

Marci A. Hamilton
Academic Director and Chairman, Board of Directors
CHILD USA
(215) 746-4165

Resident Senior Scholar
Program for Research on Religion
Co-chair, Common Ground for the Common Good Project
Fox Leadership Program
University of Pennsylvania
3814 Walnut Street
Philadelphia, PA 19104
(215) 353-8984 (cell)
hamilton.marci@gmail.com

Sen. Stewart J. Greenleaf
Chair
PA Senate Judiciary Committee
Main Capitol, 19 EW
Harrisburg, PA 17120
June 13, 2016

RE: Constitutionality of HB 1947

Dear Sen. Greenleaf and Members of the Committee:

Thank you for asking me to testify at this hearing on the constitutionality of HB 1947, which modestly amends Pennsylvania's statutes of limitations (SOLs) for child sex abuse.

I am a Resident Senior Fellow in the Program for Research on Religion in the Fox Leadership Program at the University of Pennsylvania; a co-chair of the Common Ground for the Common Good project; and the Academic Director of CHILD USA, an interdisciplinary think tank on child abuse and neglect. After 26 years of full-time teaching, I now hold the Paul R. Verkuil Research Chair at the Benjamin N. Cardozo School of Law, Yeshiva University. My book, *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012), and website, www.sol-reform.com, are the leading resources on child sex abuse statutes of limitations, and I have researched, written, and testified on the issue in many states and abroad. The views expressed in this testimony are solely my own.

The issue this Committee has asked me to focus on is whether the revival of a civil SOL for child sex abuse is consistent with the Pennsylvania Constitution. The short answer is that along with a majority of the states, it is constitutional in Pennsylvania to revive an expired civil SOL.

I. HB 1947 does not violate due process under the Pennsylvania or Federal Constitution.

Let me first set aside the due process issues in this arena. It is unconstitutional to revive a criminal SOL, because it violates the Ex Post Facto Clause. *Stogner v. California*, 539 U.S. 607, 610 (2003). At the same time, it is not a due process violation and, therefore, it is constitutional

to revive a civil SOL. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 (1994). Under the federal Constitution, revival of a civil SOL is constitutional if two due process requirements are met: (1) clear legislative intent and (2) the change is to a procedural element, like a statute of limitations. 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. 304, 311-15 (1945); *Campbell v. Holt*, 115 U.S. 620, 6 S. Ct. 209 (1885).

While the precise question of the constitutionality of revival of child sex abuse SOLs has not yet been addressed by the Pennsylvania Supreme Court, the Court has applied these due process principles in *Bible v. Dep't of Labor & Indus.*, 548 Pa. 247, 696 A.2d 1149 (Pa. 1997), when it held a retroactive amendment to the Workers' Compensation Act constitutional because "[w]e have used the same reasonableness/balancing of interests analysis in applying the due process protections of the Pennsylvania Constitution. There we observed that 'traditionally, retrospective laws which have been deemed reasonable are those which impair no contract and disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, and do not vary existing obligations contrary to their situation when entered into and when prosecuted.'" *Id.* at 260, 1156 (quoting *Krenzelak v. Krenzelak*, 503 Pa. 373, 382-83, 469 A.2d 987, 991 (Pa. 1983) (internal citation omitted)). The Pennsylvania Supreme Court's reasoning controls, and in *Bible*, the court found that an amendment which retroactively changed the compensation for loss of hearing for workers' compensation claims did not violate due process. The amendment did not impair claimants' right to receive compensation for hearing loss, which would have been substantive, but merely changed the remedy, and retroactive application of the amendment to pending cases was rational.

Any claim to a vested right in the running of a statute of limitations is grounded in a right to due process, and the Pennsylvania Supreme Court has already foreclosed any proper reliance on such an argument. Most recently, in 2015, two of Pennsylvania's sister State Supreme Courts considered the constitutionality of similar revival legislation, and after careful analysis both Courts upheld the revivals to be a proper exercise of legislative judgment under their state Constitutions. See *Sliney v. Previte*, 473 Mass. 283, 41 N.E.3d 732 (Mass. 2015); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 119 A.3d 462 (Conn. 2015).¹

As under federal law, where the retroactive intent is plain, and the statute involves the retroactivity of a civil (not criminal) procedural matter, the revival of a civil statute passes constitutional muster.

