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No. 15-35506

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**JOHN DOE et al.,**

Plaintiffs-Appellants,

v.

**JOSEPHINE COUNTY,**

Defendant-Appellees.

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Appeal from the United States District Court  
for the District of Oregon

Case Nos. 1:12-cv-02080-CL, 1:13-cv-00724-CL, 1:13-cv-00825-CL

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**BRIEF OF *AMICI CURIAE*  
NATIONAL CENTER FOR VICTIMS OF CRIME  
AND OREGON TRIAL LAWYERS ASSOCIATION  
IN SUPPORT OF APPELLANTS' REQUEST FOR REVERSAL**

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## INTRODUCTION

*Amici Curiae* (“*Amici*”) National Center for Victims of Crime and Oregon Trial Lawyers Association submit this brief for the Court’s consideration in its review of the District Court’s decision in *Doe v. County of Josephine*, Lead Case 1:12-cv-2080-CL, 2015 U.S. Dist. LEXIS 65642 (D. Or., May 18, 2015). The District Court’s decision finding all of Plaintiffs’ claims time-barred poses a grave injustice to child sex abuse victims because many of these victims *cannot* disclose that they are being abuse when it is happening. After the abuse itself ceases, victims are often psychologically incapable of defending their interests in the dispassionate and clinical manner envisioned by the trial court. Additionally, the trial court’s misreading of Oregon law on the statute of ultimate repose slams shut any relief offered by state law in this case, contrary to the language and intent of the Oregon Tort Claims Act (OTCA).

If the trial court decision stands, many if not most victims of child sexual abuse will be deprived of the means to seek justice for their injuries, where they have been sexually molested by government agents entrusted with the power and responsibility for their care. That cannot be the law in any system of justice worthy of the name.

## ARGUMENT

This brief seeks to provide information and background to the Court on:

(1) the phenomenon of delayed or non-disclosure in child abuse cases and how federal accrual law can accommodate these impacts of abuse; and (2) how the statute of ultimate repose contained in ORS 12.115 does not bar a claim against a private entity, and thus why it cannot bar a claim against a public entity.

First, in presuming that a child who is sexually molested necessarily understands injury at the time of the abuse, the District Court held as a matter of law that no reasonable juror could believe that other factors could toll the discovery of a cause of action. However, professional literature shows that because of shame, self-blame, avoidance and denial, children abused by trusted adults often do not understand that the abuser caused them injury, even if they know or perceive that the sexual contact itself is “wrong.” Child victims of sexual assault often believe that they have somehow caused the abuse themselves or invited it, believing that *they* are the ones who did wrong. So too, known psychological conditions arising from abuse cause child victims to avoid, minimize, and otherwise dissociate from the abuse in a way that makes it psychologically impossible to disclose their abuse near the time it occurred.

Second, “child abuse” claims are specifically exempted from the statute of ultimate repose contained in ORS 12.115. Were this claim brought against any

private party or other entity, ORS 12.117(1) would apply “notwithstanding ORS ... 12.115.” To resolve the question of whether the statute of ultimate repose applies to a claim under ORS 30.265(6)(d), the Court must look to the status of such claims under all parts of Oregon law, including ORS 12.117. The claims made here, even though brought under the Oregon Tort Claims Act (OTCA), would not otherwise be “barred” by a statute of ultimate repose. The trial court erred by applying ORS 12.115 to dismiss the state law claims.

## **I. THE IMPACT OF CHILD ABUSE SIGNIFICANTLY DELAYS DISCLOSURE**

### **A. Child Abuse is Significantly Underreported.**

Research studies conclusively establish that sexual abuse can alter a child’s physical, emotional, cognitive and social development. Damage from child sexual abuse often makes it impossible for many victims to speak about their trauma.

*See generally* D. Viens, *Countdown to Injustice: The Irrational Application of Criminal Statutes of Limitations to Sexual Offenses Against Children*, 38 SUFFOLK U.L. REV. 169, 176 (2004) (describing effects of childhood sexual abuse). Abused children come to despise their own existence and are consumed by “shame”—a catch-all term modern psychology uses to describe absolute self-hatred and loathing—as a result of childhood sexual trauma. *See* J. Bradshaw, *HEALING THE SHAME THAT BINDS YOU* (1988). *See also* C. Feiring & L.S. Taska, *The*

*Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery*, 10 CHILD MALTREATMENT: J. AM. PROF'L SOC'Y ON ABUSE CHILD 337, 337-47 (2005). The physical and mental health of some victims remains scarred for life.

