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A Change in South Dakota's Child Sexual Abuse Statute of Limitations: An Equal Protection Violations?

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A CHANGE IN SOUTH DAKOTA’S
CHILD SEXUAL ABUSE STATUTE OF LIMITATIONS:
AN EQUAL PROTECTION VIOLATION?

By Peyton N. Healy

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A CHANGE IN SOUTH DAKOTA'S CHILD SEXUAL ABUSE STATUTE OF LIMITATIONS: AN EQUAL PROTECTION VIOLATION?

*Peyton N. Healy**

I. INTRODUCTION

This article addresses the change to South Dakota's statute of limitations (SOL) for bringing civil claims against institutions that had constructive knowledge of sexual abuse, a change that occurred in South Dakota in 2010. Using the historical treatment of Native Americans in the United States and in South Dakota as a contextual backdrop, I will argue that South Dakota narrowed its SOL for these claims to prevent Indians from bringing claims related to sexual abuse that occurred during the boarding school era against the Catholic Church, other Christian ministries, and the government. Since this legislative change occurred, its nefarious purpose has been demonstrated by the fact that it has had this discriminatory effect. Furthermore, I will argue that there are no compelling State interests indicating the necessity of this change. In purpose and effect, the law does not pass the federal judiciary's strict scrutiny test and the law is, therefore, unconstitutional under the Fourteenth Amendment. For these reasons, the SOL should be repealed.

To understand fully the reasoning behind the change, and the proposed remedies, this article will first review how Federal

* J.D. Candidate, 2019, Seattle University School of Law. I am not of American Indian Indigenous ancestry, but I am committed to being an ally and advocate for the Native Community and I hope to work with Indian tribes throughout my legal career. The opinions that I share in this article are wholly my own and are my honest reflections of Native community members to whom I owe a great debt for their contributions and support. As both a citizen of South Dakota and a survivor of sexual abuse and sexual assault, I approached this article with the hope that I could make a meaningful contribution to the ongoing discussion about how state and federal governments can and must do more to recognize, understand, and combat the trauma endured by Native children as a result of harmful policy and legislative negligence. My sincere thanks to my family, friends, and community in South Dakota who continue to serve as role models for mindful advocacy and allyship: your work and wisdom will always be an inspiration.

Indian Policy led to the establishment of boarding schools and the abuses that occurred therein. The article will then present a synopsis of past and present discrimination in South Dakota.

Western expansion devastated many Indian individuals and their tribes.¹ Federal Indian Policy transformed as colonization swept across the North American Continent. Over the course of several centuries, relations between Indians and their white colonizers were demarcated by various policy eras. For purposes of this article, the Removal Era and the Assimilation Era are particularly significant because each signifies a time when the United States was no longer concerned with avoiding hostility with Indian tribes. During the Removal Era, laws like The Indian Removal Act of 1830² led to new treaties that forced out most eastern tribes from their traditional lands. By 1887, when Congress passed the General Allotment Action (GAA)—an act that diminished tribal sovereignty by erasing reservation boundaries and mandated the assimilation of Indians into western society³—the United States had also established over 200 boarding schools for Native youths.⁴ This time period signaled the beginning of the Assimilation Era. Throughout this era, over 14,000 Indians were forcibly enrolled in these assimilation-focused boarding schools.⁵ Most Indian boarding schools were run by the federal government⁶ or by Christian ministries.⁷

The first boarding schools for Native American children were founded by an Army officer named Richard Pratt in 1879,

¹ “[T]he disruption of Indigenous relationships to land represents a profound epistemic, ontological, cosmological violence. This violence is not temporally contained in the arrival of the settler but is reasserted each day of occupation.” Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor*, 1 *DECOLONIZATION: INDIGENEITY, EDU. & SOC’Y*, 1, 5 (2012).

² See e.g. Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, 3 *PROF. COUNS.* 117, 118-119 (2013).

³ Tuck & Yang, *supra* note 1.

⁴ See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* (Oxford Univ. Press, 4th ed. 2012) for a general discussion of these trends.

⁵ *Id.*

⁶ See Brown-Rice, *supra* note 2, at 119.

⁷ Edwin Schupman, *Boarding Schools Struggling with Cultural Repression*, NAT’L MUSEUM OF THE AM. INDIAN, <http://www.nmai.si.edu/education/codetalkers/html/chapter3.html> [<https://perma.cc/M56B-S9T3>].

just prior to the Assimilation Era.⁸ Pratt developed the first boarding schools based on an education program he had previously developed while working in a prison for Indians.⁹ Pratt notably stated, “A great general has said that the only good Indian is a dead one. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”¹⁰ Pratt’s philosophy actively persisted within these boarding schools and American politics for another fifty years.

By the 20th century, Pratt’s philosophy as expressed through the activity of boarding schools caused irreparable psychological and emotional damage to Native youths and their communities. Youths who attended boarding schools were physically and sexually abused by school personnel that worked in a system geared towards desecrating their cultural identities.¹¹ These schools did not function to educate their students to read and do math. Instead, Indian boarding schools were engaged in an “ideological and psychological” war “waged against children.”¹² In 1945, a six-year-old named Bill Wright was sent to the Stewart Indian School in Nevada.¹³ Wright recalls matrons shaving his head and bathing him in kerosene.¹⁴ He lost the ability to speak his Native language and can longer remember his Native name because he was not allowed to speak them.¹⁵ Lucy Toledo, a member of the Navajo Nation, recalled during a National Public

⁸ See, e.g., Raymond Cross, *American Indian Education: The Terror of History and the Nation’s Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 944 (1999).

⁹ Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 151 (2007).

¹⁰ PEVAR, *supra* note 4, at 392.

¹¹ Charla Bear, *American Indian Boarding Schools Haunt Many*, NAT’L PUB. RADIO (May 12, 2008), <https://www.npr.org/templates/story/story.php?storyId=16516865> [https://perma.cc/UD5S-TXC3].

¹² Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 53 (2006) (quoting David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* 27 (U. Kansas Press 1995)).