Pennsylvania follows the same reasoning as the United States Supreme Court and has permitted the retroactive application of statutes under circumstances like HB 1947. In recent years, it has observed the distinction drawn by the federal courts between procedural and substantive retroactive changes in the law, and prescribed deference with respect to procedural

¹ The constitutionality of civil retroactive legislation for victims of child sexual abuse has been upheld as a proper exercise of legislative power by Pennsylvania's sister states repeatedly since *Landgraf*. See, *Sliney v. Previte*, 473 Mass. 283, 41 N.E.3d 732 (Mass. 2015); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 119 A.3d 462 (Conn. 2015); *Roe v. Ram*, No. 14-00027 LEK-RLP, 2014 U.S. Dist. LEXIS 120830 (D. Haw. 2014); *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011); *Deutsch v. Masonic Homes of California, Inc.*, 80 Cal. Rptr. 3d 368 (Cal. Ct. App. 2008); *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc), slip op. (S.D. Cal. Dec. 20, 2005); *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 414, 418-420 (Minn. 2002); *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220, 223-24 (S.D. 1997); *Cosgriffe v. Cosgriffe*, 864 P.2d 776, 776 (Mont. 1993).

rules. Statutes of limitation are procedural in Pennsylvania, not substantive. *Seneca v. Yale & Towne Mfg. Co.*, 142 Pa. Super. 470, 474 (Pa. 1941).

Since the Supreme Court's articulation of the modern constitutional standard in *Landgraf* in 1997, the retroactive application of lengthened statutes of limitations has not been found to disturb vested rights under Pennsylvania law. *McDonald v. Redevelopment Auth.*, 952 A.2d 713, 718 (Pa. Commw. Ct. 2008), *appeal denied*, 600 Pa. 772, 968 A.2d 234 (Pa. 2009) (“[N]o one has a vested right in a statute of limitations or other procedural matters, and the legislature may at any time alter, amend or repeal such provision without offending constitutional restraints.”). In *McDonald*, which involved statutes of limitations under eminent domain, the Court held that a retroactive restriction in the limitations period from five years to one did not violate the plaintiffs’ due process rights. In other words, the shortening of an SOL for a plaintiff was permissible, because it was just a procedural change, not a substantive change. The same reasoning applies to defendants, and thus to H.B 1947—mere alteration of an SOL does not violate due process in Pennsylvania. Pennsylvania is thus in line with the majority of states, which have **not** found that defendants have a vested right in expired SOLs post-*Landgraf*.²