It is difficult to accurately estimate the number of children that are sexually abused each year due to the wide practice of under-reporting. R. Hanson *et al.*, *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE AND NEGLECT 559, 559-569 (1999) (stating that nearly 85% of child abuse is not reported, indicating that the number of children sexually abused each year is dramatically higher than the number of incidents reported to authorities). There are numerous reasons for the under-reporting of childhood sexual abuse, as discussed below. *See* D.R. Reinert, SEXUAL ABUSE AND INCEST 34-38 (1997). In fact, childhood sexual abuse may be one of the most under-reported crimes in the United States. M.O. Hyde & E.H. Forsyth, M.D., THE SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 10 (1997). Under-reporting is so prevalent that virtually every state, including Oregon, *see* ORS 419B.010, has mandatory reporting statutes that make it a crime to not report suspected child abuse to the proper authorities for those who interact with children. Child Information Gateway, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws*, <https://www.childwelfare.gov/pubPDFs/manda.pdf> (2010) (last visited

October 26, 2015). Whatever the numbers truly are, it is inarguable that there is a great deal of pain and victimization that is never seen.

### **B. Why Children Do Not Disclose Abuse.**

Children typically do not disclose sexual abuse during or immediately after the time they are abused. J.E.B. Meyers, 1 EVIDENCE IN CHILD ABUSE AND NEGLECT CASES §1.27 at 62–67 (57% of children with sexually transmitted disease did not disclose abuse on first interview; 25% of children with medical indications of sex abuse refused to disclose). In a recent study, 58% of child sexual abuse victims did not disclose their abuse until adulthood. R. Alaggia, *Many Ways of Telling: Expanding Conceptualizations of Child Sexual Abuse Disclosure*, 28 CHILD ABUSE & NEGLECT 1213, 1218 (2004). Nearly a quarter of the study's subjects continued not to disclose, including instances of outright denial of suffering any abuse at all. *Id.* at 1220. Another third of the study participants had no memory of the abuse into adulthood, even when abused in later childhood. *Id.* at 1220, 1223. The role of the abuser is also important, because when the abuser is “a significant caregiver, then attachment issues, [*i.e.*] traumatic bonding” discourage abuse. *Id.* at 1216.

The pressures to remain silent are wide-ranging and often overwhelming, including pressure or threats from the perpetrator, a relationship with the

perpetrator, fear of the anticipated consequences of telling, fear of negative reactions from parents or family, fear of not being believed; and feelings of embarrassment, shame and self-blame. Alaggia, *Many Ways of Telling*, 28 *Child Abuse & Neglect* at 1213–1227; L.C. Malloy, S.P. Brubacher, & M.E. Lamb, *Expected Consequences of Disclosure Revealed in Investigative Interviews with Suspected Victims of Child Sexual Abuse*, 15 *APPLIED DEVELOPMENTAL SCIENCE* 8–19 (2011); I. Hershkowitz, O. Lanes, & M.E. Lamb, *Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents*, 31 *CHILD ABUSE & NEGLECT*, 111–123 (2007); S. J. Collings, S. Griffiths, & M. Kumalo, *Patterns of Disclosure in Child Sexual Abuse*, 35 *SOUTH AFRICAN JOURNAL OF PSYCH.*, 270–285 (2005).

There is a wide variety of documented psychological bases for delayed disclosure by boys—such as the Plaintiffs here—who were sexually abused by an adult in a position of responsibility. For purposes of this appeal the most significant categories are: (1) denial/avoidance of the abuse entirely; (2) minimization/denial of any impact from the abuse; (3) victim’s perception of participation/co-conspirator guilt; and (4) fear of the abuser or the consequences of disclosure.<sup>1</sup> Each of these is examined in turn.

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<sup>1</sup> A further cause of non-disclosure of abuse is the inability to recall specific traumatic events, or at times any abuse at all. D. M. Elliott, *Traumatic events: Prevalence and delayed recall in the general population*, 65 *J OF CONSULTING AND*

### 1. *Denial of Any Understanding of the Abuse.*

Denial is fundamentally different from not being able to remember the abuse: denial is a concrete pattern of behavior and thinking, generated from the trauma, that separates the abuse from conscious life. Denial is classified as “the avoidance of awareness of some painful external reality . . . accomplished by *withholding conscious understanding of the meaning and implications* of what is perceived.” R.L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1254 n.74 (1991), *quoting* Horowitz et al., *A Classification Theory of Defense*, in REPRESSION & DISASSOCIATION 60, 80 (Jerome L. Singer ed., 1990) (emphasis added). See J. Briere, *Psychological Assessment of Child Abuse Effects in Adults*, in ASSESSING PSYCHOLOGICAL TRAUMA AND PTSD 540–41 (Wilson and Keane eds. 2004) (“chronic child abuse promotes avoidance behaviors”). “[C]hildren suffering from PTSD often enter an avoidance phase,” in which they deny abuse or recant because they cannot cope with the traumatic memories. C. Koverola and D.