¹³ Bear, *supra* note 6.

¹⁴ *Id.*

¹⁵ *Id.* At this time, Native students attending federal boarding schools were prohibited from speaking indigenous languages.

Radio piece that the boarding schools weren't "really about education."¹⁶ Toledo attended the Sherman Institute during the 1950's.¹⁷ Toledo stated that she and her fellow students did not learn basic concepts of English or math.¹⁸ Instead their curriculum focused on traditional, colonial gender roles; this curriculum included teaching housekeeping to girls, and carpentry to boys.¹⁹ Toledo recalled that the children were allowed to watch movies on Saturday nights that always depicted cowboys killing off Indians.²⁰

In an attempt to address and acknowledge the wrongs of the past that persist to this day, this paper advocates for a change in South Dakota's SOL for civil claims of past sexual abuse. This change would not only bring healing and justice to those who survived sexual abuse in boarding schools but would also heal the communities that they were and are a part of. Federal and state governments have not traditionally treated Native bodies with respect. Tsianina Lomawaimia, the former head of the American Indian Studies program at the University of Arizona, characterizes this treatment as an attempt at assimilation, i.e. the complete transformation of Native peoples inside and out. Lomawaimia explains that colonial family structures, economics, expressions, and other concepts all indicate that the government's objective from the beginning was to replace and erase Native American culture.²¹ In fact, the federal government, in its attempts to bring about widespread assimilation, targeted tribes known to be hostile and the children of those tribes' leaders.²² Although not all children who attended boarding schools were physically forced to do so, school segregation policies and other coercive methods also meant that there were few to no other education options for Native American children.²³ In fact, to push Native American parents to send their children to boarding schools, the federal government often intentionally withheld promised rations.²⁴

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Bear, *supra* note 6.

²² *Id.*

²³ *Id.*

²⁴ This was permitted under 25 U.S.C. § 283 (2012).

Although the system of assimilation began more than a century ago, it is a system that lasted well into the twentieth century whose influence can be seen today. The implementation of boarding schools, with their many atrocities against Native youths and their communities, directly relates to the ongoing efforts of survivors in South Dakota who are perpetually denied justice.

II. Historical Treatment of Native Americans in South Dakota

The South Dakotan government's involvement in the oppression of Native peoples has been roughly coextensive with that of the United States. In this section, I will briefly discuss the historical treatment of Native peoples in South Dakota, and then I will focus on the current treatment of Native children at Chamberlain High School, the same school where a generation before, Native American children and instructors transferred from the Saint Joseph's Indian school, including one defendant that faced childhood sexual abuse allegations stemming from Saint Joseph's. This juxtaposition between past and present trends shows the racial animus against Native Americans that still persists in South Dakota today. This juxtaposition is also indicative of the intergenerational trauma²⁵ that presently affects Native peoples in South Dakota.²⁶

A brief look into the history of discrimination in South Dakota will help illustrate the racial animus that still exists there today. One particularly illustrative part of this history consists of the events that led to Wounded Knee, a massacre for which neither the State nor Federal government has apologized for. Following

²⁵ MARY ANNETTE PEMBER, INTERGENERATIONAL TRAUMA: UNDERSTANDING NATIVES' INHERITED PAIN 3 (2016), <https://www.tribaldatabase.org/wp-content/uploads/2017/01/ICMN-All-About-Generations-Trauma.pdf> [<https://perma.cc/T8P2-CHV9>] (adopting a three-part definition intergenerational trauma: "In the initial phase, the dominant culture perpetrates mass trauma on a population in the form of colonialism, slavery, war or genocide. In the second phase the affected population shows physical and psychological symptoms in response to the trauma. In the final phase, the initial population passes these responses to trauma to subsequent generations, who in turn display similar symptoms.").

²⁶ See Roe Bubar & Pamela Jumper Thurman, *Violence Against Native Women*, 31 SOC. JUST. 70, 73 (2004) (describing the lasting effects of intergenerational trauma).

the 1866 defeat of Lieutenant Colonel Fetterman and his eighty men, the United States and several tribes entered into the Fort Laramie Treaty.²⁷ On November 9, 1875, Inspector E.C. Watkins issued a report to the Commissioner of Indian Affairs declaring that the hundreds of Northern Cheyenne and Lakota Sioux in Wyoming, Montana, and South Dakota were openly hostile against the country.²⁸

Sitting Bull, a Lakota tribal leader, and his warriors had a noteworthy victory over Custer and his men at the Battle of Little Big Horn, but that victory did not last long. Many Indians were forced to relinquish their horses and weapons, leaving them defenseless and dependent on rations.²⁹ By August 1876, Congress enacted an appropriations bill withholding rations from the Sioux Nation unless they surrendered rights to their off-reservation hunting grounds and ceded the land of the Black Hills to the United States; under the Fort Laramie Treaty, such cession of Great Sioux Reservation lands required the approval of three quarters of the Nation's adult male population.³⁰ In December of 1876, Spotted Tail, another Lakota tribal leader, remarked on the situation saying, "This war was brought upon us by the children of the Great Father who came to take our land without price."³¹ To address this inconsistency, Congress modified the Treaty of Fort Laramie in 1876; this abrogated many of the tribal rights that were recognized in the Treaty and opened the Black hills for settlement.³² Through the years that followed, this has been seen as

²⁷ See *New Perspectives on The West: Red Cloud*, PBS, http://www.pbs.org/weta/thewest/people/i_r/redcloud.htm [<http://perma.cc/55MR-PGHE>].

²⁸ Watkins stated in his report that Native Americans who associated with Crazy Horse and Chief Sitting Bull "set at defiance all law and authority . . . laugh at the futile efforts that have thus far been made to subjugate them and scorn the idea of white civilization" and suggested that the Army should "whip them into subjection." Alys Landry, *Native History: Indian Agent Report Leads to Great Sioux War*, INDIAN COUNTRY TODAY (Nov. 9, 2013), <https://indiancountrymedianetwork.com/history/events/native-history-indian-agent-report-leads-to-great-sioux-war/> [<http://perma.cc/DRH2-YRWF>].