² *Catholic Bishop of N. Alaska v. Does*, 141 P.3d 719, 722-25 (Alaska 2006) (open question); *Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431, 440, 641 P.2d 1275 (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 (2010); *Mudd v. McColgan*, 183 P.2d 10, 13 (Cal. 1947); *20th Century Ins. Co. v. Superior Court*, 90 Cal. App. 4th 1247, 1263-64, 109 Cal. Rptr. 2d 611 (Cal. 2001), *cert. denied*, 535 U.S. 1033, 122 S. Ct. 1788, 152 L. Ed. 2d 648 (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. 357, 439-40 (Conn. 2015); *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*, 253 Ga. 102, 105, 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 (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*, 156 Idaho 85, 91, 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.*, 250 Kan. 655, 668-69, 831 P.2d 958 (Kan. 1992); *Ripley v. Tolbert*, 921 P.2d 1210, 1219 (Kan. 1996); *Allstate Ins. Co. v. Kim*, 376 Md. 276, 296-98, 829 A.2d 611 (Md. 2003); *Doe v. Roe*, 419 Md. 687, 703-707, 20 A.3d 787 (Md. 2011) (open question); *City of Boston v. Keene Corp.*, 406 Mass. 301, 312-13, 547 N.E.2d 328 (Mass. 1989); *Kienzler v. Dalkon Shield Claimants Trust*, 426 Mass. 87, 88-89, 686 N.E.2d 447, 449-450 (Mass. 1997); *Rookledge v. Garwood*, 65 N.W.2d 785, 790-92 (Mich. 1954); *Pryber v. Marriott Corp.*, 98 Mich. App. 50, 56-57, 296 N.W.2d 597 (Mich. Ct. App. 1980), *aff’d*, 411 Mich. 887, 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 776, 778 (Mont. 1993); *Alsenz v. Twin Lakes Village*, 843 P.2d 834, 837-838, 108 Nev. 1117, 1122 (Nev. 1992), *affirmed*, 864 P.2d 285 (Nev. 1993) (open question); *Panzino v. Continental Can Co.*, 71 N.J. 298, 304-305, 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, 12 N.M. 344, 348, 1904-NMSC-024, 6 (N.M. 1904); *Gallewski v. Hentz & Co.*, 301 N.Y. 164, 174-75, 93 N.E.2d 620 (1950); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1079-80 (N.Y. 1989); *In Interest of W.M.V.*, 268 N.W.2d 781, 786 (N.D. 1978); *Pratte v. Stewart*, 125 Ohio St. 3d 473, 482; 929 N.E.2d 415, 423 (Ohio 2010) (open question); *McFadden v. Dryvit Systems, Inc.*, 338 Ore. 528, 535, 112 P.3d 1191, 1195 (Or. 2005); *Owens v. Maass*, 323 Ore. 430, 439-440, 918 P.2d 808, 813 (Or. 1996); *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220, 223 (S.D. 1997); *Lane v. Dep’t of Labor & Indus.*, 21 Wn.2d 420, 426, 151 P.2d 440, 443 (Wash. 1944); *Ballard Square Condo. Owners Ass’n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617-618, 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*, 166 Wn.2d 178, 207 P.3d 1251 (Wash. 2009); *Pnakovich v. SWCC*, 163

Pennsylvania courts have thus observed a distinction—even in the sovereign immunity context—between retroactive application of a legislative procedural enactment, such as revival of an SOL, and actual retrospective or retroactive laws which might violate either the Ex Post Facto clause, or Due Process. Expressly following *Landgraf*, one Pennsylvania Court has reasoned:

A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Instead, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. A statute is retroactive only if it changes the legal consequences of acts completed before its effective date. The...amendments do not impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. As such they do not operate retroactively. ...Furthermore, as our Supreme Court has explained the modified timing requirements...are procedural and therefore do not fall within the categories of retrospective laws prohibited by the Ex Post Facto Clause.

Commonw. v. Johnson, 1999 PA Super 128, P9-P10, 732 A.2d 639, 643 (Pa. Super. Ct. 1999) (internal citations omitted). **Consistent with this reasoning, H.B. 1947 does not retroactively alter the burdens on the parties, or the penalties for defendants who commit or create the conditions for the sexual abuse of children at the time of the commission of the offense. It merely changes one procedural element of the civil law governing child sex abuse: the timing of bringing a civil lawsuit.**

One of the reasons given for due process arguments against revival of SOLs is a stated concern about the potential for false claims. This argument is a red herring in this arena. Victims of child sex abuse rarely make false claims, as we learned in California and Delaware, where windows already opened and closed. In California, there were anecdotal, unconfirmed reports of approximately 5 false claims out of the 1,150 filed, which means false claims in the area of child sex abuse are statistically insignificant. In addition, numerous scientific studies have established that children rarely make up child sex abuse. While there were few false claims in California, the window resulted in the identification of 300 child predators previously unidentified to the public, as mentioned above. These numbers, when applied to the due process “reasonableness/balancing of interests analysis” articulated by the Pennsylvania Supreme Court in *Bible*, also weighs in favor of deference to legislative judgment for the protection of children under the *Landgraf* framework. *Bible*, 548 Pa. at 260.

