

NORTH CAROLINA COURT OF APPEALS

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GREGORY COHANE,

*Plaintiff-Appellant,*

v.

THE HOME MISSIONERS OF AMERICA d/b/a GLEMARY HOME MISSIONERS, ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NORTH CAROLINA, and AL BEHM,

*Defendants-Appellees.*

**BRIEF FOR CHILD USA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL**

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## INTRODUCTION

Child sexual abuse<sup>1</sup> is a national public health crisis, with 3.7 million children sexually abused every year.<sup>2</sup> It affects 1 in 5 girls, and 1 in 13 boys in this nation.<sup>3</sup> 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 have played into the hands of perpetrators and their enabling institutions and kept victims out of court. By passing the SAFE Child Act (hereinafter the “Act”), which creates a two-year window that revives “any civil action for child sexual abuse”, 2019 N.C. Sess. Laws 245, § 4.2(b), the General Assembly has taken a proactive stance to address access to justice for victims who—through no fault of their own—were unable to come forward with their claims until long after the limitations period had expired. Revival laws are not solely about justice victims, there are also compelling public policy reasons for permitting older claims to proceed: (1) they identify hidden predators and the institutions that

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<sup>1</sup> No person or entity other than amicus curiae contributed to this brief or contributed money for its preparation

<sup>2</sup>See Preventing Child Sexual Abuse, CDC.gov (last visited Feb. 22, 2022), <https://www.cdc.gov/violenceprevention/pdf/can/factsheetCSA508.pdf>.

<sup>3</sup> G. Moody, et. al., Establishing the international prevalence of self-reported child maltreatment: a systematic review by maltreatment type and gender, 18(1164) BMC PUBLIC HEALTH (2018); M. Stoltenborgh, et. al., A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World, 16(2) CHILD MALTREATMENT 79 (2011); N. Pereda, et. al., The prevalence of child sexual abuse in community and student samples: A meta-analysis, 29 CLINICAL PSYCH. REV. 328, 334 (2009).

endanger children to the public, thereby shielding other children from abuse; (2) they shift the cost of abuse from victims and taxpayers to those parties responsible for it; and (3) they educate the public about the prevalence of child sex abuse and patterns institutions follow that put children at risk, so that the legal system can develop more effective prevention policies while also incentivizing institutions to implement accountability and safety practices.

Because it is unconstitutional to revive a criminal SOL, Stogner v. California, 539 U.S. 607, 610 (2003), filing civil claims under the revival window is the sole avenue of justice available to many victims and the only means of fulfilling these compelling public interests. It is also consistent with the national trend to give child sex abuse victims long overdue access to justice through a window and/or age limit revival law. The majority of these laws recognize the critical role entities play in preventing or perpetuating child sexual abuse and empower victims to hold all responsible parties accountable, just as the General Assembly recognized when it passed the SAFE Child Act.

The Superior Court decision denies Plaintiff-Appellant of any such occasion for redress while permitting Defendants-Appellees to escape the statute's explicit and intended reach. This case presents an opportunity for the Court to correct this error,

thereby putting perpetrators and their aiding and abetting institutions on notice that the state of North Carolina stands with the victims of these heinous crimes.

### **ARGUMENT**

The General Assembly unanimously passed the SAFE Child Act to provide access to justice for child sex abuse victims, to ensure meaningful accountability of perpetrators and their enabling institutions, and to protect North Carolina's children now and into the future. By narrowly construing the Act's window provision to exempt entities from accountability, the Superior Court has effectively rendered the law inutile. If the decision below is adopted, institutions will be free to turn a blind eye to child sexual abuse when it is reported, or worse conspire to cover it up, thereby leaving the children that these institutions serve today powerless and exposed. This Court should reverse the decision below as this will 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.

#### **I. THE GENERAL ASSEMBLY PASSED THE SAFE CHILD ACT IN RECOGNITION OF THE SCIENCE OF TRAUMA THAT CAN DELAY DISCLOSURE**

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.<sup>4</sup> Estimates across studies reveal that between 70% and 95% of child sexual abuse victims never report their abuse to authorities.<sup>5</sup> Many victims do not disclose their abuse for years, even decades, if at all. In fact, research indicates that 44.9% of male victims and 25.4% of female victims delayed disclosure by more than 20 years.<sup>6</sup> The decades before disclosure give perpetrators and their enabling institutions wide latitude to suppress the truth to the detriment of children, parents, and the public. It is with this understanding that the General Assembly passed the Act.