²⁹ BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 161 (2003).

³⁰ *Id.*

³¹ Linda Darus Clark, *Sioux Treaty of 1868*, U.S. NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/sioux-treaty> [<https://perma.cc/EH76-S72F>].

³² PEVAR, *supra* note 4.

breach of the United States' obligation to reserve the Black Hills in permanence for occupation by the Native Americans.³³

Soon after, the Secretary of the Interior issued an order stating that all Indians seen outside of a reservation would be seen as hostile and that the Sioux Nation had until January 31, 1876, to move to a reservation. Failure to comply would result in forced removal by the military.³⁴ According to 1876 Senate documents, the United States authorized military operations “against certain hostile parts of [the Sioux Nation] which def[ied] the government” and not the Sioux Nation as whole.³⁵ As noted by Smithsonian Institution curator Herman Viola, if the Sioux were hostile, it was because they were forced to leave land to which they had legal rights.³⁶ Remarking on the war, he stated that “[t]he government wasn’t going to stop until they drove Indians into the ground. . . . they’re still recovering from that. It was called the Great Sioux War, but it was more like the Great Sioux Destruction.”³⁷ It was not until 1980, more than 100 years later, that the United States Supreme Court found this action to be an unjust taking by the United States government under the Fifth Amendment.³⁸

On December 29, 1890, in southwestern South Dakota, the Wounded Knee Massacre (Massacre) resulted in the death of over 250 Native Americans.³⁹ Daniel F. Royer was selected as an agent for the Pine Ridge Agency, home to the Oglala Lakotas.⁴⁰ He harbored an irrational fear of the members of Pine Ridge and began sending dispatches to Washington D.C. warning of an outbreak similar to what occurred in Minnesota in 1862, where many settlers were killed by the Santee Sioux.⁴¹

The day before the Massacre, a detachment of the United States 7th Calvary under Major Samuel “escorted” the Lakota to

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *United States v. Sioux Nations*, 448 U.S. 371, 423–24 (1980).

³⁹ Univ. of Neb., *Encyclopedia of the Great Plains: Wounded Knee Massacre* (David J. Wishart ed., 2011),

<http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.056>

[<http://perma.cc/TAS6-DSUZ>].

⁴⁰ *Id.*

⁴¹ *Id.* (indicating that Royer’s fear was caused by an incident in which the Santee Sioux killed several settlers in 1862).

Wounded Knee Creek. Once they arrived, the Calvary encircled Wounded Knee Creek, placed four Hotchkiss rapid-fire guns at points around the perimeter and began firing.⁴² Over half of the Lakota were killed, including more than sixty women and children. After the firefight, which continued into the following day, bodies were found three miles from camp as the Lakota had attempted to flee with the military in pursuit.⁴³

The oppression of Native Peoples is not simply a footnote in the history of South Dakota. This form of oppression is a present-day reality. The Legislature of South Dakota perpetually uses the law to discriminate against Native Americans. In 1965, the Voting Rights Act, which was aimed at detecting and preventing discriminatory voting procedures.⁴⁴ A key provision of that Act was nullified by a Supreme Court decision in 2013. Until the Supreme Court's 2013 decision in *Shelby County v. Holder*, parts of South Dakota were covered by Section 5 of the Act.⁴⁵ The Act originally required those covered jurisdictions to freeze changes in election practices.⁴⁶ Any new election and voting procedures proposed by a covered jurisdiction had to be vetted by either the Attorney General through administrative review or a hearing before the United States District Court for the District of Columbia.⁴⁷ The covered jurisdictions were determined by a formula that was meant to determine if a jurisdiction was being discriminatory in its election practices.⁴⁸ After *Shelby County*, both Shannon and Todd Counties in South Dakota were no longer covered under Section 5.⁴⁹ These counties encompass Oglala Sioux territory and the Rosebud Sioux Reservation respectively.

⁴²R.G. Grant, *Wounded knee massacre*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Wounded-Knee-Massacre> [<https://perma.cc/9M5S-DWVD>].

⁴³*Id.*

⁴⁴*About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> [<http://perma.cc/9Z9N-EE6Z>].

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.* (explaining how Section 4 of the Voting Rights Act established Section 5 covered jurisdictions).

⁴⁹JURISDICTIONS PREVIOUSLY COVERED BY SECTION 5, UNITED STATES DEPT. OF JUSTICE (2015), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>

The South Dakota school system is another institution that continues to oppress Native peoples despite the closing of the boarding schools decades ago. In 2010, in Chamberlain, South Dakota (the location of Saint Joseph's Indian School), six students attending Chamberlain High School came to school wearing white t-shirts that were labeled with the words "white pride world-wide" and "cracker;" the shirts also featured the symbol of the Celtic cross—a well-known emblem of white supremacy.⁵⁰ The students chose to wear these shirts to school because they overheard other students acknowledge that white students in the district were more privileged than Native students.⁵¹ When asked about the students' actions, the School Superintendent, Tim Mitchell, indicated that conversations to find 'balance' in accepting all culture needed to be struck, while a female student who wore one of the shirts stated the incident was, "blown out of proportion".⁵² The students were asked to change, and when one of the female students refused, she was able to leave campus.⁵³

The Chamberlain Superintendent's suggestion of balancing the needs of students seems to echo the sentiments of those who forced Native children into boarding schools. Here, white children were allowed to overtly attack Native cultures and beliefs as an acceptable reaction to a tangential discussion of white privilege. Instead, Native children were forced to walk the halls of their school knowing that degradation of their culture would be tolerated at the place where children are to be protected, taught, and nurtured.