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CLINICAL PSYCH. 811, 812 (1997) (“some memory loss in trauma survivors may reflect dissociative avoidance strategies ... traumatic memory loss may be understood as a form of avoidance conditioning, whereby access to memory is punished ... thereby motivating the development of memory-inhibiting mechanisms”). *Amici* understand that this case does not involve delayed recall (sometimes called “repressed memory” or “traumatic amnesia” case), but it is certainly a documented effect of abuse. Because of the complexity of that issue, *Amici* do not address it here.

Foy, *Post-traumatic Stress Disorder Symptomatology in Sexually Abused Children: Implications for Legal Proceedings*, 2 J. OF CHILD SEXUAL ABUSE 119-128 (1993). Well beyond mere “not thinking about it,” the victim *cannot* think about it.

In order for the child victim to avoid psychological breakdown, the defense mechanism of denial prohibits the conscious mind from examining or integrating the acts of child abuse into the child’s daily experience. The child’s mind splits the abuse off from normal life and compartmentalizes it.<sup>3</sup> In that way, the child can continue to function in the presence of a trusted abuser knowing that she has been sexually abused, and is likely to be abused again. Several men, looking back on their abuse, viewed it as something they put in a box and shelved for decades. L. Sorsoli, M. Kia-Keating, F. Grossman, *“I Keep That Hush-Hush”: Male Survivors of Sexual Abuse and the Challenges of Disclosure*, 55 J. OF COUNSELING PSYCH. 333, 339-40 (2008). These coping mechanisms often cause the child not to realize or experience the symptoms of the sexual abuse for many years, until the symptoms are forced into plain view by therapy or a developmental “trigger.” Thomas, *Adult Survivors*, 26 WAKE FOREST L. REV. at 1254. Importantly, for

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<sup>3</sup> L. Johnson, *Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse*, 51 S.C. L. REV. 939, 942 (2000) (“Sigmund Freud first proposed the theory of a ‘defense mechanism that serves to repudiate or suppress emotions, needs, feelings or intentions in order to prevent psychic pain.’”) (citation omitted).

purposes of ORS 30.275(9), these coping mechanisms begin immediately after the abuse.

A real-world example of this phenomenon is seen in a story out of Penn State, in which a Jerry Sandusky victim denied being abused despite the long-delayed (and self-incriminating) testimony of a direct witness. *See* ABC News, *Penn State Rape Victim Denies Assault, Jerry Sandusky's Lawyer Claims* <http://abcnews.go.com/US/penn-state-rape-victim-denies-sex-assault-lawyer/story?id=14953587> (last visited October 26, 2015). Indeed, in the Sandusky example, one can see the strength and persistence of denial: even when confronted with objectively reliable testimony from a third party witness decades later, some victims still refuse to acknowledge they have been abused at all. Denial is not simply some “excuse” or emotional weakness—it is a powerful, and often irresistible, psychological protection mechanism.

## **2. *Minimization/Denial of Negative Impact.***

Sadly, many abused children truly believe that sexual contact with an adult, even a trusted adult who betrays that trust, caused no real harm. Consider the myth of the attractive female teacher and male teenage student. Indeed, one of the most significant reasons for non-disclosure in men is that “[m]en do not define their childhood experiences as abusive, and do not think that their abuse experiences

have had a negative impact.” G.R. Holmes, L. Offen, G. Waller, *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?*, 17 CLINICAL PSYCHOL. REV. 69, 75 (1997). Astoundingly, even severe abuse can be passed off as of no consequence.

