting 1 in 5 girls, and 1 in 13 boys in this nation. 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). Arrests are only made in 29% of child sexual abuse cases, and for children under six, only 19% of sexual abuse incidents result in arrest. Snyder, H. N., Sexual assault of young children as reported to law enforcement: Victim, incident, and offender characteristics, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf>. This means that over two thirds of child sexual predators are never arrested, let alone convicted. They continue to move through society with unfettered access to children. Historically, 90% of child victims never go to the authorities and the vast majority of claims have expired before the victims were able to get into court. Centers for Disease Control and Prevention, The Adverse Childhood Experiences (ACE) Study, available at <http://www.cdc.gov/violenceprevention/acestudy/#1> (hereinafter “CDC ACEs Study”); *see also* U.S. Dep’t of Health & Human Services Administration for Children & Families, Administration on Children, Youth & 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 in a way that is wholly distinguishable from victims of other crimes. As explained by the Center for Disease Control, Adverse Childhood Experiences (“ACEs”) “have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity.” CDC ACES 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) (hereinafter Felitti); 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 showing 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. 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) (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).

The ways in which victims of child sexual abuse are harmed makes it difficult or impossible to process and cope with the abuse, or to self-report it. In fact, the best science has found that the average age of disclosure in a majority of cases involving childhood sex abuse is 52. Spröber at 282. The decades before disclosure give perpetrators and institutions like Defendants the latitude to suppress the truth to the detriment of children, parents, and the public.

## **B. The Social and Economic Costs of Childhood Sexual Abuse Are Severe**

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 fail to hold responsible institutions that harbor perpetrators and assist in covering up their heinous acts committed against children.

### C. Institutional Liability Serves A Number Of Significant Public Interests

Undoubtedly there is great societal interest in protecting the well-being of children. *See, e.g.,* New York v. Ferber, 458 U.S. 747, 756-57 (1982); Packingham v. North Carolina, 137 S. Ct. 1730, 1740 (2017) (Protecting children from sexual misconduct is a “government objective of surpassing importance.”); Maryland v. Craig, 497 U.S. 836 (1990) (“[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.”); Bellotti v. Baird, 443 U.S. 622 (1979) (recognizing that the “peculiar vulnerability” of children may curtail otherwise protected rights of adults); Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (“[P]rotecting children from abuse is a compelling state interest.”); People v. Foley, 94 N.Y.2d 668, 682-83 (2000) (“The State plainly has a ‘compelling’ interest in protecting children from sexual exploitation....”). It is hard to imagine a more compelling interest than providing access to justice to victims of child sexual abuse and protecting New York’s children now and into the future.

Reviving expired claims serves three compelling interests: (1) identifying hidden child predators and the institutions that endanger children; (2) shifting the cost of abuse from victims and taxpayers to those who caused the abuse; and (3) educating the public about the prevalence, signs, and impact of child sex abuse so that it can be prevented in the future. By enacting the Child Victims Act revival

window, the New York Legislature has sought to achieve these purposes, taking reasonable steps to revive expired claims of child sex abuse where it recognized an opportunity to right a long-standing injustice that kept the truth hidden and victims out of court.

The revival provisions serve the compelling state interest in increasing child protection. By allowing previously expired claims to proceed through the justice system, the State encourages victims to identify New York's hidden child predators and institutions that endanger children to the public so they can be held accountable. Without viable tort remedies, institutions in Defendants' position are free to put profits above the public good causing a chilling effect on disclosure and identification of predators to the detriment of parents and the general public.

By enacting the revival window, the Legislature acted to shift the cost of abuse from the victims to those responsible for their abuse. The cost of sex abuse can be high, and victims are often forced to bear life-long, high costs of the abuse. See *infra* I(B). Often taxpayers unjustly carry the burden of this enormous lifetime expense with the victims when they must depend on Medicaid or other state services. A plaintiff still has the initial burden of proof to establish a claim. The balance weighs heavily in favor of the compelling interest in compensating survivors for the life-long losses suffered as a result of the intentional or tortious conduct of others and protecting the public.