Moreover, these attitudes were shared by the community at large, reaching as far as the Chamberlain School Board. As of 2013, there has been a Change.org petition to try and effectuate change in this school to address the ongoing battle between the School Board and the Native students who wish to sing their honor

⁵⁰ Kayla Gahagan, Chamberlain School Officials: White Pride Shirts Spurs Dialogue, RAPID CITY J. (May 8, 2010), https://rapidcityjournal.com/news/chamberlain-school-officials-white-pride-shirts-spurs-dialogue/article_85e5bd6e-5a19-11df-ab29-001cc4c03286.html [<https://perma.cc/55LM-WDD9>].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

song at graduation.⁵⁴ Even though the school's population is nearly forty percent Native, the Chamberlain School Board decided that the singing of the honor song was not acceptable.⁵⁵ The School Board voted six to one rejecting the Native American students request to sing their honor song at graduation.⁵⁶ The Board's rationale was that a separate feathering ceremony takes place the night before graduation.⁵⁷ Following the School Board's rejection, community activists filed a complaint with the federal government alleging racial discrimination.⁵⁸

The activists' complaint was filed on September 3, 2014, with the United States Department of Education's Office of Civil Rights.⁵⁹ The complaint alleged that the Chamberlain School Board impeded access by Native Americans to the School Board and the Board refused to hear testimony from Native Americans about the honor song.⁶⁰ In April, The Martin Luther King Jr. Center for Nonviolent Social Change attempted to send a letter to the Board that was signed by Bernice King, the daughter of Martin Luther King Jr.⁶¹ The Board refused to accept the letter and further stated that the issue of the honor song would not be addressed at future board meetings.⁶² One board member, Rebecca Reimer, stated that "[m]ost schools with our demographics have either a feathering ceremony or an honor song, not both."⁶³ A second board member, Casey Hutmacher said, "I can't see how it honors everybody when it's not in our language, and when I say our language, I mean English...I look at the Pledge of Allegiance and it

⁵⁴ Lynn Hart, Chamberlain, *SD High School: Let Native American Students Be Recognized with an Honor Song*, CHANGE.ORG, <https://www.change.org/p/chamberlain-sd-high-school-let-native-american-students-be-recognized-with-an-honor-song> [https://perma.cc/8YSN-P5MG].

⁵⁵ Jonathan Ellis, *Chamberlain Honor Song Complaint Prompts Investigation*, ARGUS LEADER (Sept. 17, 2014), <http://www.argusleader.com/story/news/2014/09/16/chamberlain-honor-song-complaint/15736899/> [https://perma.cc/6P5C-F3B2].

⁵⁶ Anna Jauhola, *Indian Students Lose Fight for Honor Song*, DAILY REPUBLIC (May 13, 2013), <http://www.tulalipnews.com/wp/2013/05/14/indian-students-lose-fight-for-honor-song/> [https://perma.cc/9BMW-BTE4].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Ellis, *supra* note 55.

⁶⁰ *Id.*

⁶¹ Jauhola, *supra* note 56.

⁶² *Id.*

⁶³ *Id.*

covers everything.”⁶⁴ In response to the actions of the board, the Crow Creek Chairman, Brandon Sazue, called for an economic boycott of Chamberlain.⁶⁵ As of the writing of this article, the honor song debate remains unresolved.

III. EQUAL PROTECTION

In 2010 South Dakota changed its statute of limitations (SOL) on sex offenses. Under the new law, no victim over the age of forty can bring civil damages against an institution that knew or should have known about occurring sex abuse. The change is an equal protection violation under the Fourteenth Amendment because in purpose and effect, it bars claims by Native Americans concerning the sexual abuse that occurred at boarding schools. Both the description of Indian boarding schools and South Dakota’s history of discriminatory treatment of Native Peoples provided above give context to the issues presented in this section and provide evidence of the law’s discriminatory purpose.

In addition to recognizing the Equal Protection violation, I will argue that South Dakota should acknowledge its history of discrimination, deconstruct its current discriminatory practices, and address the effects of the intergenerational trauma that it continues to contribute to.⁶⁶ The State’s government can start the process of recognition and reparations by repealing the current law and establishing a significantly extended SOL for civil claims against institutions that ignored the sexual abuse of children by their agents. An extended SOL would promote justice for the Native citizens of South Dakota and possibly heal of some of the wounds suffered within the boarding school system. South Dakota should amend state law to allow those who have been sexually abused as children to bring related claims regardless of how much time has passed since the abuse occurred. Lastly, I will argue that due to the trust responsibility of the federal government to protect the interests of tribes, the federal government should provide states

⁶⁴ *Id.*

⁶⁵ Associated Press, *South Dakota: Honor Song Group Protests Exclusion in High School Graduation*, TWIN CITIES PIONEER PRESS (May 19, 2013), <https://www.twincities.com/2013/05/19/south-dakota-honor-song-group-protests-exclusion-in-high-school-graduation/> [http://perma.cc/EU6K-XNJ6].

⁶⁶ See Brown-Rice, *supra* note 2, at 117.

with incentives to amend their SOL so as to allow child sexual abuse claims.

The SOL change in South Dakota was motivated by claims against the Catholic Church relating to sexual abuse brought by Native adults who were abused in boarding schools while they were children.⁶⁷ In 2010, the South Dakota legislature passed South Dakota Codified Laws (SDCL) § 26-10-25, which includes the following passage:

Any civil action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, or three years of the time the victim reasonably discovered or reasonably should have discovered that the injury or condition was caused by the act, whichever period expires later. However, no person who has reached the aged of forty may recover damages from any person or entity other than the person who perpetrated the actual act of sexual abuse.⁶⁸

This change to the SOL has effectively barred Native American claims of child sexual abuse against the entities that operated boarding schools, often the Catholic Church or the government. As of March 2011, a judge had used the SOL to dismiss eighteen claims relating to the sexual abuse of Native children.⁶⁹ This is precisely the type of evidence that demonstrates the discriminatory effect of the law in South Dakota.

Native sexual abuse claimants are being discriminated in violation of the Constitution as a direct result of South Dakota's SOL law. In order to invalidate the SOL law, the injured parties should bring a Fourteenth Amendment Equal Protection challenge

⁶⁸ S.D. Codified Laws § 26-10-25 (2010).