For example, a man with a 39-year history of severe psychological problems described being repeatedly oral and anally penetrated by older boys as “horseplay.” *Id.* In another case, a 22 year old man admitted to a hospital after a suicide attempt described being anally raped by an older boy when he was 10 as just “mucking about.” *Id.* The conception of masculinity in society likewise plays a significant role, with boys not wanting to appear as a victim, or—whether the fear is warranted or not—as gay. Alaggia, *Many Ways of Telling*, 28 CHILD ABUSE & NEGLECT at 1214; R. Alaggia, *Disclosing the Trauma of Child Sexual Abuse: A Gender Analysis*, 10 J. OF LOSS AND TRAUMA, 453–470 (2005). Typically, some of this minimization is triggered by the very position of trust the perpetrator is using to gain access to and compliance from the victim:

Coupled with this feeling of having been a willing participant may be the fact that ***boys may have been successfully “groomed”<sup>2</sup> by the***

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<sup>2</sup> *In re Application of Nash*, 317 Or. 354, 359 n3, 855 P.2d 1112 (1993) (“As used in the context of child sexual abuse, the term ‘grooming’ has been described as “a lot of gift giving, a lot of affection, praising, rewards, anything to make the individual more comfortable even to the extent of dealing with lots of people surrounding this particular person, just getting into a comfortable role; in other

***abuser—the sexual contact may be preceded by (and coupled with) affectionate ... substitute parenting, attention, and rewards. Males with these experiences may find it hard to acknowledge the abusive nature of the relationship*** (Watkins & Bentovim, 1992).

*See No Evil*,<sup>17</sup> CLINICAL PSYCHOL. REV. at 76 (emphasis added).

Denial of any impact—while acknowledging the sexual activity—is a classic adaptive response. One study indicated only 4% of men believed they had been harmed by childhood sexual abuse, while 57% felt it had “no effect” on them later in life, even though they “may be more likely [than female abuse victims] to develop psychological problems.” *Id.* at 77. *See also* E. Olafson, B. Boat, *Long Term Management of the Sexually Abused Child*, TREATMENT OF CHILD ABUSE 23, 27 (R. Reece, ed. 2005) (“vigorous denial of any impact of sexual abuse experiences ... is adaptive for some period of time”). Indeed, this reaction is not one of emotional weakness, it is one of self-preservation.

Tragically, some victims of child sexual abuse do not view the sexual contact as abuse, instead viewing it as a loving relationship between the child and a parent or other adult figure. Such minimization is often just a cover for deeper

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words, feeling comfortable and being close to an individual. Yes, they often establish some emotional dependency.” *State v. Hansen*, 304 Or. 169, 174, 743 P.2d 157 (1987)). Child molesters themselves report using a slow courtship or “grooming process” to seduce children with gifts, attention, and affection. Rubin A. Lang et. al., *How Sex Offenders Lure Children*, 1 CANADA ANNALS OF SEX RESEARCH 303-317 (1988). “Perpetrators frequently seek out children who are particularly trusting and work to proactively establish a trusting relationship with them before assaulting them.” Paine & Hansen, *Factors Influencing*, 22 CLINICAL PSYCHOL. REVIEW 276 (multiple citations omitted).

problems waiting to be dealt with, after some type of triggering event. As clinician Mic Hunter explained:

Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, *a child who seemed unharmed by childhood abuse can develop crippling symptoms years later* and can have a difficult time connecting his adulthood problems with his past.

M. Hunter, ABUSED BOYS 59 (1991) (emphasis added). Part of this seems to be undeniably adaptive, given that the abuser is often a close, trusted adult, and most of the victims in at least one study described their relationship with the perpetrator as positive—with half reporting that they “loved him, liked him, needed or depended on him.” M.L. Paine and D.J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 CLINICAL PSYCHOL. REVIEW 271, 276 (2002). In fact, abusers often manipulate the child victim into thinking that the relationship is built on mutual love. See Maxine Hancock & Karen Burton Mains, CHILD SEXUAL ABUSE: HOPE FOR HEALING 33 (1987) (citations omitted). In such cases, this irresolvable dichotomy of love and fear forces the mind to accommodate these contending impulses by denying harm from the abuse. But in any of these situations, the pressure to not disclose the abuse is heightened by the child’s inability to grapple with the fact that she has been sexually harmed.

### 3. *Co-conspirator Guilt.*

Male disclosure of sexual abuse is hampered significantly by feelings of participatory guilt. “Unlike in females, male arousal is markedly visible and this can enhance ... the ‘myth of complicity.’” Holmes, *See No Evil*, 17 CLINICAL PSYCHOL. REV. at 76. Because of male physical reactions to sexual stimulus, male victims may feel complicit in their abuse, believing that they either desired the abuse or somehow bought it on themselves.