New York also has a compelling interest in educating the public about matters of public safety, especially child sex abuse. With the opening of the revival window, the public uncovers instances of child sex abuse that would have otherwise remained hidden. Children are at heightened risk when the public and parents are unaware that certain adults or institutions endanger children. When predators and institutions are exposed, particularly high-profile ones like Larry Nassar, Jeffrey Epstein, the Boy Scouts of America, and the Catholic Church, the public learns about the insidious ways child molesters operate to sexually assault children and the institutional failures that enabled their abuse. By shedding light on the prevalence and harm from child sex abuse, parents and others are better able to identify abusers and responsible institutions and prevent further abuse. This knowledge helps to educate children to be aware of the signs of grooming and abusive behavior and to create more social awareness to help keep kids safe, while also encouraging institutions to implement accountability and safety practices and the legal system to develop policies to protect victims more effectively. Broader prevention of abuse has positive long-term impacts for the children and families of New York.

The states that have revived expired civil SOLs have learned about hidden child predators and institutions that harbored them while empowering victims. These revival laws provide long-overdue justice to adult victims of child sex abuse. They also address the systemic issue of institutional child sex abuse, which occurs



with alarming frequency in athletic institutions, youth-serving organizations, religious groups, and schools. These entities are in a unique position to deter institutional sex abuse but will be unmotivated to do so if liability is lessened. Accountability is the best way to deter institutions from failing to properly respond to sexual abuse allegations and prevent future harm. Without institutional accountability for enabling child sex abuse to happen and for looking the other way or covering up abuse when it's reported, the children these institutions serve remain at risk today. Revival windows send a strong message to these institutions that the state will not tolerate or look the other way when a person sexually assaults a child in their midst.

## **POINT II**

### **VICTIM-PERPETRATOR DYNAMICS COMPLICATE THE EXPERIENCE OF ABUSE AND UNIQUELY SO IN CASES OF CLERGY-PERPETRATED ABUSE**

The inherent power dynamics involved in child sexual abuse complicate victims' experiences and perceptions surrounding the abusive event and can affect when and in what manner trauma-related symptoms manifest. In cases of clergy-perpetrated abuse, the dynamics of the abusive relationship are especially insidious, and the long-term effects particularly damaging.

## A. The Victim-Perpetrator Dynamic Complicates Victims' Experience of Child Sexual Abuse

The victim-perpetrator relationship further complicates the experience of child sexual abuse and can, as expected, effect the timing of the disclosure. See Smith, D.W., et. al., Delay in disclosure of childhood rape: results from a national survey, 24(2) CHILD ABUSE & NEGLECT, 273-287 (2000); see also, Sjoberg, R.L. & Lindblad, F., Limited disclosure of sexual abuse in children whose experiences were documented by videotape, 159 AM. J. PSYCH. 312-314 (2002). Sexual abuse is most frequently committed by adults who occupy positions of trust and authority in relation to the child. Paine, M. & Hansen, D.J., Factors influencing children to self-disclose sexual abuse, 22 CLINICAL PSYCH. REV. 271-295, 276 (2002) (hereinafter "Paine"). Typically, the perpetrator will exploit the inherent power-imbalance to exert control over the child. *Id.*

Perpetrators often use their position of power and trust to "groom" their victims, a process through which the perpetrator distorts the victims' emotions in ways that makes them feel more 'special' than others. See McAlinden, A., 'Setting 'Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children, 15 SOC. & LEG. STUD. 339, 340 (2006) (Grooming "refers to the situation whereby a potential offender will set up opportunities to abuse by gaining the trust of the child in order to prepare them for abuse."); see also U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to

Congress 21 JUSTICE.GOV (Aug. 2010) (“Grooming usually involves normalizing sexualized behavior in the offender-child relationship by introducing increasingly intimate physical contact by the offender toward the victim, very gradually sexualizing the contact, and sometimes using child pornography to break down the child’s barriers. This gradual process and the relationship of trust and authority that the offender usually holds over the child, along with the child’s immaturity and subservience, serves to break down the child’s resistance.”). Offenders generally target victims due to their vulnerability, isolation, or those from dysfunctional families who may lack emotional dependence. *Id.* at 349. The dynamics of the abusive relationship and the insidious nature of the grooming process leaves children feeling deeply confused and overwhelmed. *Id.* In fact, many victims perceive themselves as willing participants in a “relationship” with their perpetrator. Paine at 278. The child’s feelings of complicity may be compounded by intense feelings of shame. Hunter, S., Disclosure of child sexual abuse as a life-long process: Implications for health professionals, 32(2) AUSTRALIAN AND NEW ZEALAND J. OF FAM. THERAPY 159, 164 (2011) (feelings of fear, shame, and embarrassment may dwarf a child victim’s desire to disclose abuse).