#### **A. The Traumatic Effects of Child Sexual Abuse**

The trauma stemming from child sexual abuse is complex and individualized, and it impacts victims both in the short-term and throughout their lifetimes.<sup>7</sup> It has devastating impacts on the brain that disrupt neurodevelopment and impair social, emotional, and cognitive functioning.<sup>8</sup> The psychological impact of sexual abuse

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<sup>4</sup> Ramona Alaggia et al., Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000-2016), 20 TRAUMA VIOLENCE ABUSE 260, 279 (2019).

<sup>5</sup> David Finkelhor et al., Sexually Assaulted Children: National Estimates and Characteristics, US Dept. of Justice, Office of Justice Programs (2008), available at <https://www.ojp.gov/pdffiles1/ojdp/214383.pdf>; Kamala London et al., Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers, 16 MEMORY 29, 31 (2008).

<sup>6</sup> Patrick J. O'Leary & James Barber, Gender Differences in Silencing following Childhood Sexual Abuse, 17 J. CHILD SEX. ABUSE 133 (2008).

<sup>7</sup> BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (Viking 2014).

<sup>8</sup> De Bellis, M. D., Spratt, E. G., & Hooper, S. R., Neurodevelopmental biology associated with childhood sexual abuse, 20(5) J. OF CHILD SEXUAL ABUSE 548 (2011).

may also cause victims to deny or repress memories of the abuse.<sup>9</sup> Often it is not until decades after the abuse has stopped that the most severe symptoms manifest, and victims are able to connect the devastating effects to the abusive experience.<sup>10</sup>

Child sexual abuse takes a significant, long-term toll on victims' overall health as well, increasing the risk not only for depression, anxiety, substance abuse, PTSD, and suicidal ideation, but also physical ailments such as high blood pressure and chronic illness.<sup>11</sup> This list is far from exhaustive, but it is certainly illustrative of the need to ensure that victims of are able to seek redress for these injuries.

### **B. The Insidiousness of Institutional Abuse**

Victims of child sexual abuse suffer a distinct harm, known as “institutional betrayal”, upon learning that an entity responsible for their care knowingly allowed their abuse to happen.<sup>12</sup> This discovery is strongly linked to poorer outcomes for victims.<sup>13</sup> In fact, the negative effects of institutional betrayal exacerbate and often exceed those associated with the primary abusive experience.<sup>14</sup>

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<sup>9</sup> Goodman, G.S., et. al., A prospective study of memory for child sexual abuse: New findings relevant to the repressed-memory controversy, 14(2) PSYCHOL. SCI. 11 (2003).

<sup>10</sup> Id.

<sup>11</sup> *Supra* n.2.

<sup>12</sup> Elizabeth Oddone Paolucci et al., A Meta-analysis of The Published Research on the Effects of Child Sexual Abuse, 135 J. PSYCH. 17 (Jan. 2001).

<sup>13</sup> Carly P. Smith & Jennifer J. Freyd, Insult, then Injury: Interpersonal and Institutional Betrayal Linked to Health and Dissociation, 26 J. OF AGGRESSION, MALTREATMENT, AND TRAUMA 1117 (June 19, 2017).

<sup>14</sup> Id.

For victims of clergy abuse, there is also a spiritual dimension that sets it apart from child sexual abuse in the general population, including a spiritual and religious crisis during and following the abusive experience.<sup>15</sup> 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” and for that reason has been called the “ultimate deception.”<sup>16</sup> The impact of such a betrayal is amplified when the perpetrator is sheltered and supported by a larger religious community.<sup>17</sup>

Clergy-perpetrated abuse also harms the institutional community and public as well. Institutions that are responsible for the care of children are enticing to perpetrators, and in the absence of adequate detection and preventative measures, can foster a culture in which child sexual abuse is permitted to thrive. The harms to the public do not end with the abuse, and where secrecy and concealment flourish, the public can suffer for years, or even decades.

## **II. THE STATUTE’S PLAIN LANGUAGE AND LEGISLATIVE HISTORY MAKE CLEAR THAT THE WINDOW PROVISION APPLIES TO ALL PARTIES RESPONSIBLE FOR CHILD SEXUAL ABUSE**

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<sup>15</sup> Farrell, D., et. al., Silenced by God, COUNSELING PSYCH. QUARTERLY 22 (2000).

<sup>16</sup> Id.; see also, 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).

<sup>17</sup> Id.