The fact that males can have a clear physiological reaction during their abuse ... may also lead some males to rationalize their abuse as something that they desired or invited.

*Id.* (citation omitted). A history of studies show that victims frequently feel that they are in some way responsible for their own abuse.

Regardless of the type of abuse experienced by a child, most children feel responsible for their own abuse (Ney, Moore, McPhee, & Trought, 1986). The dynamics of the abusive relationship and the insidious nature of the grooming process may lead victims to perceive themselves as willing participants in a “relationship” with the offender (Berliner & Conte, 1990; Kaufman et al., 1996). Similarly, victims may perceive themselves as coconspirators, acting to maintain the secret of the abuse (Furniss, 1991; Summit, 1983). A retrospective study using a sample of female undergraduates suggests children who do not disclose their sexual victimization immediately may be more reluctant to disclose subsequent incidents of abuse (Arata, 1998). Victim’s feelings of responsibility may be compounded by the intense feelings of shame and stigma associated with sexual abuse (Finkelhor, 1986; Furniss, 1991). Many children are reluctant to disclose their victimization for fear they will be blamed or judged negatively by others (Berliner & Conte, 1995; Gomes-Schwartz et al., 1990; Sauzier, 1989).

Paine & Hansen, *Factors Influencing*, 22 CLINICAL PSYCHOLOGY REVIEW at 281.

Part of this guilt also has to do with the socialization of boys as needing to be strong, in control, and not see themselves as victims. *Id.* at 274. In this way, male victims of child sexual abuse are particularly unlikely to disclose their sexual abuse because they believe that they were willing, or at least permissive, participants. This leads to the most pernicious aspect of abuse and the flip side of cooperative guilt: the feeling that it was the victim's own fault.

Child victims frequently engage in self-blame to avoid recognizing that the abuser has injured them. I. Daigneault, M. Tourigny, H. Martine, *Self-attributions of Blame in Sexually Abused Adolescents: a Mediation Model*, 19 J. OF TRAUMATIC STRESS 153-157 (2006); P. Coffey, H. Leitenberg, K. Henning, T. Turner, & R.T. Bennett, *Mediators of the Long Term Impact of Child Sexual Abuse: Perceived Stigma, Betrayal, Powerlessness, and Self-blame*, 20 CHILD ABUSE & NEGLECT 447, 452–53 (1996) (statistically significant correlation between child sex abuse and self-blame). *Cf* H.H. Filipas, S.E. Ullman, *Child Sexual Abuse, Coping Responses, Self-Blame, Posttraumatic Stress Disorder, and Adult Sexual Revictimization*, 21 J. OF INTERPERSONAL VIOLENCE 652–672 (2006) (child abuse victims often experience self-blame, and those who do are statistically more likely to be re-victimized). The abuse victim feels responsible for their own abuse, as if they “seduced” an adult.

Clinically, self-blame can be viewed as means of asserting control to conquer the feelings of powerlessness associated with the sexual assault. *See* P.A. Frazier, H. Mortensen, J. Steward, *Coping Strategies as Mediators of the Relations Among Perceived Control and Distress in Sexual Assault Survivors*, 52 J OF COUNSELING PSYCH 267–278 (2005). However, that clinical distance only serves to magnify the horror of a sexual assault victim blaming themselves for being raped. Nevertheless, if a victim feels it is his fault that he was sexually assaulted, he will not disclose that abuse to authorities. *See* Paine & Hansen, *Factors Influencing*, 22 CLINICAL PSYCHOL. REV. at 274-75.

#### **4. *Fear of the Abuser or the Consequences of Disclosure.***

Finally, in some cases, victims simply fear their abuser. Paine & Hansen, *Factors Influencing*, 22 CLINICAL PSYCHOL. REV. at 281-82. “Personal threats to the victim may include threats of physical harm, punishment, and withdrawal of material goods, privileges, or affection.” *Id.* at 282. The fear of incarceration would obviously be a significant fear along these lines. In some cases, abusers threaten the victim’s family. *See* Paine & Hansen, *Factors Related to the Reporting*, 23 CHILD ABUSE & NEGLECT 564. However, the fear of not being believed is also significant. *Id.* So too, victims may fear the effect on their family. *Id.* Occasionally, victims also cite concern for the perpetrator’s well-being as a

factor inhibiting disclosure Paine & Hansen, *Factors Influencing*, 22 CLINICAL PSYCHOL. REV. at 282-83. A “pseudonormal” relationship is built upon the fact that an abuser often cares for a young and otherwise vulnerable child. *Id.* at 283. These factors also weigh the perception of social interactions, making the abusive conduct seem like a “fair exchange.” *Id.* at 286.