### **B. The Dynamics of Clergy-Perpetrated Abuse Uniquely Impact Victim Disclosure**

Research shows that abusive clergy follow patterns similar to perpetrators in the general community when grooming their victims, with one major exception—

clergy-offenders uniquely misuse and exploit the deference and respect accorded to them as church leaders in order to avoid suspicion, and to coerce victims into silence. Spraitz, J., et. al., Proposing a behavioral taxonomy of priest sexual grooming, 7(1) INT'L J. FOR CRIME, JUSTICE & SOCIAL DEMOCRACY 30 (2018).

The respect bestowed to clergy by parents and community members also impacts the likelihood of disclosure and makes it more likely that victims will keep their abuse a secret. *Id.* The reluctance to disclose is further entrenched by targeted grooming of the victims' families which accelerates their willingness to allow their children to spend time alone with the perpetrator. Terry, K.J. & Ackerman, A., Child sexual abuse in the Catholic Church: How situational crime prevention strategies can help create safe environments, 35 CRIM. JUSTICE. & BEHAVIOR 643 (2008).

Another unique characteristic of clergy-perpetrated abuse is the way in which God is invoked as a silencing strategy. Isley, P.J., et. al., In their own voices: A qualitative study of men abused as children by catholic clergy, 17(3-4) J. OF CHILD SEXUAL ABUSE 201 (2008) (documenting how priest abusers would tell their victims they were chosen over others to receive either the abuser's or God's love and they would show love of God by not telling anyone about it). Beyond causing significant spiritual trauma, this silencing strategy also serves to delay disclosure. *Id.*

If and when victims *do* choose to disclose, they risk secondary trauma when the person to whom the disclosure is made fails to respond appropriately, especially

when the recipient of that disclosure is a parent. Abusive clergy exploit the reality that parents' own religious beliefs and the trust and respect they have for members of the clergy may manifest as a reluctance to believe children's veritable reports of abuse. MADIGAN, L. & GAMBLE, N., *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* (1991). This secondary betrayal by parents in addition to non-response by the church exacerbates and compounds the distress and psychological harm caused by the initial abuse. *Id.*

### **C. Clergy-Perpetrated Abuse Is Associated with Unique Consequences That Distinguish It from Other Forms of Trauma**

Though clergy-perpetrated abuse shares similarities with other forms of child sexual abuse, including the psychological and emotional consequences attendant to it, there are additional aspects— particularly the profound change in individual spirituality and the impact of the abuse and institutional betrayal on the family— which differentiate this abuse from other forms of trauma. Indeed, clergy-perpetrated abuse has been described as a “unique betrayal” and the “ultimate deception.” Guido, J.J., *A unique betrayal: Clergy sexual abuse in the context of the Catholic religious tradition*, 17(3-4) *J. OF CHILD SEXUAL ABUSE* 255 (2008).

Specifically, there is a spiritual dimension to clergy abuse that sets it apart from child sexual abuse in the general population, including a spiritual and religious crisis during and after the abuse. Farrell, D., et. al., *Silenced by God*, *COUNSELING PSYCH. QUARTERLY* 22 (2000). Indeed, abuse by a trusted figure, who is recognized

as and holds himself out to be a representative of God, is “a sinister assault on that person’s psychosocial and spiritual well-being.” *Id.* Clergy-perpetrated abuse is associated with a deep sense of betrayal by the individual perpetrator and the church as well. *Id.* The impact of such a betrayal is amplified when the perpetrator is sheltered and supported by a larger religious community. *Id.*

### POINT III

#### **PLAINTIFF MAY PROCEED ON HIS BREACH OF FIDUCIARY DUTY CLAIM WITHOUT VIOLATING DEFENDANTS’ FIRST AMENDMENT OR EQUAL PROTECTION RIGHTS**

At one time courts blindly accepted religious institutions’ broad First Amendment claims without consideration as to the broader social implications. For too long, the failure to adjudicate claims where religion was superficially involved enabled institutional predators to seek shelter from the very laws that were designed to deter their harmful activities. It also meant denying access to justice for individuals who had been victimized in a religious setting.

