

Statement of

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to the
Judiciary Committee
Connecticut General Assembly

regarding
Raised Bill 5473

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Senator McDonald, Representative Lawlor, and distinguished members of the Committee. My name is Martin Nussbaum. I serve as co-chair of the Rothgerber Johnson & Lyons Religious Institution Group. Our law firm has a national practice representing a wide variety of religious institutions in over 30 states. As part of that practice, we have acquired substantial experience in working to prevent childhood sexual abuse, reporting allegations, investigating them, and defending claims. I speak on behalf of the Connecticut Catholic Public Affairs Conference.

Because of persistent, outsized media coverage of the Catholic sexual abuse scandal since 2002, there is a tendency by some to think that Catholic institutions have a more severe problem than others. They do not. I will provide you with information today regarding the scope of the problem in government institutions that work with children. This information is drawn from four sources: (1) data that we acquired from Connecticut state agencies under the Freedom of Information Act, (2) the 2004 U.S. Department of Education study regarding educator sexual misconduct,¹ (3) the Associated Press' 2007 investigative report regarding sexual abuse by public school teachers,² (4) the 2010 U.S. Department of Justice study regarding sexual abuse in juvenile detention facilities.

Here's what the data shows.

Public Schools

112 Connecticut public school teachers and coaches have lost their licenses due to sexual misconduct with students since 1992.³ These include the sex ring of five coaches at Southington High School who required sex from girls playing on the athletic teams over a 20 year period.⁴ Nationally, the teaching credentials of 2,570 public schools educators were "revoked, denied, surrendered or sanctioned from 2001 through 2005 following

¹ U.S. Department of Education, "Educator Sexual Misconduct: A Synthesis of Existing Literature," 18 (2004) (compiled by Professor Charol Shakeshaft); *see also* American Ass'n of Univ. Women, "Hostile Hallways," (2001).

² Martha Irvine and Robert Tanner, "Teachers' Sexual Misconduct Plagues Schools," (Associated Press Oct. 20, 2007).

³ Information acquired through Connecticut of Freedom of Information request.

⁴ Kimberly W. Moy and William Shubert, Coaches Avoid Charges in Sex Allegations," *Courant* (January 10, 2002).

allegations of sexual misconduct" with students.⁵ The U.S. Department of Education estimates that more than 4.5 million students are subject to sexual misconduct by a public school employee sometime between kindergarten and 12th grade.⁶

Juvenile Detention

While Connecticut state agencies refused to provide information in response to a Freedom of Information Act request, the U.S. Department of Justice study found that 12% of youth in state juvenile facilities nationally (3,220 persons) and 14.6% in Connecticut reported an incident of sexual victimization *during the previous year*.⁷ 2,370 of these persons or 10.3% reported that the abuse involved facility staff, and almost all were women staff.⁸

Foster Care

19 Connecticut foster parents, paid by the State, engaged childhood sexual abuse since 2006.⁹ Nine of these occurred in 2009. In 2004, former Connecticut State Representative, Jefferson B. Davis, was convicted of sexually abusing a foster child in his care.¹⁰

Department of Corrections

50 Connecticut Department of Corrections employees perpetrated sexual abuse on inmates or parolees since 1999.¹¹

This data shows that there is a substantial, *current* problem of childhood sexual abuse in Connecticut governmental settings. It is a much larger, and much more current problem than the problem Catholic institutions largely resolved by 1992. The Catholic Conference can see no reason why the law of Connecticut should discriminate between childhood sexual abuse claimants based upon whether they were injured in a governmental setting or a Catholic setting.

I have also attached appendices regarding: (1) the relative number of childhood sexual abuse allegations against Catholic institutions involving conduct since 1992, (2) the fact that childhood sexual abuse claims brought under federal statute 42 U.S.C. § 1983 are not viable when brought against public schools and other government institutions, and (3) and why sexual abuse claimants do not require extra time to come forward with their claims. I am willing to speak to those subjects if you wish.

⁵ Martha Irvine and Robert Tanner, "Teachers' Sexual Misconduct Plagues Schools," (Associated Press Oct. 20, 2007).

⁶ U.S. Department of Education, "Educator Sexual Misconduct: A Synthesis of Existing Literature," 18 (2004) (compiled by Professor Charol Shakeshaft); *see also* American Ass'n of Univ. Women, "Hostile Hallways," (2001).

⁷ U.S. Department of Justice, Bureau of Justice Statistics, "Sexual Victimization in Juvenile Facilities Reported by Youth 2008-09," 1, 24 (January 2010). *See also* Coline Poitras, "Teacher at Juvenile Facility Suspended: State Examines Claim of Sexual Misconduct," Courant (March 7, 2002); Colin Poitras, "Girl at Long Lone Alleges Sexual Assault," Courant (Mary 15, 2002).

⁸ *Id.*

⁹ Source: 2-5-10 E-mail from Lisa Flower, Office of Public Information, Connecticut Dept. of Families and Children. *See also* David Owens, "Foster Child Was Abused: Online Pornography," Courant (November 18, 2008) (foster parent working for state licensed agency admits "repeatedly sexually assaulting 10-year-old girl" in his care and streaming images of "him abusing her" over the internet).

¹⁰ Avi Salzman, "Surprise Over a Guilty Plea and a Sentence," New York Times (September 5, 2004).

¹¹ Information acquired through Connecticut Freedom of Information Act request.

The Conference requests that you reject RB 5473 and also that you revise Connecticut law in a manner that is "All In, All Even," to wit: that the law treats public and private entities alike, beginning with the elimination of sovereign immunity; that the law ceases to have retroactive effect; and that the law serve the cause of prevention by promoting earlier reporting of abuse so perpetrators can be removed.