Opponents of reform further try to claim that without a statute of limitations, institutions and pedophiles won't be able to defend themselves in court against decades-old claims, thus also raising due process fairness concerns. This is another red herring. SOL reform does nothing more

W. Va., 583, 589-91, 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); *Society Ins. v. Labor & Industrial Review Commission*, 2010 WI 68, 326 Wis. 2d 444, 472-76, 786 N.W.2d 385 (Wis. 2010)(open question); *Vigil v. Tafoya*, 600 P.2d 721, 725 (Wyo. 1979); *RM v. State*, 891 P.2d 791, 792, (Wyo. 1995).

than remove the arbitrary deadline for filing a claim. The plaintiff still bears the initial burden of proof, and if the plaintiff does not have corroborating evidence, the case is over. The defendant need not defend cases where the plaintiff lacks evidence, and simply need file a motion to dismiss. Indeed, right now, for the majority of cases in Pennsylvania, institutions and pedophiles simply file motions to dismiss solely on SOL grounds. They fear that the cases will now move to the merits rather than remain unheard due to this arbitrary deadline.

As the *Landgraf* Court noted in discussing the reasonableness of retroactive legislation as related to tort claims, "there is no such thing as a vested right to do wrong." *Landgraf*, 511 U.S. at 297, 114 S. Ct. at 1510, 128 L. Ed. 2d at 272 (quoting *Freeborn v. Smith*, 69 U.S. 160, 2 Wall. 160, 175, 17 L. Ed. 922 (1865)). This principle has long existed under Pennsylvania law as well. There is no such thing as a vested right to commit a wrong, nor to cover up a crime. *Kiskaddon v. Dodds*, 21 Pa. Super. 351, 355 (Pa. Super. Ct. 1902) ("No one has a vested right to do wrong"); *Satterlee v. Matthewson*, 16 Serg. & Rawle 169, 191 (Pa. 1827) ("there can be no right to do wrong"). Where the defendant would be claiming a vested right arising out of the very same procedural problem which motivated the legislature to act, due process concerns are muted, and fundamental fairness cuts in favor of retroactive reach intended to cure the wrong. *Gilman v. United States*, 290 F. 614, 616 (D. Pa. 1923) ("[T]here can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed."). The key distinction is that the pedophile and aiding and abetting institutional defendants knew full well when they endangered and harmed children that they were violating the law. There is no unfair surprise in subjecting them to liability, because when they acted, they were on full notice that they should not have done what they did. The revival will do no more than impose on them the liability they created through their own wrongful actions at the time they acted wrongfully. *Johnson*, 1999 PA Super at P9-P10, 732 A.2d at 643.

II. The plain language of the PA Remedies Clause protects those "injured" not those who caused the injury

Aware of the foregoing law, the Catholic Bishops and their big business supporters have now fallen back on an alternative theory—that the Remedies Clause of the State Constitution supposedly bars revival of a cause of action, in order to protect tortious defendants. The purpose of the Remedies Clause is to protect plaintiffs from legislative action that will undermine the existence of an individual's remedy for an injury done. It is a constitutional guarantee of open courts for plaintiffs, and a not shield to block court access in favor of powerful defendants. Unlike a general Due Process concern which must be applied to either party, the Remedies clause text limits its own application, stating, "*all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.*" Pa. Const. Art. 1 § 11.

With H.B 1947, the legislature is simply trying to protect a plaintiff's ability to proceed in court in pursuit of a remedy for the injury already done. This bill does not create a new substantive theory but rather makes it possible for the one who was injured to receive "due course of law." All Pennsylvania courts agree that the "legislative branch cannot dissolve a right to recover once a case accrues. ...' If, at that moment in a particular case, the law would provide the plaintiff access to a remedy, no subsequent law can take it away." *Konidaris v. Portnoff Law*

Associates, Ltd., 598 Pa. 55, 74, 953 A.2d 1231, 1242 (Pa. 2008) (citing and quoting *David Schuman, The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1206, 1208 (1992)); *see also Stroback v. Camaioni*, 449 Pa. Super. 395, 674 A.2d 257 (Pa. Super. Ct. 1996).

