

CHILD USA

THE THINK TANK FOR CHILD PROTECTION

TO: Hon. Stephen D. Hambley, Chair
and members of the House Civil Justice Committee

FROM: Marci Hamilton, CEO & Academic Director, CHILD USA; Robert A. Fox
Professor of Practice, University of Pennsylvania

RE: Constitutionality of revival of civil statute of limitations, H.B. 249

DATE: September 10, 2019

Mr. Chairman and members of the committee, my name is Professor Marci Hamilton. Thank you for allowing me to testify today regarding H.B. 249, which increases access to justice for sex abuse and assault victims of physicians at land grant universities in lawsuits against the university.

By way of introduction, I am the Founder, CEO, and Academic Director of CHILD USA, an interdisciplinary think tank dedicated to the prevention of child abuse and neglect at the University of Pennsylvania, where I am the Robert A. Fox Professor of Practice. I am the author of *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012), which makes the case for statute of limitations (SOL) reform in the child sex abuse arena. I am the leading legal expert on the history and constitutionality of SOL reform and have submitted testimony and successfully briefed the issue in numerous states. Before joining the University of Pennsylvania faculty, I held the Paul R. Verkuil Chair in Public Law at Benjamin N. Cardozo School of Law, where I was a constitutional law scholar, after clerking for Justice Sandra Day O'Connor at the United States Supreme Court.

CHILD USA is the leading nonprofit think tank dedicated to the prevention of child abuse and neglect. It is also the leader in the field of statute of limitations, or "SOL" reform, and the only organization to track child sex abuse SOLs in every state, D.C., and the federal government.

This year has been a banner year for SOL reform as 44 states and D.C. have considered legislation to extend or revive the SOLs for child sex abuse. Between 2003 and this year, ten states had revived expired civil SOLs. This year, to date, seven more states have done so. For more information about the movement for SOL reform in 2019, see www.childusa.org/2019sol

There is a growing trend toward revival of expired civil SOLs for adult victims of sex abuse and assault as well. New Jersey enacted a window this year, which revives expired civil SOLs for child and adult sex assault victims for a period of two years. It will go into effect on December 1st. There is a bill pending in California, AB 1510, which will provide access to justice through SOL reform to victims of physicians at California universities. Michigan opened a 90-day window in 2018 to create justice for the victims of Dr. Larry Nassar.



Statutes of limitations or SOLs are judicial housekeeping rules: they set the deadline for pressing criminal charges or filing a civil lawsuit. An SOL is an arbitrary and technical legal rule that historically has prevented the vast majority of sex abuse and assault victims from obtaining justice. Civil SOL reform in this context serves the public good in three ways:

- 1) ***It empowers and validates the victims by giving them a legal weapon to force the previously hidden facts into the public square;***
- 2) ***It shifts the cost of abuse from the victims to the ones who caused the abuse;***
- 3) ***It educates the public about sexual predators and the entities that enable them to improve prevention in the future.***

The net result is that the society as a whole comes together to support the traumatized victims and to heal itself. This is a vital step in the process toward righting the wrongs perpetrated against the vulnerable and exacerbated by unfairly short SOLs.

There is a nationwide epidemic of sexual abuse on college and university campuses. In a 2015 survey, 5.9% of female undergraduates and 22.4% of female graduate students reported sexual harassment by a member of the faculty.¹ Among cases reported in the media, 10% of female students reported sexual harassment ranging from unwelcome sexual touching to forcible rape by a faculty member. Of these reports, 53% involved repeat offenses by the same faculty member, and the frequency of a single faculty member harassing multiple students increased with the severity of the incidents.²

Athletes and students in universities across the country, including Ohio State University, have been victimized by physicians, trusting that their university would be vigilant about hiring and overseeing safe doctors for the students. Institutions that hire perpetrators of sexual violence like Dr. Richard Strauss³, Dr. Larry Nassar⁴, Dr. George Tyndall⁵, Dr. Dennis Kelly⁶, Dr. James Mason

¹Tricia Serio, *How Colleges and Organizations can Stop the Cycle of Faculty Sexual Abuse*, The Chronicle (June 26, 2018) <https://www.chronicle.com/article/How-CollegesOrganizations/243761>.