⁶⁹ Stephanie Woodard, *South Dakota Boarding School Survivors Detail Sexual Abuse*, INDIAN COUNTRY TODAY, July 2011, <https://newsmaven.io/indiancountrytoday/archive/south-dakota-boarding-school-survivors-detail-sexual-abuse-QtChBLOde0-apnPNqWd3qw/> [https://perma.cc/HNC5-G5HJ].

in federal court. In order to bring an Equal Protection claim, plaintiffs must prove that on the basis of race the statute is either facially discriminatory or the statute has discriminatory purpose and effect.⁷⁰ If one of these are established, the court will apply strict scrutiny.⁷¹ Further, to show standing,⁷² the plaintiff must prove that he or she suffered an injury in fact and that the injury is “fairly traceable” to the challenged action.⁷³ This article argues, much like representatives sponsoring a reversal of the 2010 SOL change, that this link is evident.⁷⁴ Lastly, to prove standing, the plaintiff must show that relief from the injury would be “likely” to follow from a favorable judgment.⁷⁵ A favorable judgment by a court on an equal protection claim would not only repeal the SOL law but symbolize the beginning of a process of healing related to the abuse that occurred at Indian boarding schools.

In order to review such a claim, the court must determine that the case is ripe. Under the *Abbott Laboratories* test, the court will assess (1) fitness of the issue for judicial review (whether more facts are required to decide the case)⁷⁶ and (2) the hardship on the parties.⁷⁷ This article argues that the issue presented by South Dakota’s SOL change relates to a robust set of facts and is fit for review, which is evidenced by three subsequent attempts to change the SOL and the legislative history concerning these changes.⁷⁸ Further, this article argues that the additional hardships brought on by assimilation, oppression, and the suppression of past abuses should have been addressed a long time ago.

IV. LEGISLATIVE HISTORY SURROUNDING THE 2010 CIVIL STATUTE OF LIMITATIONS

⁷⁰ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 724 (5th ed. 2015).

⁷¹ *Id.*

⁷² *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”).

⁷³ Chemerinsky, *supra* note 70, at 61.

⁷⁴ See Larry Echohawk, *Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 83, 104 (2001) (describing how BIA mismanagement facilitated the abuse of Indian children).

⁷⁵ Chemerinsky, *supra* note 70, at 62.

⁷⁶ *Id.*

⁷⁷ *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1987).

⁷⁸ See *infra* notes 92, 104, 105.

A closer look at the South Dakota legislative history reveals that, in purpose, the change in the SOL discriminates against Native peoples. Furthermore, the change in the SOL runs against the trend established by most other states in how they have chosen to deal with childhood sexual abuse prosecutions and relevant legislation.⁷⁹ Steve Smith, the Bill's author, described the former SOL as impossible to defend because it would permit sexual abuse claims to be brought even when the perpetrators were dead.⁸⁰ In the record, Smith also suggested that his client, St. Joseph's Indian School, made sufficient reparations to the Native community.⁸¹ Smith went on to suggest that a person would understand whether he or she had been abused by the age of twenty-five, as they have been an adult for seven years at that point.⁸²

Smith also made comments to the news media explaining his rationale for authoring the Bill that led to the SOL change. During the Bill's passage, one of Smith's clients was the Congregation of Priests of the Sacred Heart, which was the defendant in a dozen boarding school sexual abuse cases.⁸³ Smith was quoted in the Huffington Post as stating that the plaintiffs in that case were "trying to grab the brass ring, seeing someone else grab the brass ring, thinking that's [their] ticket out of squalor" and that "few people can remember what happened or didn't happen."⁸⁴ When asked by the Huffington Post about repentance on behalf of the Church, Steve Smith stated, "we aren't going to throw money just because of this purported healing process the Church has to go through."⁸⁵ When testifying in front of the South

⁷⁹ See Stephanie Woodard, *South Dakota Sex Abuse Scandal: A Peek Inside the Church's Drawers*, HUFFINGTON POST, Apr. 2011, https://www.huffpost.com/entry/south-dakota-catholic-sex-abuse_b_850102 [<https://perma.cc/6SSZ-J4KW>] (quoting SNAP director David G. Clohessy who said, "Most states are making it easier to expose predators. South Dakota is the only one making it harder.").

⁸⁰ *An Act to Limit the Source of Recovery in Certain Civil Actions for Childhood Sexual Abuse Injuries: Hearing on H.B. 1104 Before the H. Judiciary Comm.*, 2010 Leg., 85th Sess. 57:21 (S.D. 2010) (statement of defense attorney and proponent of the Bill, Steve Smith).

⁸¹ *Id.* at 54:30-54:47

⁸² *Id.* at 1:02:55

⁸³ Woodard, *supra* note 79.

⁸⁴ *Id.*

⁸⁵ *Id.*

Dakota House, Smith suggested that the former statute, while perhaps useful for lawyers out of California, served as the California lawyers’—here referring to the plaintiffs’ attorneys—welfare bill.⁸⁶ He claimed California lawyers were flying out to South Dakota to recruit plaintiffs and found numerous people willing to say that they were abused as children. He suggested in the course of recruiting plaintiffs that the California lawyers were hurting institutions.⁸⁷

The pronouncements of Smith and his involvement, as defense counsel, clearly demonstrate that this Bill was enacted in order to frustrated sexual abuse claims brought by Native plaintiffs. For that reason, the SOL was implemented to serve a purpose that is impermissible under the Fourteenth Amendment.