In *Ieropoli v. AC&S Corp.*, 577 Pa. 138, 842 A.2d 919 (Pa. 2004), the Pennsylvania Supreme Court held that the statute limiting successor asbestos-related liabilities for corporations was unconstitutional. The court analyzed the history of the Remedies Clause in Pennsylvania, and found that the legislation violated the Remedies Clause, because it *extinguished the plaintiff's accrued cause of action* to recover for his asbestos-related illness. The *Ieropoli* Court "held that under the Remedies Clause, a *cause of action* that has accrued is a vested right which cannot be eliminated by subsequent legislation." *Konidaris*, 598 Pa. at 64, 953 A.2d at 1236 (quoting *Konidaris v. Portnoff Law Assoc., Ltd.*, 884 A.2d 348, 353 (Pa. Cmwlth. 2005) (emphasis added). Any academic attempt to broaden the *Ieropoli* holding or reasoning to include tortious defendants is belied by the words of the Pennsylvania Supreme Court itself, which in considering a narrower legislative reenactment in response to *Ieropoli*, re-stated its own *Ieropoli* holding as follows: "we held that the statute was unconstitutional as applied to complaints filed before its effective date because the statute extinguished already existing *causes of action*." *Johnson v. Am. Std.*, 607 Pa. 492, 500, 8 A.3d 318, 323 (Pa. 2010) (emphasis added). According to the Pennsylvania Supreme Court, "the guarantee of a 'remedy by due course of law' in Article 1, Section 11, means that a case cannot be altered, in its 'substance' by a subsequent law." *Ieropoli* 577 Pa. at 149, 842 A.2d at 926 (quoting *Menges v. Dentler*, 33 Pa. 495, 498-99 (Pa. 1859)). Procedural changes are not constitutionally problematic under the Remedies Clause, and statutes of limitation are procedural in Pennsylvania, not substantive. *Seneca v. Yale & Towne Mfg. Co.*, 142 Pa. Super. 470, 474 (Pa. 1941); *see also, In re Condemnation of Real Estate by Carmichaels*, 88 Pa. Commw. 541, 490 A.2d 30 (Pa. Cmwlth. 1985); *Upper Montgomery Joint Authority v. Yerk*, 1 Pa. Commw. 269, 274 A.2d 212 (Pa. Cmwlth. 1971).

Given the due process holdings of cases such as *Bible* and *McDonald*, it does not follow that *Ieropoli* or *Konidaris* alter the text of the Remedies Clause to make it apply to not only those injured but also those responsible for the injury. There is no vested right to do wrong in Pennsylvania. *Kiskaddon v. Dodds*, 21 Pa. Super. 351, 355 (Pa. Super. Ct. 1902); *Satterlee v. Matthewson*, 16 Serg. & Rawle 169, 191 (Pa. 1827). Thus, the plain language of the Remedies Clause should control. *Ieropoli*, 577 Pa. at 148, 842 A.2d at 925 (noting that "the fundamental rule of construction which guides us is that the Constitution's language controls"). There is no legitimate, much less plain, reading of HB 1947 whereby child sex abuse victims can be said to be the cause of "injury done" to the institutions and individuals who endangered them. *Commonw. v. Davidson*, 595 Pa. 1, 32, 938 A.2d 198, 216-217, (Pa. 2007) (noting "words and phrases...shall be construed according to rules of grammar and according to their common and approved usage...When the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning[.]" (internal citations omitted); *see also, Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 609-610, 735 A.2d 100, 108-109 (Pa. 1999).

In the interest of a full explanation, it should be noted that there is one very old case which contains dictum that might indicate a defendant at one time in Pennsylvania had a vested right in expired claims. It is the 108-year-old *Lewis v. Pennsylvania R. Co.*, 220 Pa. 317, 69 A. 821 (Pa. 1908), and the actual facts of the case dealt with retroactive expansion of negligence liability to include employers which had previously not been subject to vicarious liability for an employee's negligence when an employee was injured. As the statute at issue in *Lewis* created a new category of liability--one for which the employer defendant did not have full notice that they should not have done what they did--it could not be applied retroactively.