Today, courts recognize in more meaningful ways that the First Amendment is not a shield behind which religious adherents can escape liability for social wrongs they committed. The distinguishing and pervasive facts about sexual abuse across the country have changed the law’s perspective on the range of religious freedom. They have clarified that child sexual abuse, and the protection of predators from courts, are always against the “neutral principles of law,” and claims arising from

the same may be adjudicated by state and federal courts without interfering with religious freedom. Child sexual abuse and its cover-up is not protected by the First Amendment. The secular harms committed by predatory institutions are subject to neutral, generally applicable laws and Plaintiff's breach of fiduciary duty claim may proceed without implicating Defendants' First Amendment or Equal Protection rights.

**A. The First Amendment is Not a Shield Behind Which Religious Institutions Who Aid and Abet Predatory Clergy Can Hide**

The First Amendment to the United States Constitution prohibits any "law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. AMEND. ART. I. The First Amendment "embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). As the United States Supreme Court has stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. \*\*\* 'To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.'" Employment

Div. v. Smith, 494 U.S. 872, 879 (1990) (citing Reynolds v. United States, 98 U.S. 145 (1879)).

As the Supreme Court repeatedly has made clear in Smith, 494 U.S. 872, Gillette v. United States, 401 U.S. 437 (1971), Cantwell, 310 U.S. 296, Reynolds, 98 U.S. 145, and United States v. Lee, 455 U.S. 252, 255 (1982), Defendants' religious beliefs do not mitigate their legal obligation to refrain from harmful acts. In fact, the Supreme Court has held religious actors accountable for third-party harms under a variety of neutral, generally applicable laws. *See, e.g.*, Smith, 494 U.S. 872 (applying neutral principles of law to drugs and unemployment compensation); Lee, 455 U.S. 252 (applying neutral principles of law to social security taxes); Wolf, 443 U.S. at 604 (applying neutral principles of law to adjudicate a church property dispute); Braunfeld v. Brown, 366 U.S. 599 (1961) (applying neutral principles to Sunday closing laws); Reynolds, 98 U.S. 145 (applying neutral principles of law to polygamy). The Supreme Court's settled doctrine requires deference to and application of state laws that are neutral and generally applicable even if they burden religious conduct. Courts in many states have similarly held that religious organizations can and should be held responsible for sexual misconduct by their clergy and that the First Amendment is not a barrier to such liability. *See, e.g.*, Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 947-48 (9th Cir. 1999); Martinelli v. Bridgeport



Roman Catholic Diocesan Corp., 196 F.3d 409, 431-32 (2d Cir. 1999); Doe v. Liberatore, 478 F. Supp. 2d 742, 774 (M.D. Pa. 2007); Doe v. Archdiocese of Denver, 413 F. Supp. 2d 1187, 1194-95 (D. Colo. 2006); Malicki v. Doe, 814 So. 2d 347, 351 (Fla. 2002); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208, 1232 (Me. 2005). The same applies to breach of fiduciary claims. *See, e.g.*, Sanders v. Casa View Baptist Church, 134 F.3d 331, 337 (5th Cir. 1998); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993); Doe v. Evans, 814 So. 2d 370 (Fla. 2002); F.G. v. MacDonell, 150 N.J. 550, 696 A.2d 697 (1997); McKelvey v. Pierce, 173 N.J. 26 (2002). Simply put, application of a secular standard to secular conduct, even though committed by a religious organization, does not offend the First Amendment, and challenges to the same are subject only to rational basis review. To hold otherwise, would “cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded.” Smith v. Privette, 128 N.C. App. 490, 495 (1998) (citing Jones v. Trane, 153 Misc.2d 822, 591 N.Y.S.2d 927, 932 (N.Y. Sup. Ct. 1992)).

Defendants do not nor could they reasonably claim that there is a religious belief or tenet that would require them to harbor, aid, and/or abet abusive clergy. Therefore, the challenge need only satisfy the deferential rationality review. Even if Defendants could articulate some incidental burden on their religious

beliefs or practices, the Child Victims Act—the language and history of which does not exclude breach of fiduciary duty claims—serves the compelling state interests in identifying predators and supportive institutions to the public and shifting the cost of abuse from the victims and the state to those who caused the abuse and thus would satisfy strict scrutiny as well. Therefore, Defendants have no basis upon which to challenge Plaintiff’s breach of fiduciary duty claim.