V. DISCRIMINATORY EFFECTS OF THE SOUTH DAKOTA SEXUAL ABUSE STATUTE OF LIMITATIONS

The law’s discriminatory purpose has resulted in discriminatory effects. The South Dakota SOL change has resulted in disparate impacts on Native American childhood sexual abuse claimants. For example, since its passage in 2011, the SOL change has been applied eighteen times to throw out childhood sexual abuse cases related to Indian boarding schools.⁸⁸ Consider the result in *Eagleman v. Diocese of Rapid City*, a case that resulted from former catholic boarding school students bringing claims of sexual abuse perpetrated by clergy members that took place between 1950 and 1970. In connection with these claims, the Plaintiffs brought an action against the religious societies that operated the school for breach of fiduciary duty and negligence.⁸⁹ Because there was no evidence that the religious societies had engaged in intentional criminal conduct against the former students, the Supreme Court of South Dakota held that the bill amending the SOL was not a bill of attainder.⁹⁰ Further, the Court held that no evidence demonstrated that the Defendants had

⁸⁶ *An Act to Limit the Source of Recovery in Certain Civil Actions for Childhood Sexual Abuse Injuries: Hearing on S.B. 1104 Before the H. Judiciary Comm.*, 2010 Leg., 85th Sess. 55:10 (S.D. 2010) (statement of Steve Smith).

⁸⁷ *Id.* at 55:18

⁸⁸ Woodard, *supra* note 69.

⁸⁹ *Eagleman v. Diocese of Rapid City*, 862 N.W.2d 839, 843 (S.D. 2015).

⁹⁰ *Id.*

fraudulently concealed information when the abuse allegedly occurred. The Court found the material issue of whether societies had fraudulently concealed their knowledge as to brother Francis Chapman's molestations of former students precluded summary judgement. The Court then found that one of the Plaintiffs failed to meet his burden to show that he had exercised due diligence in attempting to discern his cause of action. Further, the Court found that a genuine issue of material fact, i.e. whether the student exercised due diligence to discern his causes of action against the Defendant, was also precluded by summary judgement.⁹¹

Eagleman and other cases like it have led some South Dakota legislators to recognize the SOL's disparate impact on Native American complainants. Representative Steve Hickey is one of those legislators. In 2012, Hickey introduced House Bill (HB) 1218, which was co-sponsored on both sides of the isle. HB 1218 proposed to rescind the SOL for any civil cause of action arising out of childhood sexual abuse.⁹² When presenting HB 1218, Hickey made the following statement:

[The] 2010 attorney for the catholic church who is presently litigating cases in our state for the church drafted a bill at that time called HB 1104 . . . [which] placed an arbitrary and discriminatory statute of limitation on childhood sex abuse civil litigation. The bill was not circulated for co-sponsors, no opponent testimony, and those directly affected by it did not know about it until it passed.⁹³

Hickey also made the following suggestion:

HB 1104 came to this body in 2010 reinforcing a church cover up of abuses which has been extensively documented in our state and throughout the world. Unknowingly to most at the time here at

⁹¹ *Id.*

⁹² *An Act to Rescind the Statute of Limitations for Any Civil Cause of Action Arising Out of Childhood Sexual Abuse: Hearing on H.B. 1218 Before the H. Judiciary Comm., 2012 Leg., 87th Sess. 23:32 (S.D. 2012) (statement by Rep. Steve Hickey).*

⁹³ *Id.* at 23:54.

the legislature and unconscionably now to some, our legislature in effect was inadvertently used to shield pedophiles from justice sought by victims. The fact the bill was drafted by a lawyer by one of the institutions at the heart of the numerous abuse accusations and allegations in our state and the fact it was drafted shortly after the filing of numerous otherwise notorious cases by Native American victims leads to the conclusion that the bill was targeting this particular group of victims.⁹⁴

When advocating for HB 1218, Hickey made several key points to his colleagues. First, Hickey informed his colleagues that the Civil Rights Division of the Department of Justice was monitoring the status of HB 1218 while considering opening an investigation concerning whether South Dakota, through its legislature, had committed a civil rights violation.⁹⁵ Second, Hickey reminded his colleagues that South Dakota's constitution requires that its courts be open to all citizens.⁹⁶ Third, Hickey argued that it is up to the judiciary, not the legislature, to determine who should have their day in court.⁹⁷ Fourth, Hickey, in reference to the repressed memories of childhood victims of sexual abuse, informed his colleagues that it is not their place to play psychologists and that the current law impedes access to justice.⁹⁸ Fourth, Hickey reminded his colleagues that there is no statute of limitations for things such as murder.⁹⁹ In comparing sexual abuse crimes to murder, Hickey said that murder can only occur once, while sexual abuse usually happens multiple times and to multiple victims of the same perpetrator¹⁰⁰. Hickey also said that those who prey on children bring about the death of a child's innocence much like murder.¹⁰¹ He argued that sexual abuse crimes, like that of murder, should have no statute of limitations.¹⁰² Lastly, Hickey

⁹⁴ *Id.* at 25:11.

⁹⁵ *Id.* at 25:58.

⁹⁶ *Id.* at 27:03.

⁹⁷ *Id.* at 27:25.

⁹⁸ *Id.* at 27:40.

⁹⁹ *Id.* at 28:02.

¹⁰⁰ *Id.* at 28:06

¹⁰¹ *Id.* at 28:12

¹⁰² *Id.* at 28:21

indicated that the creation of laws that make it easier for perpetrators to hide within an institution perpetuates abuse.¹⁰³ Despite Representative Hickey’s efforts, his 2012 attempt to change the statute of limitations failed, as it did not acquire enough votes to pass. In 2014, legislators made an attempt to address the retroactive use of the SOL change; the bill they came up with, Senate Bill (SB) 130, was brought and effectively killed by being deferred to the forty-first day.¹⁰⁴

The SOL was also addressed more recently. In 2018, Representative Killer brought SB 196 in a third attempt to address the SOL.¹⁰⁵ Representative Killer, when speaking with his colleagues, explained that the 2010 bill was “written by a church attorney as a constituent bill... blocking anyone over the age of forty from suing an institution such as the catholic church for childhood sexual abuse.”¹⁰⁶ He argued that since virtually all the Native American plaintiffs that want to bring claims that are barred under the 2010 SOL amendment are over forty and some of the alleged perpetrators are dead—meaning that only the religious institutions that they served may be sued in connection with sexual abuse allegations—the claims most impacted by the 2010 bill are those that would be brought by people who were forced into Indian boarding schools.¹⁰⁷ Representative Killer argued that the only crime committed by the plaintiffs was being Native, and that amending the bill would ensure that all people have their day in court.¹⁰⁸ Further, Representative Killer argued that amending the current SOL would help to close a sad chapter in South Dakota history and live up to the state’s motto: “Under God, the People Rule.”¹⁰⁹ These words of Representative Killer should give further

¹⁰³ *Id.* at 28:32

¹⁰⁴ *An Act to Reinstate Certain Civil Actions for Child Sexual Abuse if Subsequent Legislation Had the Effect of Limiting the Plaintiffs Right to Recovery: Hearing on S.B. 130, Before the S. Judiciary Comm.*, 2014 Leg., 89th Sess. (S.D. 2014).