Abusers may also manipulate the family into thinking that the abuser is someone who can be trusted and respected. A child may see how much their family respects and trusts the abuser. Some abusers shower the child with attention and buy the child gifts, making the child feel special. Children may be told by the abuser to keep the abuse a secret. See Reinert, SEXUAL ABUSE AND INCEST 34-35 (1997). Ultimately, compliance and silence are temporarily secured, even as other psychological mechanisms develop that will prevent disclosure once the immediate fear has subsided.

Additionally, as noted above, social stigma against abuse victims and LGBT individuals leads to a reluctance to report. For boys in particular, they fear—rightly or wrongly—the stigmatization of being labeled a victim or homosexual if they disclose their abuse. Alaggia, *Disclosing the Trauma*, 10 J. OF LOSS AND TRAUMA at 453–470. The phobic response to being labelled by society also regrettably silences victims of abuse.

### C. When Child Abuse Victims Do Disclose their Abuse.

The overwhelming weight of the psychological research and scholarship on childhood sexual abuse and its victims shows that a substantial amount of time is generally required for victims to come to grips with the abuse and to recognize its impact. *See generally*, J. Crewsdon, BY SILENCE BETRAYED (1988); D. Hechler, THE BATTLE AND THE BACKLASH (1988). *See also* 1989 Or. HB 2668, minutes of the Senate Judiciary Committee, May 24, 1989, at 251 (testimony of Jean Sherkoff, psychotherapist, Lutheran Family Services: “Many victims are in their late-20’s or early-30’s before they are able to identify [child sexual abuse] as a precursor to the problems in their lives.”). *See also*, HB 2668 (1989), Exhibit T to May 24, 1989 Hearing (testimony of Lorah Sebastian, Ph.D.) (same). A review of several studies showed a mean range of disclosure anywhere between 3 and 18 *years* before victims told anyone of their abuse. R. Alaggia, *Many Ways of Telling*, 28 CHILD ABUSE & NEGLECT at 1215.

According to the scientific literature, apart from therapy directed at the abuse experience, the typical triggering event for discovery of a causal link between abuse and injury is usually a significant life event that causes intense reflection or replicates the environment of the abuse. In addition to adult sexual activity, events such as a job promotion or the victim’s child reaching the age at which the victim was abused have been noted as triggers. Thomas, 26 WAKE

FOREST L. REV. at 1254 n78, *also citing Evans v. Eckelman*, 265 Cal. Rptr. 605 (oldest child's psychological blocking mechanisms broke down when he was convicted of sexual assault and ordered to undergo therapy); *K.E. v. Hoffman*, 452 N.W.2d 509 (Minn.1990) (memories of sexual abuse resurfaced while adult survivor was serving in Army); *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. Ct. App. 1988) (thirty-year-old's repression of sexual relations with high school teacher unearthed while watching television show on sexual exploitation of students by teacher); *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. Ct. App. 1987) (victim discovered psychological damage when she realized sister was to inherit position as father's lover). *See also B.R. v. Horsley*, 345 P.3d 836, 841 (Wn. App. 2015) (question of fact whether marital problems and sexual dysfunction were different injuries triggering the renewal of the statute of limitations).

Moreover, Oregon law recognizes that an abuse victim can even be in therapy and talking about the sexual contact, but that the statute of limitations does not start to run until that abuse is perceived as abusive. *Jasmin v. Ross*, 177 Or. App. 210, 212-13, 33 P.3d 725 (2001) (abuse by step-uncle was considered "loving" relationship until discussions with high school confidant 12 years from the last incident of sexual contact triggered recognition of injury). In *Jasmin*, it is notable that such delayed discovery of injury provided a timely claim under either the common law discovery rule or ORS 12.117. *Id.* at 215 ("under either [rule],

plaintiff prevails if she presented any evidence from which a jury could find that she did not discover ... facts creating a substantial possibility that her psychological or emotional injuries resulted from defendant's sexual abuse of her"). There is no hard and fast rule by which a court can say a victim *must* have disclosed his abuse by a set date.

To meet this hard-won disclosure with a legal rule that ignores the tragic reality of child abuse is not logical, fair, or rational. Disclosure of child abuse is different from discovery of a sponge after a surgery. Demanding suit be brought almost immediately after a child is sexually abused is fundamentally irrational.