Where, as here, the Diocese conduct resulted in devastating secular harm to countless children, civil courts can, and indeed must, be the final arbiter of justice. *See Prince*, 321 U.S. 158 (prohibiting even parents from allowing their children to distribute religious literature, is constitutionally proper where necessary to protect the health and safety of youth, even when parents consider such work a religious duty).

**B. The Doctrine of Judicial Abstention Does Not Grant Civil Immunity to Defendants for the Secular Harm They Caused by Committing Secular Torts**

The First Amendment’s guarantee that “Congress shall make no law . . . prohibiting the free exercise’ of religion” holds an important place in our scheme of ordered liberty, but our courts have steadfastly maintained that claims of religious conviction do not automatically entitle persons to immunity from civil laws. “Not all burdens on religion are unconstitutional.” *Bowen v. Roy*, 476 U.S. 693, 701-02 (1986); see also, *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (“Although a

determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”).

The United States Supreme Court has developed a limited doctrine of judicial abstention, whereby only ecclesiastical or theological questions or those involving judgements of hierarchical church tribunals are beyond the reach of civil determinations under the First Amendment. Indeed, the Framers by no means intended the First Amendment to provide an unrestricted license to engage in harmful conduct under the auspices of religious freedom. *See Reynolds*, 98 U.S. at 163 (discussing Madison’s and Jefferson’s view that “it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order”). Rather, it was expected that religious institutions would conduct themselves in a manner consistent with the safety, peace, and order of the public. *See Cantwell*, 310 U.S. at 304; Marci A. Hamilton, Religious Institutions, the No-Harm Doctrine, and the Public Good, 2004 BYU L. REV. 1099, 1194-95 (2004). Simply put, the Supreme Court’s First Amendment case law reflects an orientation toward the common good where harm to third parties is the outer limit on the free exercise of religion. *Id.* at 1194-95.

Here, Defendants seeks to exploit the religious freedom guaranteed under our constitution by arguing for an expanded theory of ecclesiastical immunity that, if adopted, would allow wrongdoers to circumvent judicial oversight of their harmful conduct and, in effect, the rule of law simply because of a religious affiliation. *See* MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 45 (2014). While courts have given great protection to the abstention exception in order to protect religious freedom, the exception “does not mean that religious institutions enjoy a general immunity from secular laws[.]” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Religious organizations do not possess absolute religious freedom to ignore generally applicable laws. The First Amendment’s Religion Clauses are not a refuge for criminal or tortious behavior that harms children or vulnerable adults.

If this court were to accept Defendants’ proposed framework, defenses to harmful conduct against minors would grow both in number and success. The result would be that children would be unprotected simply because the harm arises from religious conduct or in a religious setting and past child victims would have no forum to seek remedy for the wrongs perpetrated against them by religious actors. Any deterrent effect of our civil tort laws would effectively be eliminated, and bad actors would continue to be empowered to harm vulnerable children. It is precisely this concept of religious autonomy and immunity that led religious institutions to believe

that they had a right to handle repeated crimes in private and place their public image above the interests of children in clergy sex abuse cases in the first place. *See* GOD VS. THE GAVEL at 38-80.

**C. The Defendants’ Equal Protection Rights Are Not Violated Because Religious and Secular Actors Are Subject to The Same Neutral, Generally Applicable Tort Laws**

It is well-established that the First Amendment “right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 (Stevens, J., concurring)). The neutral principles standard, first espoused in *Jones v. Wolf*, has the “primary advantage” of being “completely secular in operation and yet flexible enough to accommodate all forms of religious organization and polity” and thus “promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.” 443 U.S.595, 599, 602-04 (1979).