At the heart of this case, is whether the SAFE Child Act’s revival window provision can be read to shield entities from liability for their negligent conduct that perpetuates child sexual abuse. The statute’s clear language and legislative history do not support such an interpretation.

#### **A. The Express Language of the Provision Supports Entity Liability**

The SAFE Child Act revives for a two-year period “any civil action for child sexual abuse otherwise time barred under G.S. 1-52 as it existed immediately before the enactment of this act.” 2019 N.C. Sess. Laws 245, § 4.2(b). Therefore, only two conditions must be satisfied in order to file a claim pursuant to Section 4.2(b): (1) the claim must be for a civil action, which N.C. GEN. STAT. § 1-2 defines as “an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, [or] the redress or prevention of a wrong”; and (2) the cause of action must have previously been barred by N.C. GEN. STAT. § 1-52 - the general three-year SOL for personal injury which *expressly covers claims sounding in negligence*. It follows that Plaintiff-Appellant’s claims fall squarely within the scope of the two-year window provision. However, the Superior Court points to the language differences between the window provision which describes such claims as “for sexual abuse,” and the tolling language of N.C. GEN. STAT. §4.1(d) and § 4.1(e) which describes the claims as “related to child sexual abuse”, to find that the provision exempts entities from accountability. See *Id.* This

distinction has no substantive practical effect, and if followed, would permit claims against entities to be brought under the provisions related to the criminal conviction of a perpetrator but not under the two-year revival window which is not fixed to any criminal conviction or any determination as to the individual perpetrator. That would be an absurd result. Taylor v. Crisp, 286 N.C. 488, 496 (1975) (“[S]trict literalism will not be applied to the point of producing ‘absurd results.’”). Yet this is precisely what the Superior Court has concluded. While it is not unusual for a statutory question to turn on the meaning of only a few words, “[s]tatutory construction . . . is a holistic endeavor” and courts are required to interpret those words in their context within the full statutory text. United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988); see also, Williams v. Williams, 299 N.C. 174, 180-81 (1980) (“Statutes dealing with the same subject matter must be construed in *pari materia*, as together constituting one law, and harmonized to give effect to each.”). The rule that statutes be strictly construed does not require that they be stingily or even narrowly construed, and it certainly does not require that they be read to provide less than what their terms would ordinarily be read to provide. See generally, Elliott v. North Carolina Psychology Bd., 348 N.C. 230 (1998). If the General Assembly had sought to limit the revival window to claims against individual perpetrators, it simply would have said so.

## **B. The Legislative History Makes Clear That the Window Provision Applies to All Parties Responsible for Child Sexual Abuse**

The North Carolina Supreme Court has continually acknowledged that the legislature is the branch of government that is best equipped to weigh “all the factors surrounding a particular problem,” Tetterton v. Long Mfg. Co., 314 N.C. 44, 58 (1985) (quoting Kennedy v. Cumberland Eng’g Co., 471 A.2d 195, 206 (R.I.1984) (Murray, J., dissenting)), and “balance competing interests”, Id., and is, therefore, a more appropriate forum than the courts for implementing policy-based changes to the state’s laws. See State v. Warren, 252 N.C. 690, 696 (1960). To the extent that the revival language creates ambiguity as to its intended scope, it is the court’s role to ascertain the intent of the legislature and to effectuate those congressional objectives to the fullest extent possible. See generally, Applewood Properties, LLC v. New South Properties, LLC, 366 N.C. 518 (2013). As mentioned, the General Assembly enacted the revival window in response to the epidemic of child sexual abuse and the science of trauma that can delay disclosure. As, Representative Dennis Riddell explained on the House floor, “[t]he trend in our land, friends, is recognizing the brain science that’s out there. The long term, debilitating effects that it has on a child to be abused like this and the ability to finally come forward only as an adult.” *Hearing on House Bill 37 Before the House of Representatives* (2019) (statement of Rep. Dennis Riddell), available at

<https://www.ncleg.gov/DocumentSites/HouseDocuments/2019-2020%20Session/Audio%20Archives/2019/06-19-2019.mp3>.

The legislature also gave due consideration to the potential unfairness to defendants in requiring them to litigate decades-old claims and determined that access to justice for victims outweighed any supposed evidentiary challenges defendants may have, especially since plaintiffs face the same evidentiary challenges but also bear the ultimate burden of proof.