The *Lewis* court did reference remedies in its discussion, however, the reasoning was not discussed as a Remedies Clause holding, and more probably referenced now-antiquated due process reasoning, though, admittedly, it was not entirely clear. *Id.* at 823. There was a time in the Nineteenth and early Twentieth Centuries when nearly every court—federal and state—agreed on that now outdated principle. But that doctrine is now soundly rejected in federal cases and the majority of states, including Pennsylvania. Even where the federal and state Constitution may protect a vested right, there is no vested right in the mere running of a civil SOL in Pennsylvania. Current legislative judgments regarding retroactive revival of previously time-barred causes of action should be considered in light of the Supreme Court’s holding in *Landgraf*, which the Pennsylvania Supreme Court has cited approvingly in other recent procedural contexts. Outdated, pre-*Landgraf*, case law is of little practical guidance regarding the modern legislative and judicial understandings of the application of procedural revival statutes and possible “vested rights” analyses.

Accordingly, *Lewis* was distinguished by the Supreme Court of Pennsylvania in 2008 in *Konidaris v. Portnoff Law Associates, Ltd.*, 598 Pa. at 73-74, 953 A.2d at 1241-42. In *Konidaris*, the Supreme Court of Pennsylvania held that a retroactive amendment to Municipal Claims and Tax Liens Act (MCTLA) to provide for recovery of attorney fees expended in collecting tax claims did not violate the Remedies Clause of the Pennsylvania Constitution. The *Konidaris* Court reasoned that the 2003 retroactive amendment to the Municipal Claims and Tax Liens Act did not violate the Remedies Clause precisely *because* the constitutional protection contained in the Clause is *for a remedy for an injury done*. In *Konidaris*—as with the Catholic Conference and their big business allies today—those challenging constitutionality of retroactive application were claiming a right *not to do something*, specifically paying attorney’s fees related to the collection of a school district’s tax claims. *Id.*; Pa. Const. Art. I, § 11.

Finally, once again, there is no vested right to do wrong in Pennsylvania. This rule has long existed under Pennsylvania law. *Kiskaddon v. Dodds*, 21 Pa. Super. 351, 355 (Pa. Super. Ct. 1902); *Satterlee v. Matthewson*, 16 Serg. & Rawle 169, 191 (Pa. 1827). There is also no vested right to do wrong under federal law. " *Landgraf*, 511 U.S. at 297.

Although after reviewing both longstanding precedent and modern jurisprudence, I am persuaded that civil SOL revival legislation, if enacted, would be a proper exercise of legislative judgment in the state of Pennsylvania, the only way to have this question answered once and for all is to enact H.B. 1947 with its retroactive, revival provision, and allow the Justices of the Supreme Court of Pennsylvania to answer the question themselves. Under Pennsylvania law, as under federal, “any legislative enactment, enjoys a presumption of constitutionality,” those who wish to challenge it “bear a heavy burden to prove it unconstitutional” and “[a] statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution.” *Ieropoli*, 577 Pa. at 153-154, 842 A.2d at 928 (quoting *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325, 331 (Pa. 2002)) (citation omitted).

Pennsylvania’s children and adult survivors deserve at least this much respect by this body for their civil rights.

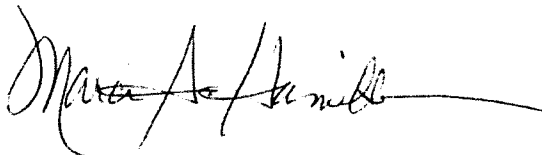
III. The PA Remedies Clause, according to the PA Supreme Court, is similar to 39 other states.