² *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, Utah Law Review Vol. 2018, 671-786, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971447

³ Ohio State University employed Dr. Richard Strauss as a team physician in the OSU Athletics Department. *See An independent report finds Ohio State had knowledge of late doctor's sex abuse as early as 1979*, Dakin And one, CNN.com, at <https://www.cnn.com/2019/05/17/us/ohio-state-university-sex-abuse/index.html>.

⁴ Michigan State University employed Dr. Larry Nassar as a trainer. *See A comprehensive timeline of the Larry Nassar case*, James Dator, SBNation.com, at <https://www.cnn.com/2019/05/17/us/ohio-state-university-sex-abuse/index.html>.

⁵ University of Southern California employed Dr. George Tyndall as a gynecologist. *See Longtime USC gynecologist George Tyndall charged in sex assaults of 16 women*, Stefanie Dazio, USA Today, at <https://www.usatoday.com/story/news/nation/2019/06/26/george-tyndall-ex-usc-gynecologist-charged-16-sexual-assaults/1580104001/>.

⁶ University of Southern California employed Dr. Dennis Kelly as a doctor. *See LGBTQ alumni at USC allege men's doctor sexually abused them*, Matt Hamilton, Los Angeles Times, at <https://www.usatoday.com/story/news/nation/2019/06/26/george-tyndall-ex-usc-gynecologist-charged-16-sexual-assaults/1580104001/>.

Heaps⁷, and Dr. Robert Hadden⁸ must be held accountable for letting sexual abuse continue unchecked.

The victims of OSU's Dr. Richard Strauss are far beyond the short statute of limitations and require revival of their SOLs, due to shame and humiliation and because the trauma of sex abuse and assault creates many barriers to disclosure. The average age of the victims to come forward so far is 50 years-old.⁹

Opponents to reviving a civil SOL argue that it is unconstitutional, but a majority of states have upheld the revival of civil SOLs.¹⁰ H.B. 249 is constitutional under federal and state constitutional law.

⁷ UCLA employed Dr. James Mason Heap as a doctor. *See UCLA knew of doctor sex abuse allegation in 2014 but didn't fire him for four years*, Richard Winton, Los Angeles Times, at <https://www.usatoday.com/story/news/nation/2019/06/26/george-tyndall-ex-usc-gynecologist-charged-16-sexual-assaults/1580104001/>.

⁸ Columbia University employed Dr. Robert Hadden as a doctor. *See 17 women sue Columbia University, its hospitals, claim "massive coverup of doctor's sex abuse*, Graham Kates, CBSNews.com, at <https://www.cbsnews.com/news/columbia-university-hospital-doctor-robert-hadden-sexual-abuse-lawsuit/>.

⁹ *See An independent report finds Ohio State had knowledge of late doctor's sex abuse as early as 1979*, Dakin Andone, CNN.com, at <https://www.cnn.com/2019/05/17/us/ohio-state-university-sex-abuse/index.html>.