Nothing in the Act or its legislative history indicate that the General Assembly intended the two-year revival window to be limited to individual perpetrators, rather than to all parties who could be held liable in “any civil action.” All the opposite, the General Assembly was acutely aware of compelling public interests in holding perpetrators *and* enabling institutions accountable and passed the Act with these interests in mind. When the legislature enacts a statute after examining its legal and public policy implications it is not the province of the court to substitute its judgement for that of the legislature. See Wynn v. United Health Services/Two Rivers HealthTrent Campus, 716 S.E. 2d 373 (N.C. Ct. App. 2011), writ denied, review denied, 720 S.E. 2d 685 (N.C. 2012).

### **III. THE NATIONAL TREND IN SOL REFORM IS REVIVAL AGAINST ALL RESPONSIBLE PARTIES**

The General Assembly passed the Act amidst a sweeping SOL reform movement in this country. Since 2002, at least 30 states and territories have passed laws reviving previously expired child sexual abuse claims by extending the age limit and/or opening a revival window.<sup>18</sup> Of those 30, only 5 states— Georgia, Massachusetts, Nevada, Rhode Island, and Utah— have *explicitly* limited revival to perpetrators of abuse, and only 3 of the 5 have done so via a revival window.<sup>19</sup> For the remaining 25 states, the legislatures imposed no such limitation upon liability; this includes Arizona, Arkansas, California, Colorado\*, Delaware, Hawaii, Kentucky, Louisiana, Maine, Minnesota, Montana, New Jersey, New York, Vermont, and Washington D.C. all of which revived claims via a retroactive revival window similar to North Carolina's.<sup>20</sup>

Courts across the country have also construed similar statutes to apply broadly to both perpetrator and non-perpetrator defendants. See, e.g., Doe v. Arizona Bd. of Regents, Superior Court of Arizona. June 9, 2021 WL 2561534 (“Indeed, it would seem to be inconsistent with the purpose of the new statute to revive most claims involving sexual abuse of minors, yet leave claims against public entities time barred.”); Doe H.B. v. M.J., 59 Kan. App. 2d 273, 286 (2021), review

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<sup>18</sup> CHILD USA, Revival Laws for Child Sex Abuse Since 2002 (Jan. 1, 2022), <https://childusa.org/windowsrevival-laws-for-csa-since-2002/>.

<sup>19</sup>CHILD USA, 2020 SOL Report, (Feb. 26, 2021), 57-59, <https://childusa.org/wp-content/uploads/2021/02/2021-02-26-2020-SOL-Report-2.16.21-v2-1.pdf>.

<sup>20</sup> *Supra* n.18.

granted (Apr. 23, 2021) (holding that the revival provision applied to entities even though the statute defined “child sexual abuse” as including a number of crimes against minors that can only be committed by individuals but where the statute lacked broad language indicating that entities were exempt from accountability); Stephanie M. v. Coptic Orthodox Patriarchate Diocese of Southern U.S., 362 S.W.3d 656, 659 (Tex. App. 2011) (same).

Simply put, these revival laws “plainly [are] not concerned with *particular types of defendants*, but with providing a recovery for a *particular type of injury*” namely, child sexual abuse. Doe v. Boy Scouts of Am. Corp., 323 Conn. 303, 334 (2016). Any finding that the revival provision does not apply to claims sounding in negligence would be “totally inconsistent with [the] legislative intent to afford an opportunity for minor victims of sexual assaults caused by such institutional negligence to be made whole. We simply can perceive no legitimate reason why the legislature would have wanted to exempt persons or entities whose negligent conduct legally caused a plaintiff's injuries from also being held liable for their misconduct.” Id. at 337–338.

#### **IV. EXCLUDING ENTITIES FROM ACCOUNTABILITY UNDER THE WINDOW PROVISION SUBVERTS THE PRINCIPLES OF TORT LAW**

When it comes to tackling the epidemic of child sexual abuse, criminal prosecutions of individual perpetrators are important, but they do little to influence

the conduct of their enabling institutions. Civil accountability is critical to addressing institutional child sexual abuse. By empowering victims to bring claims against *all* responsible parties, hidden predators and their aiding and abetting institutions are brought into the light and are deterred from abusing more children. Limiting application of the Act's revival window is counterproductive because it diminishes this deterrent effect.