## **II. Oregon's Discovery Rule must be applied properly to Oregon Statutes of Limitation in Section 1983 Cases.**

It is possible for this Court to synthesize the rules of federal accrual and the application of the Oregon statute of limitations in 42 U.S.C. § 1983 cases in a way that does justice to child abuse victims. Accrual and the statute of limitations diverge under Oregon law—accrual may occur while the statute of limitations is tolled from running. Because the Oregon statute of limitations (applied in Section 1983 cases) relies independently upon the Oregon discovery rule, and because that rule requires four specific elements be met before it is satisfied, the statute of limitations may be tolled in this case despite the technical accrual of the Section 1983 claims under federal law.

Settled 42 U.S.C. § 1983 precedent provides that “[f]ederal law determines when a cause of action accrues and [therefore when] the statute of limitations begins to run for a § 1983 action.” *Elliott v. City of Union City*, 25 F.3d 800, 801–02 (9th Cir. 1994) (citation omitted). However, under Oregon law, the statute of limitations may be tolled until the elements of the common law discovery rule have been met. Section 1983 also borrows “the law of the forum state regarding tolling.” *Johnson v. State of California*, 207 F.3d 650, 653 (9th Cir. 2000), citing *Hardin v. Straub*, 490 U.S. 536, 537-39, 543 (1989). See also *Silva v. Crain*, 169 F3d 608, 610 (9th Cir 1999) (“we apply the state’s general residual statute of limitations and state rules which toll the running of that statute”). “Tolling” means to “suspend or stop temporarily[,] as the statute of limitations is tolled . . . during the plaintiff’s minority.” BLACK’S LAW DICTIONARY 1488 (7th ed.1999).

In Oregon, the statute of limitations itself—not simply accrual of a claim—is subject to tolling by the discovery rule: “[l]ike the notice period, *the statute of limitations can also be tolled by the discovery rule*. *Stephens v. Bohlman*, 314 Or. 344, 349-50, 838 P.2d 600 (1992).” *Catt v. Dep’t of Human Servs.*, 251 Or. App. 488, 507, 284 P.3d 532 (2012) (emphasis added). See also *F.D.I.C. v. Smith*, 328 Or. 420, 428, 980 P.2d 141 (1999) (discovery rule in Oregon not only delays accrual of a claim but also “has the effect of tolling the commencement of [statutes of limitation] under certain circumstances.”). Therefore, this Court should

consider the Oregon discovery rule as a tolling provision that, even after the claim has accrued under federal law, halts the continued running of the statute of limitations for the victims' 42 U.S.C. § 1983 claim until such time as the victims can satisfy all elements of the Oregon discovery rule. In this way, the harsh realities of child abuse and the manifest inability of many abuse victims to disclose immediately will not serve as a complete bar to justice.

Indeed, the Oregon discovery rule requires that Plaintiffs file a claim only upon the discovery of *all four* elements of legal “injury” under Oregon law: (1) harm; (2) tortious conduct; (3) identity of the tortfeasor; and (4) causation. *Johnson v. Multnomah County Dep’t of Cmty. Justice*, 344 Or. 111, 118 n.2, 178 P.3d 210 (2008), *citing Gaston v. Parsons*, 318 Or. 247, 255, 864 P.2d 1319 (1994). *See also Doe v. American Red Cross*, 128 Or App 38, 45, 874 P.2d 828 (1994) (the plaintiff must be “aware of a substantial possibility that each of those ... elements exists” for the statute of limitations to commence). Objectively, the statute of limitations begins to run “when (1) the plaintiff knows, or a reasonable person should know, that there is enough chance that the defendant had a role in causing the plaintiff’s injury to require further investigation; and (2) an investigation would have revealed the defendant’s role.” *T.R. v. Boy Scouts of America*, 344 Or. 282, 296, 181 P.3d 758 (2008).

Because the Plaintiffs as teenage parolees could not seriously investigate County procedures and County officials' knowledge about the abuser, it should be a jury question when the statute of limitations began to run in this case. *See T.R.*, 344 Or. at 297 (when one should inquire and what could be discovered are both objective standards, but still victim-specific: discovery hinges upon "the relevant circumstances, which include [e.g., a] plaintiff's minority" among other factors). Simply pointing to the date Plaintiffs were molested and saying "good enough" is not, in fact, good enough to satisfy all four elements of Oregon's discovery rule.