¹⁰ *Allstate Ins. Co. v. Kim*, 829 A.2d 611, 622-23 (Md. 2003); *Chevron Chemical Co. v. Superior Court*, 641 P.2d 1275, 1284 (Ariz. 1982); *City of Tucson v. Clear Channel Outdoor, Inc.*, 105 P.3d 1163, 1167, 1170 (Ariz. 2005) (barred by statute, Ariz. Rev. Stat. Ann. § 12-505 (Ariz. 2010)); *Mudd v. McColgan*, 183 P.2d 10, 13 (Cal. 1947); *20th Century Ins. Co. v. Superior Court*, 109 Cal. Rptr. 2d 611, 632 (Cal. Ct. App. 2001), cert. denied, 535 U.S. 1033;(2002); *Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs*, 948 P.2d 1002, 1011-13 (Colo. 1997); *Rossi v. Osage Highland Dev., LLC*, 219 P.3d 319, 322 (Col. App. 2009) (citing *In re Estate of Randall*, 441 P.2d 153, 155 (Col. 1968)); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. at 439-40; *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1258-60 (Del. 2011); *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1241 (D.C. 1990); *Canton Textile Mills, Inc. v. Lathem*, 317 S.E.2d 189, 193 (Ga. 1984); *Vaughn v. Vulcan Materials Co.*, 465 S.E.2d 661, 662 (Ga. 1996); *Roe v. Doe*, 581 P.2d 310, 316 (Haw. 1978); *Gov't Employees Ins. Co. v. Hyman*, 975 P.2d 211 (Haw. 1999); *Hecla Mining Co. v. Idaho State Tax Comm'n*, 697 P.2d 1161, 1164 (Idaho 1985); *Peterson v. Peterson*, 320 P.3d 1244, 1250 (Idaho 2014); *Metro Holding Co. v. Mitchell*, 589 N.E.2d 217, 219 (Ind. 1992); *Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958, 967-968 (Kan. 1992); *Ripley v. Tolbert*, 921 P.2d 1210, 1219 (Kan. 1996); *Sliney v. Previte*, 473 Mass 283, 41 N.E.3d 732 (Mass. 2015); *Rookledge v. Garwood*, 65 N.W.2d 785, 790-92 (Mich. 1954); *Pryber v. Marriott Corp.*, 296 N.W.2d 597, 600- 01 (Mich. Ct. App. 1980), aff'd, 307 N.W.2d 333 (Mich. 1981) (per curiam); *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002); *In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 830-31 (Minn. 2011); *Cosgriffe v. Cosgriffe*, 864 P.2d at 778; *Panzino v. Continental Can Co.*, 364 A.2d 1043, 1046 (N.J. 1976); *Bunton v. Abernathy*, 73 P.2d 810, 811-12 (N.M. 1937); *Orman v. Van Arsdell*, 78 P. 48, 48(N.M. 1904); *Gallewski v. Hentz & Co.*, 93 N.E.2d 620, 624-25 (N.Y. 1950); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1079-80 (N.Y. 1989); *McFadden v. Dryvit Systems, Inc.*, 112 P.3d 1191, 1195 (Or. 2005); *Owens v. Maass*, 918 P.2d 808, 813 (Or. 1996); *Bible v. Dep't of Labor & Indus.*, 696 A.2d 1149, 1156 (Pa. 1997); *McDonald v. Redevelopment Auth. of Allegheny Cnty.*, 952 A.2d 713, 718 (Pa. Commw. Ct. 2008), appeal denied, 968 A.2d 234 (Pa. 2009); *Twomey v. Carlton House of Providence, Inc.*, 11 R.I. 264, 271 (R.I. 1974); *Dandeneau v. Board of Governors for Higher Educ.*, 491 A.2d 1011, 1012 (R.I. 1985); *DeLonga v. Diocese of Sioux Falls*, 329 F. Supp. 2d 1092, 1101-1102 (S.D. 1994); *Stratmeyer v. Stratmeyer*, 567 N.W.2d at 223; *Lane v. Dep't of Labor & Indus.*, 151 P.2d 440, 443 (S.D. 1944); *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.3d 914, 922 (Wash. 2006), superseded in part by statute Wash. Rev. Code 25.15.303, as recognized in *Chadwick Farms Owners Ass'n v. FHC, LLC*, 160 P.3d 1061, 1064 (Wash. 2007), overruled in part by 207 P.3d 1251 (Wash. 2009); *Pankovich v. SWCC*, 163 W. Va., 259 S.E.2d 127, 131-32 (W. Va. 1979); *Shelby J.S. v. George L.H.*, 381 S.E.2d 269, 273 (W. Va. 1989); *Neiman v. Am. Nat'l Prop. & Cas. Co.*, 613 N.W.2d 160, 164 (Wis. 2000); *Vigil v. Tafoya*, 600 P.2d 721, 725 (Wyo. 1979); *RM v. State*, 891 P.2d 791, 792 (Wyo. 1995).

A Time-limited Civil Revival Window Is Constitutional Under the United States Constitution

The United States Supreme Court has rejected the proposition that retroactive elimination of a viable civil statute of limitations defense constitutes a denial of due process.¹¹ Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). The United States Supreme Court reaffirmed this principal in Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994), that retroactive civil legislation is constitutional if the legislative intent is clear and the change is procedural. The Landgraf Court explained the duty of judicial deference as follows: “legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments.” Landgraf, 511 U.S. at 272. The Court explained that retroactive provisions “often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.” Id. The Court went on to observe that “the constitutional impediments to retroactive civil legislation are now modest Requiring clear intent [of retroactive application] assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.” Id. at 272-73.