¹⁰⁵ *An Act to remove the statute of limitations for bringing a civil action for certain cases of child sexual abuse: Hearing on S.B. 196 Before the S. Judiciary Comm.*, 2018 Leg., 93rd Sess. 1:06:07 (S.D. 2018) (statement of Senator Kevin Killer in support of the bill).

¹⁰⁶ *Id.* at 1:08:21.

¹⁰⁷ *Id.* at 1:09:28.

¹⁰⁸ *Id.* at 1:12:46.

¹⁰⁹ *Id.* at 1:14:36.

weight to the argument that the SOL law is both discriminatory in purpose and effect.

VI. COURT REMEDIES AND OTHER FIXES FOR THE SOUTH DAKOTA'S UNCONSTITUTIONAL STATUTE OF LIMITATIONS

The most obvious remedy to the equal protection violations cause by the SOL is for the court to invalidate the law so that plaintiffs of any age may bring civil claims related to child sexual abuse in state court. Not only are criminal charges for child sex abuse an ineffective means to deter perpetration of these crimes in the absence of civil remedies, but criminal charges also leave victims with little relief or support.¹¹⁰ Thus, revoking the SOL ensures that victims have recourse, remedy, and relief. Relief would be far more likely if the SOL was either amended out of the law or substantially increased.

South Dakota should do away with the SOL on account of the state's historical treatment of Native peoples and our societal understanding that child victims of sexual abuse tend to repress or stay quiet about the abuse well into adulthood.¹¹¹ At the very least, South Dakota should change its SOL so that it would no longer apply to Natives of the boarding school generation. As Representative Killer stated in 2018, "as you begin to study how [the SOL change] came about . . . you know it could almost be directly correlated to the era of boarding schools, and the nature of sexual abuse that goes on now can be traced back to this era."¹¹²

South Dakota could look to Utah for an example of how lawmakers synthesized the law with an understanding of the effects of child sexual abuse, by accounting for the latency of these claims. Although Utah's sexual abuse SOL is not ideal, it does

¹¹⁰ Gregory G. Gordon, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1367–68 (1993).

¹¹¹ Erin Khorram, *Crossing The Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation are Legal*, 16 U.C. DAVIS J. JUV. L. & POL'Y 391, 406, 407 (2012) (describing memory lapse studies that show child victims of sexual abuse block memories of abuse well into adulthood and may only recall the abuse upon a triggering event or after starting therapy).

¹¹² *An Act to remove the statute of limitations for bringing a civil action for certain cases of child sexual abuse: Hearing on S.B. 196 Before the S. Judiciary Comm.*, 2018 Leg., 93rd Sess. 1:09:22 (S.D. 2018) (statement of Senator Kevin Killer in support of the Bill).

acknowledge that there is often a prolonged period between childhood abuse and when a victim files a claim. Utah lawmakers have even acknowledged research that supports a prolonged SOL for childhood sexual abuse claims:

The Legislature of Utah [found] that: a) child sex abuse is a crime that hurts the most vulnerable in our society and destroys lives; b) research over the last 30 years has shown that it takes decades for children and adults to pull their lives back together and face what happened to them; c) often the abuse is compounded by the fact the perpetrator is a member of the family...d) even when abuse is not committed by a family member, the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to ensure silence; e) in 1992, when the Legislature enacted the statute of limitations requiring victims to sue within four years of majority, society did not understand the long lasting effects of abuse on the victim that it takes decades for a victim to seek redress; f) the Legislature, as the policy-maker for the state, may take into consideration advances in medical science and understanding in revisiting policies and law shown to be harmful to the citizens of this state rather than beneficial, and g) the Legislature has the authority to change old laws in the face of new information, and set new policies within the limits of due process, fairness, and justice.¹¹³

Utah law makers took into account a more fully developed understanding of child sexual abuse, and they allowed victims of childhood sexual abuse to file civil actions against perpetrators of abuse at any time.¹¹⁴ The Utah Legislature also recognized that the

¹¹³ H.B. 77, 62nd Leg., 2018 Gen. Sess. at 28. (Utah 2018).

¹¹⁴ *Id.*

current law did not allow those who were abused as children to bring claims against responsible non-perpetrators if they happened to recall the abuse after reaching majority. Due to this, the state amended the law so “if a victim discovers abuse only after attaining the age of [eighteen] years, that individual may bring a civil action for such sexual abuse within four years after discovery.”¹¹⁵ Although the new Utah law does not feature an open SOL for non-perpetrators, it does recognize that disclosure and recall of child sexual abuse frequently happens after the child becomes an adult.

VII. THE FEDERAL TRUST DOCTRINE AS A JUSTIFICATION FOR CHANGING SOUTH DAKOTA’S UNCONSTITUTIONAL STATUTE OF LIMITATIONS

In addition to amending the law to increase the SOL, the federal government through Congress could invoke the Federal Trust Doctrine (FTD),¹¹⁶ also known as the Indian Trust Doctrine.