**A. Entity Liability Is Essential to Ensure Victims' Fundamental Right to Access the Civil Justice System and Obtain Meaningful Redress for Their Injuries**

Reaching large institutions in civil suits is unquestionably good for victims. On an emotional and psychological level, it provides acknowledgement not only of the abusive experience itself, but also of the systemic failures that enabled the abuse to happen. Not only does the decision below foreclose on victims' opportunity to obtain such redress, but it has significant practical implications as well. The costs of civil litigation can be prohibitive. A case that settles after discovery is complete can cost anywhere from \$5,000 to \$36,000 in attorney fees, and if the case goes to trial total costs can range anywhere from \$18,000 to \$109,000 per side.<sup>21</sup> While some perpetrators may have the "deep pockets" necessary to justify the cost of litigation, in most cases, a lawsuit against an individual perpetrator would cost more

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<sup>21</sup> Paula Hannaford-Agor & Nicole L. Waters, Estimating the Cost of Civil Litigation, 20(1) NATIONAL CENTER FOR STATE COURTS: CASELOAD HIGHLIGHTS, 1, 5 (2013).

to a victim than it would provide monetary benefits, making such cases financially impracticable to plaintiffs' lawyers working on a contingency fee basis. The right to representation is fundamental to ensuring victims obtain redress for their harms as "it is through counsel that all other rights," including access to justice are secured. Penson v. Ohio, 488 U.S. 75, 84 (1988). If victims are unable retain counsel, the right to access courts and obtain redress for their injuries will be nothing but "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

### **B. Entity Liability Helps Shift the Cost of Abuse from the Victim and Society Back to The Responsible Parties**

The economic burdens of child sexual abuse are often unknowingly and unjustly placed on the community as the negative effects over a victim's lifetime generate many costs that impact the nation's health care, education, criminal justice, and welfare systems.<sup>22</sup> The estimated average lifetime cost per victim of abuse includes: \$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, and \$7,999 in special education costs.<sup>23</sup> That places the economic

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<sup>22</sup> Fang, et. al., The Economic Burden of Child Maltreatment in the United States & Implications for Prevention, 36 CHILD ABUSE & NEGLECT 156-165 (2012).

<sup>23</sup> Id.

burden of abuse at an estimated \$2 trillion annually.<sup>24</sup> Civil accountability shifts *some* of the economic burdens of abuse back to the responsible parties most capable of bearing it. It also changes the corporate calculus to the benefit of children by making it more expensive to ignore the problem of child sexual abuse than it is to work towards fixing the problem.

### **C. The Opportunity for Public Scrutiny Is Lost and Conduct That Harms Children Undeterred Without the Prospect of Civil Liability**

Civil accountability is critical to help past victims of abuse, but it also plays a significant role in increasing the safety of vulnerable children now and into the future. Civil lawsuits provide an important opportunity for transparency regarding the nature and scope of abuse occurring within an institution, as well as institutional responses to known or suspected abuse. This is especially true of claims involving institutional cover-ups where public criticism and the attendant reputational harm often serve as the catalyst for change. The Catholic Church is a prime example. For years, Church officials were aware of the sexual abuse by clergy members and yet spent obscene amounts of time and money to cover it up by moving predatory priests from parish to parish.<sup>25</sup> Scores of children suffered because of their actions and yet

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<sup>24</sup> See CHILD USA, Fiscal Impact of SOL Reform, (2018) available at <https://www.childusa.org/fiscalimpact>.

<sup>25</sup> See generally Reports of Attorneys General, Grand Juries, Individuals, Commissions, and Organizations, BISHOPACCOUNTABILITY.ORG (last visited Sept. 30, 2021), <https://www.bishop-accountability.org/AtAGlance/reports.htm>.

the Church refused to act until a wave of lawsuits forced them to compensate their victims. It also prompted a series of investigations and reports on clergy abuse which forced these institutions to adopt more protective policies.<sup>26</sup>

To best protect children from abuse, there must be some reasonable expectation and degree of assurance that youth-serving organizations and institutions will recognize when they fall short of public expectations and be held appropriately accountable.

### CONCLUSION

For the foregoing reasons, amici request that this Court reverse the decision below and find that the Act's window provision revives negligence claims against entities.

Respectfully submitted this 21<sup>st</sup> day of March, 2022.