No entity is above the generally applicable, neutral laws like those at issue in this case—religious or not. Breach of fiduciary duty tort law is a valid and neutral law of general applicability and Plaintiff simply seeks application of this law to Defendants’ conduct endangering children in the same manner it would be applied to a secular employer. *See, e.g., L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P.*,

75 S.W.3d 247 (Mo. 2002) (a suit may proceed against the owners, operators, and managers of a mall, along with security company employed by the mall for negligent failure to prevent sexual assault of a minor); M.C. v. Yeargin, 11 S.W.3d 604, 613 (Mo. Ct. App. 1999) (proceedings against a hotel for failure to prevent or intervene in the sexual assault of a guest may proceed because the hotel owed a duty of care). Indeed, the requisite standard of care in breach of fiduciary duty is neither general nor dependent upon the specifics of any religion or its practices, but a standard specific to the underlying relationship and thus highly fact specific. That one of the parties to the relationship is a religious institution is relevant only to the nature of the power differential in establishing the fiduciary nature of the relationship.

The case before this Court does not involve an internal church matter, but rather a dispute between church officials and a parishioner who alleges harm as a result of Defendants' aiding and abetting a sexual offender. Nor is the conduct being litigated—the acts and omissions of the Defendants—rooted in religious belief. Therefore, by applying and following neutral principles of tort law, consideration of Plaintiff's breach of fiduciary claim gives no greater or lesser deference to tortious conduct committed on third parties by religious institutions than it would to that by non-religious institutions. Religious institutions are subject to the same neutral principles of tort law as their non-religious counterparts. To conclude otherwise

would place religious institutions in a preferred position over secular institutions, and effectively immunize them from legal accountability applicable to everyone else in civil society. Contrary to the constitutional argument advanced by Defendants, Defendants' equal rights are not implicated as Plaintiff's claim simply requires the court to apply neutral principles of civil tort law. The harm to Plaintiff, and other children, is the touchstone, not the identity of the bad actors.

### CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court dismiss Defendants' appeal and permit plaintiff to proceed on his breach of fiduciary duty claim.

Respectfully submitted,



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Jennifer Freeman  
James R. Marsh  
Tatiana Akhund  
Marsh Law Firm PLLC  
31 Hudson Yards, 11<sup>th</sup> Floor  
New York, NY 10001-2170  
Phone: 212-372-3030  
[jenniferfreeman@marsh.law](mailto:jenniferfreeman@marsh.law)  
[jamesmarsh@marsh.law](mailto:jamesmarsh@marsh.law)  
[tatianaakhund@marsh.law](mailto:tatianaakhund@marsh.law)