Any presumptions against retroactivity can be readily overcome by express legislative intent. See Republic of Austria v. Altmann, 541 U.S. 677, 692-93 (2004); see also Landgraf, 511 U.S. at 267-68; Chase Sec. Corp. v. Donaldson, 325 U.S. at 311-12. The requirement of clear intent can be satisfied with express legislative language regarding retroactive application. “[T]he antiretroactivity presumption is just that - a presumption, rather than a constitutional command.” Republic of Austria v. Altmann, 541 U.S. 677, 692-93 (2004) (declined to extend Hamdan v. Rumsfeld, 548 U.S. 557 (2006)); see also Landgraf, 511 U.S. at 267-68. When retroactive intent is clear, the anti-retroactivity presumption is overcome.¹²

A Time-limited Civil Revival Window Is Constitutional Under the Ohio Constitution

Extending statutes of limitations to retroactively revive otherwise time-barred claims is deemed constitutional under Ohio law. Bielat v. Bielat, 721 N.E.2d 28 (2000). Although statutes are considered prospective, Ohio echoes federal law and considers whether a statute is retroactive “after a threshold finding that the General Assembly expressly intended the statute to apply retroactively.” Id. at 355. The Ohio legislature can therefore prove its intention by clearly stating in a bill when it would like that bill to apply.

Ohio specifically clarifies that state entities, like OSU do not have rights to protect against retroactive civil legislation, especially when it deals with procedural changes, like statute of limitations reform. Public entities as creatures of the state do not enjoy protection from retroactive legislation because they do not have vested rights that are similar to those of individuals or private

¹¹ C.f., Stogner v. California, 539 U.S. 607, 610, 123 S. Ct. 2446, 2449 (2003) (retroactive application of a criminal statute of limitations to revive a previously time-barred prosecution violates the Ex Post Facto Clause of the United States Constitution).

¹² It is unconstitutional to revive a criminal law due to the Ex Post Facto clause. That issue is irrelevant to a civil window revival.

companies. Toledo City School Dist. Bd. Of Edn. V. State Bd. Of Edn., 18 N.E.3d 505, 516 (2014) (“So far as any political subdivision of the state is concerned, there can be no vested right.”).

Ohio distinguishes between statutes that alter a substantive right and those that alter only procedural remedies. In *Bielat v. Bielat*, the court noted that “there is a crucial distinction between statutes that merely apply retroactively (or “retrospectively”) and those that do so in a manner that offends our Constitution.” *Id.* at 353. Moreover, “while [Ohio has] recognized the occasional substantive effect, [the Court] found that it is generally true that laws that relate to procedures are ordinarily remedial in nature. Van Fossen v. Babcock & Wilcox Co., 522N.E. 489 (1988).

Ohio law supports that a statute of limitation does not affect the actual claims or defenses of parties. In *Smith v. N.Y.C. Rd. Co.*, the Supreme Court found a shortened statute of limitation properly retroactive because the “case concern[ed] the statute of limitations, and concededly relates to the remedy.” *Smith . N.Y.C. Rd. Co.*, 170 N.E. 637 (1930). The Court also found that “[a] statute undertaking to provide a rule of practice, a course of procedure or a method of review, is in its very nature and essence a remedial statute”. Miami County v. City of Dayton, 110 N.E. 726, 728 (1915). Ohio was even willing to uphold a retroactive statute requiring previously convicted sex offenders to adhere to different registration and notification requirements, citing the public policy reasons of keeping people convicted of abuse from later working in schools. State v. Cook, 700 N.E.2d 570, 578 (1998).

Public institutions in Ohio are not immune from suit where they have a special relationship to a victim (Ohio Rev. Code § 2743.02(A)(1)). The relationship between a student athlete and their university doctor is one such relationship. With Ohio’s prior history, it is more than reasonable to find that a civil revival statute is constitutional.

Please do not hesitate to contact me if you have questions regarding SOL reform or if I can be of assistance in any way on other issues involving the prevention of sex abuse and assault.

Sincerely,



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