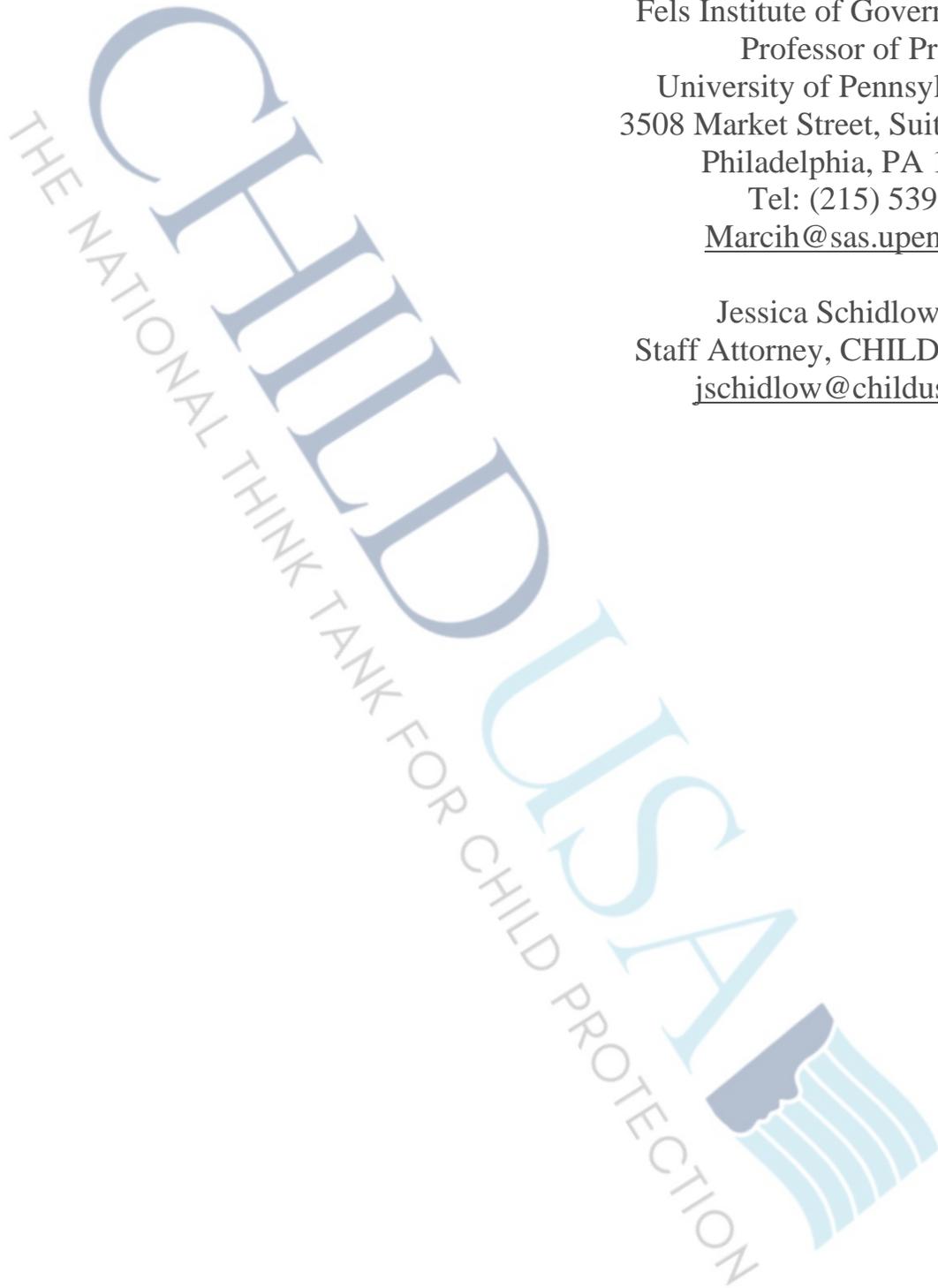
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<sup>26</sup> Vatican laws changed to toughen sexual abuse punishment, BBC (last visited Sept. 30, 2021), <https://www.bbc.com/news/world-europe-57318959>.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of North Carolina Rules of Appellate Procedure 28(j) because the brief 3,749 words excluding the parts of the brief exempt by the North Carolina Rules of Appellate Procedure. This brief complies with the type-style requirements of North Carolina Rule of Appellate Procedure 26(g)(1) because it has been prepared in a serifs typeface using Microsoft Windows 10 in 14-point double-spaced Times New Roman.

Dated: March 21<sup>st</sup> 2022.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief for Child USA as *Amicus Curiae* in Support of Plaintiff-Appellant Urging Reversal has been served this 21<sup>st</sup> day of March, 2022 by depositing a copy of the same in a post-paid envelope in an official depository of the United States Postal Service, addressed as follows:

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This the 21<sup>st</sup> day of March, 2022.

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