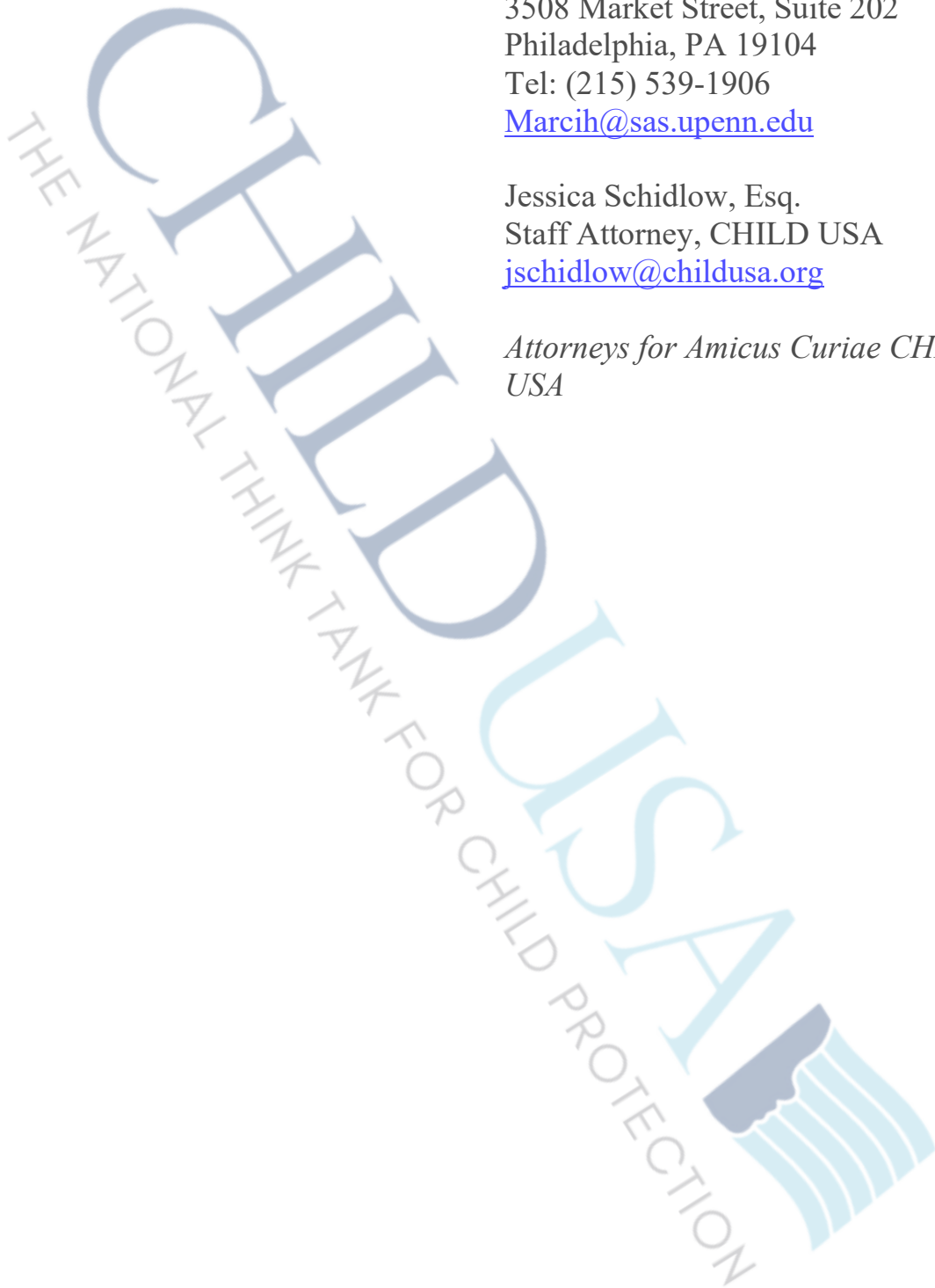
*Counsel of Record*

Marci A. Hamilton, Esq.  
CEO, CHILD USA  
Fels Institute of Government

Professor of Practice  
University of Pennsylvania  
3508 Market Street, Suite 202  
Philadelphia, PA 19104  
Tel: (215) 539-1906  
[Marcih@sas.upenn.edu](mailto:Marcih@sas.upenn.edu)

Jessica Schidlow, Esq.  
Staff Attorney, CHILD USA  
[jschidlow@childusa.org](mailto:jschidlow@childusa.org)

*Attorneys for Amicus Curiae CHILD  
USA*





**APPELLATE DIVISION: SECOND DEPARTMENT**  
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Jennifer Freeman

## CERTIFICATE OF SERVICE

I, Jennifer Freeman, Esq., hereby certify that I have caused the above Notice of Motion and Affirmation with Exhibit A to be served on all parties on September 1, 2021 by arranging for the filing of all documents on NYSECF and the emailing of copies to the following parties:

JANET, JANET & SUGGS LLC  
Andrew Janet  
4 Reservoir Circle, Suite 200  
Baltimore, MD 21208  
(410) 653-3200  
(410) 653-9030 (fax)  
[asjanet@jjsjustice.com](mailto:asjanet@jjsjustice.com)


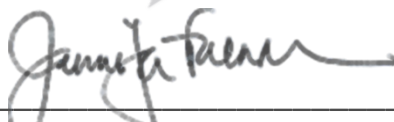
*Attorneys for Plaintiff-Respondent*

SCAHILL LAW GROUP, P.C.  
1065 Stewart Avenue, Suite 210  
Bethpage, New York 11714  
(516) 294-5200  
[frank@scahillpc.com](mailto:frank@scahillpc.com)

*Attorneys for Defendants-Appellant  
St. Francis of Assisi Roman Catholic Church,  
Borough of Queens, City of New York*

SHAUB, AHMUTY, CITRIN & SPRATT, LLP  
1983 Marcus Avenue, Suite 260  
Lake Success, New York 11042  
(516) 488-3300  
[rortiz@sacslaw.com](mailto:rortiz@sacslaw.com)

*Attorneys for Defendant-Appellant  
Roman Catholic Diocese of Brooklyn*

  
  
\_\_\_\_\_  
Jennifer Freeman