APPENDIX 1

See “The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002,” (John Jay College of Criminal Justice, Supplementary Report, 2006) (fig. 1.8 showing that the allegations of clerical abuse in the Catholic Church in the United States dropped to 50 or fewer instances after 1992 even though its institutions serve over 70 million persons). The national audit determined that there was only 10 instances of abuse that is alleged to have occurred during 2008. Report on the Implementation of the Charter for the Protection of Children and Young People, 32 (2008).

APPENDIX 2
THE NONVIABILITY OF CHILDHOOD SEXUAL ABUSE
§ 1983 CLAIMS AGAINST PUBLIC ENTITIES

Introduction: Connecticut law permits childhood victims of sexual abuse to sue a *private* entity (but not a *public* entity) for damages if the entity negligently hired or supervised the perpetrator. Proponents of RB 5473 contend that this unfairness can be ignored because claimants have similar remedies against *public* entities under 42 U.S.C. § 1983.

Question. Does § 1983 provide comparable redress for childhood sexual abuse victims of *public* employee perpetrators as the claim of negligent supervision against *private* entity employers?

Short Answer. No. If the sexual perpetrator is a state employee, § 1983 provides no opportunity to recover money damages from the employer. If the sexual perpetrator is a local government employee, § 1983 does not provide a viable remedy for monetary damages against the employer.

Discussion.

(1) **State Employees.** The Eleventh Amendment prevents a state or sovereign agency from being sued for damages. U.S. CONST. AMEND. 11; *Hans v. Louisiana*, 134 U.S. 1 (1890); *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) (immunity extends to arm-of-the-state).

(2) **Local Government Employees.** Section 1983 claims against a local government entity are generally not viable for the following reasons:

a. Must Prove Deprivation of Constitutional Rights. Section 1983 Claims are not based upon negligence but proving sexual abuse deprived constitutional rights.

b. Must Prove "Official Policy" Caused Injury. Plaintiff must prove that a municipal policy caused the constitutional tort; no liability simply because employee committed a tort. *See Roe v. City of Waterbury*, 542 F.3d 31 (2nd Cir. 2008) (rejecting § 1983 claim against municipality based on Mayor's sexual abuse of minors because no official policy was involved).

c. Failure to Train Must Prove Deliberate Indifference. Private claims of negligent supervision only require evidence of deviation from a *reasonable standard of care*. Municipality claims under § 1983 require a policy or custom and failure to train theories are only actionable as policy if supervisor was *deliberately indifferent*. *City of Canton v. Harris*, 489 U.S. 378, 389 (U.S. 1989) (rejecting *respondeat superior* and adopting deliberate indifference). Furthermore, claims cannot be based upon an affirmative duty to "prevent and protect against harm caused by the plaintiff . . . by third persons. . ." Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6.57 (4th ed. 2005).

d. Short Statute of Limitations. Section 1983 claims, based upon sexual abuse, are subject to a three year statute of limitations. *Oneto v. Town of Hamden*, 169 F. Supp. 2d 72, 80 (D. Conn. 2001) (§ 1983 claims limited by Connecticut's residual personal injury statute) The § 1983 rule of when a claim "accrues" (when the statute of limitations begins to run) is also stricter. *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Conclusion. The Connecticut legislature should not expect Congress to remedy the inequities in Connecticut law. Childhood sexual abuse victims of public employee perpetrators should have the same rights of recovery as sexual abuse victims of church or private employee perpetrators. If the Connecticut legislature created the problem, the legislature should fix the problem.

APPENDIX 3
CHILDHOOD SEXUAL ABUSE CLAIMANTS
ARE ABLE TO COME FORWARD WITH THEIR CLAIMS ON A TIMELY BASIS

Connecticut law presently permits a sexual abuse claimants to delay coming forward with legal claims 30 years after they reach the age of majority. Some contend that, because of their psychological injuries, they need longer. The data suggests otherwise.

Since January 2002, there have been twelve major spikes in the number of claims filed by claimants of childhood sexual abuse: the over 1,000 cases filed against Catholic institutions during the massive press coverage in 2002; the almost 1,100 plaintiffs who came forward in California during 2003 when the statute of limitation had been suspended;¹² the 81 plaintiffs who came forward when Connecticut lengthened its statute of limitations in 2002; the plaintiffs who came forward when Delaware suspended its statute of limitation for a two-year period, and the large numbers of new post-petition claims filed in the bankruptcies of the Dioceses of Tucson, Portland, Spokane, Davenport, San Diego, Fairbanks, and Wilmington just before the bar date; and this past year, the quintupling of claims against the Society of Jesus Oregon, Province in its bankruptcy just before imposition of the bar date.

Are we to suppose that these periods were collective moments of clarity when memories became unrepressed and claimants--all together--gained the strength to confront their oppressors? Or was something else going on?

Neither delayed emotional strength nor repressed memories explain the massing of these claims. They are explained, instead, by a rule of economics: when the price paid for an activity increases, the amount of that activity increases. See L. Martin Nussbaum, *Changing the Rules: Selective justice for Catholic institutions*, America 13, 15 (May 15, 2006)

¹² Not counting claims against religious orders, there were at least 1,083 claims against California dioceses and archdioceses as follows:

Fresno	6
Los Angeles	558
Monterrey	14
Oakland	67
Orange	90
Sacramento	38
San Diego	135
San Bernardino	60
San Francisco	92
Santa Rosa	11
Stockton	12