Because the trial court assumed that conscious awareness of the molestation was enough to trigger the statute of limitations, the dismissal of Plaintiff's claims was in error and should be reversed. Plaintiffs needed to be aware of all four discovery rule elements before the statute of limitations began to run, even after accrual under federal law. The decision should be reversed and the case remanded for trial.

### **III. Under Oregon Law, the Statute of Ultimate Repose Does Not Apply to Claims Alleging Child Abuse.**

The trial court erred by dismissing the Plaintiffs' state law claims on statute of ultimate repose grounds. The statute of ultimate repose for negligence actions, ORS 12.115, is not applicable where a litigant asserts a claim "based on child abuse, or conduct knowingly allowing, permitting, or encouraging child abuse."

ORS 12.117 specifically provides that its terms apply “[n]otwithstanding ... [ORS] 12.115.” ORS 12.117(1). Because the Oregon Tort Claims Act (OTCA) only excludes claims that *would be* barred by a statute of ultimate repose, it would not prevent Plaintiffs’ claims here.

As an initial matter, the Oregon Legislature erected a firewall between the OTCA and “any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action[.]” ORS 30.275(9). Other statutes of limitation or statutes of repose simply do not apply to OTCA claims unless specifically incorporated. *See O’Brien v. State*, 104 Or. App. 1, 799 P.2d 171 (1990) (5 year medical statute of ultimate repose did not apply to OTCA claim against state teaching hospital). Following *O’Brien*, the Oregon Legislature passed 1991 Or. HB 3520, which incorporated in relevant part the following into ORS 30.265: “Every public body and its officers, employees and agents ... are immune from liability for: ... [a]ny claim which is limited or barred by the provisions of any other statute *including but not limited to any statute of ultimate repose.*” ORS 30.265(6)(d) (emphasis denotes amendment). The purpose of the amendment to ORS 30.265(d) was to put public entities on the same footing as private actors when it came to ultimate repose provisions.

Turning then to the statute of ultimate repose, ORS 12.115 provides in relevant part, “[i]n no event shall any action for negligent injury to person or

property of another be commenced more than 10 years from the date of the act or omission complained of.” ORS 12.115(1). Superficially, it would appear that such claims would apply to OTCA negligence actions through ORS 30.265(6)(d). However, such a conclusion ignores the central language of the 1991 amendment. HB 3520 amended ORS 30.265 to exempt “[a]ny claim which *is limited or barred*” by a statute of ultimate repose—which necessarily means “if that claim were brought against any other person or entity.” ORS 30.265(6)(d) (emphasis added).

But Plaintiffs’ claims *are not* so barred. If Plaintiffs had sued the estate of the man who molested them, or the individuals responsible for allowing him to serve as a parole officer despite knowing he was likely to abuse boys, then those claims would be governed by ORS 12.117 and exempt from ORS 12.115. *See* ORS 12.117(1) (statute of limitations applies “[n]otwithstanding ... [ORS] 12.115”). In fact, claims against *any* defendant other than a public entity would fall under ORS 12.117. *Fearing v. Bucher*, 328 Or. 367, 376, 977 P.2d 1163 (1999) (claim based on *respondeat superior* against a church for sexual abuse by priest fall under ORS 12.117). In no meaningful sense can Defendant County claim that Plaintiffs’ claims “*are*” barred by any statute of ultimate repose, since the OTCA contains none.

The OTCA is intentionally set apart from other time limitations in ORS Chapter 12. The only way ORS 12.115 can be brought into the equation is if it would apply to Plaintiffs' claims in the abstract. Because Plaintiffs' claims are "based on child abuse," ORS 12.117 says that any such contention must fail. The trial court erred in finding the state law claims barred by ORS 12.115.

### CONCLUSION

*Amici*, as organizations that advocate for victims, believe that the holding set out by the District Court disregards the reality of the effect that child sexual abuse has on its victims. Demanding disclosure from a teenage probationer immediately after sexual touching by a feared parole officer is not proper under a discovery rule analysis given the avoidance, denial, and minimization that happen in many

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children after being abused. Furthermore, applying the statute of ultimate repose is not appropriate in OTCA cases involving child abuse. *Amici* ask this Court to reverse the District Court's decision here, and permit victims of sexual abuse access to justice.

RESPECTFULLY SUBMITTED this 29th day of October, 2015.

**ROGGENDORF LAW LLC**

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