To understand how the FTD came about and why it should apply, its origins must be understood. The FTD, stems from *Cherokee Nation v. Georgia*, *Worcester v. Georgia*, and *Seminole Nation v. United States*. In *Cherokee Nation v. Georgia*, the Court determined the following:

[Native tribes are] denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their

¹¹⁵ *Id.*

¹¹⁶ The United States government owes a trust duty to Native Americans. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (“In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.”).

wants; and address the President as their great father.”¹¹⁷

The above quoted dictum provides some foundation for the FTD. This foundation is bolstered by *Worcester v. Georgia*, where the Court found that tribes are to be considered separate and distinct political communities and that tribes are sovereign over lands retained. Further, the Court found that treaties between the federal government and tribes were for the purpose of preserving the sustainable, land-based, traditional existence of tribes and recognized a duty of protection by the United States government was bargained for consideration for the cessions of tribal lands.¹¹⁸ The Court also recognized a guardian-ward relationship between the federal government and the tribes in justifying the use of federal authority to exercise criminal jurisdiction in Indian Country.¹¹⁹ The Court then reaffirmed, in *Seminole Nation v. United States*, that the federal government has a “distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”¹²⁰ In arriving at this conclusion, the Court reasoned as follows:

In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians.¹²¹

Following *Seminole Nation v. United States*, the Court used language indicating that the federal government has a legally enforceable fiduciary obligation to protect tribal treaty rights,

¹¹⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831).

¹¹⁸ James Van Ness, *The Federal Trust Doctrine—Realizing the Chief Justice Marshall’s Vision*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/pmb/cadr/programs/native/gtgworkshop/The-Federal-Trust-Doctrine> [https://perma.cc/8GLP-EMY5].

¹¹⁹ *United States v. Kagama*, 118 U.S. 375, 379 (1886).

¹²⁰ *Seminole Nation*, 316 U.S. at 296.

¹²¹ *Id.*

assets, lands, resources, and to carry out mandates set by federal law with respect to Native Alaskan villages and American Indian tribes.¹²² Further, the Supreme Court has used language to suggest that trust responsibility involves moral obligations, legal duties, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and those tribes that are federally recognized.¹²³ Although Congress has attempted to address the sexual abuse of children in Indian Country,¹²⁴ more work needs to be done.

On account of the FTD, the federal government should provide incentives to the states to permit claims by Native peoples related to the abuse they experienced while in boarding schools. In addition to having a guardian-ward relationship with all Indian tribes, Congress possesses the constitutional power to spend and tax for the general welfare of the United States, which could act as one avenue to fulfilling its obligations under the FTD. When exercising that power, the United States may condition federal funding to the states as long as the following requirements are met: (1) Congress must exercise its spending power for the general welfare; (2) the conditions for receiving federal funding must be unambiguous; (3) those conditions must be related to the federal interest in a specific national project or program; (4) and these conditions must not violate Tenth Amendment.¹²⁵ Arguably, state incentive programs that encourage states to pass laws that support Native American healing from past abuses inflicted by federal and state governments, are within Congress's spending power. In the case of sexual abuse in boarding schools and South Dakota's restricted SOL for bringing claims against institutions, Congress could provide additional funding to the state for the prosecution of childhood sexual abuse claims. In addition, Congress could condition that funding on SOL revisions that would allow Native plaintiffs to bring claims related to the sexual abuse they experienced while they were in in boarding schools.

¹²² See *Seminole Nation*, 316 U.S. at 296 (1942).

¹²³ *Id.*

¹²⁴ See generally OFF. FOR VICTIMS OF CRIM., U.S. DEP'T OF JUST., CHILDREN'S JUSTICE ACT PARTNERSHIPS FOR INDIAN COMMUNITIES PROGRAM: FACT SHEET PURPOSE AREA 6, <https://www.justice.gov/tribal/file/934611/download> [<https://perma.cc/8T66-XSAC>] (describing various federal programs that would provide relief and services to Indian victims of crimes).

¹²⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987).

VIII. CONCLUSION

The 2010 amendment of South Dakota's SOL was racially motivated and promotes the injustices that are perpetrated against Native communities. By passing the SOL change, the South Dakota legislature either ignored or reinforced both past and present discrimination in that state and ignored the discriminatory effect that the change would have in the future. The Fourteenth Amendment and Equal Protection Clause calls for equal protection under the law for all citizens of the United States, including the Native population that has lived in South Dakota since time immemorial. It is time for South Dakota to correct this Equal Protection violation and recognize the rights due to its Native American citizens. South Dakota has an ugly history of withholding rations to coerce land trade, taking native children from their homes, forcing assimilation upon Native students in boarding schools, and engaging in the bloody massacre on Native American people. South Dakota owes a great deal of reparations to its Native communities. It can start by ceasing to perpetuate the trauma of Native peoples through draconian sex crime legislation.

Knowing the state's dark history with boarding schools, even if an Equal Protection claim were to fail in the courts, South Dakota legislators could eliminate the SOL on childhood sexual abuse claims or extend the age cap to permit claims stemming from the abuse experienced by Native children while they were in boarding schools. Not only would this change make it easier to prosecute childhood sexual abuse claims and put South Dakota legislation in line with that of other states, it would also begin to address the intergenerational trauma that many Natives in South Dakota presently face. Although state legislators chose poorly when they voted down the change to the SOL that was proposed in 2018, they have another chance to do the right thing in 2019 by rescinding the 2010 SOL change.

The federal government too owes a duty to the Native peoples. As the Court in *Seminole Nation* put it, the federal government "under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations

of the highest responsibility and trust.”¹²⁶ In its capacity as trustee of the Indian tribes, Congress should encourage and incentivize states like South Dakota to pass legislation that could provide paths to healing. The court of public opinion is already awake to the reality of trauma, the consequences of child sex abuse, and the horrors of the Indian boarding school era. The trauma that Native children endured in boarding schools is well documented as are the sexual abuse cases that have been struck down due to South Dakota’s unfair SOL. The time for the government to honor its obligations to treat these claims as “moral obligations of the highest responsibility and trust” is now.

¹²⁶ *Seminole Nation*, 316 U.S. 286 at 296.