Even if the language of the Pennsylvania Constitution were ambiguous, Pennsylvania's Remedies Clause is not unique, and thus does not require a unique constitutional interpretation. As the *Ieropoli* Court noted "[t]he constitutions of thirty-nine states contain a provision that is substantially similar to that part of Article 1, Section 11 that is highlighted. This provision, commonly referred to as the 'open courts' or 'remedies' clause, is derived from Magna Carta and Sir Edward Coke's Seventeenth Century commentary on the Great Charter, which was relied upon by the drafters of early American state constitutions." *Id.* at 148, 925 (internal citations omitted). As a majority of State Constitutions contain Plaintiff's Remedy Clauses similar to Pennsylvania's, **and** a majority of states has not found revival of civil SOLs to disturb any vested right, it is disingenuous to argue that Pennsylvania's Constitution is distinctive, and would thus somehow require a contrary result from that seemingly dictated by the ordinary, commonly understood meaning of the term "open courts." *Id.*

I sincerely hope that this testimony has clarified these issues for you and welcome your questions.

Finally, on a personal note, I have many close ties to Pennsylvania, where I have lived for over half of my life. I am a proud graduate of the University of Pennsylvania Law School, where I served as Editor-in-Chief of the *Law Review*, and of the graduate school of Pennsylvania State University in Philosophy and English. I also clerked for Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit, before clerking at the United States Supreme Court for Justice Sandra Day O'Connor. My husband, Peter Kuzma, has operated a successful chemical company, VIP Products Corp., in Philadelphia for over 40 years and graduated from St. Joseph's University, Archbishop Wood High School, and Our Lady of Good Counsel parochial school, before obtaining his Ph.D. in Organic Chemistry. Both of our children were Valedictorians in their classes at Council Rock North High School, which prepared them for high achievement at highly competitive colleges. We are blessed to live in this beautiful state.

Sincerely,

A handwritten signature in black ink, appearing to read "Marci A. Hamilton", with a long horizontal flourish extending to the right.

Professor Marci A. Hamilton

Marci A. Hamilton
Academic Director and Chairman, Board of Directors
CHILD USA
(215) 746-4165
Resident Senior Scholar, Program for Research on Religion
Fox Leadership Program
University of Pennsylvania
3814 Walnut Street, Philadelphia, PA 19104
(215) 353-8984 (cell) hamilton.marci@gmail.com

Summary of Primary Points: Constitutionality of HB 1947

I. HB 1947 does not violate due process under the Pennsylvania or Federal Constitution.

- It is unconstitutional to revive a *criminal* SOL, because it violates the Ex Post Facto Clause. *Stogner v. California*, 539 U.S. 607, 610 (2003).

- Under the federal Constitution, it does not violate due process to retroactively alter a law if two requirements are met:

- (1) clear legislative intent and

- (2) the change is to a procedural element, like a statute of limitations. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-68 (1994). *Republic of Austria v. Altmann*, 541 U.S. 677, 692-93 (2004); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-15 (1945); *Campbell v. Holt*, 115 U.S. 620, 6 S. Ct. 209 (1885).

- The precise question of the constitutionality of revival of child sex abuse SOLs has not yet been addressed by the Pennsylvania Supreme Court, but the Court has applied the same due process principles as above in *Bible v. Dep't of Labor & Indus.*, 548 Pa. 247, 696 A.2d 1149 (Pa. 1997) (employing “reasonableness/balancing of interests analysis” to test due process in cases involving solely a change in a procedural rule) and *McDonald v. Redevelopment Auth.*, 952 A.2d 713, 718 (Pa. Commw. Ct. 2008), *appeal denied*, 600 Pa. 772, 968 A.2d 234 (Pa. 2009) (“[N]o one has a vested right in a statute of limitations or other procedural matters, and the legislature may at any time alter, amend or repeal such provision without offending constitutional restraints.”).

II. The plain language of the PA Remedies Clause protects those "injured" not those who caused the injury

The purpose of the Remedies Clause is to protect plaintiffs from legislative action that will undermine the existence of an individual's remedy for an injury done. It is a constitutional guarantee of “open courts” for those who are injured, and not a shield to block court access after injury: “all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.” Pa. Const. Art. 1 § 11.

III. The PA Remedies Clause, according to the PA Supreme Court, is not unique but similar to 39 other states

Ieropoli v. AC&S Corp., 577 Pa. 138, 148, 842 A.2d 919, 925 (Pa. 2004).