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STATE OF RHODE ISLAND
SUPREME COURT

ROBERT HOULLAHAN, PETER CUMMINGS, PHILIP EDWARDO *Appellants*, v. LOUIS A. GELINEAU, et al. *Appellees*.	SU-2021-0032-A SU-2021-0033-A SU-2021-0041-A On appeal from Superior Court: PC 2020-02010, 2019-10530, and 2019-09894

AMICUS CURIAE BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION

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INTEREST OF *AMICUS CURIAE*

The American Tort Reform Association ("ATRA") is a broad coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. Over the past two decades, ATRA and its members have become alarmed as state legislatures consider eliminating or vastly extending statutes of limitations and reviving time-barred claims. While this case arises in the context of childhood sexual abuse, legislation of this type, left unchecked by courts, will undoubtedly spread to other cases involving sympathetic plaintiffs or causes, jeopardizing the predictability and reliability of the civil justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs seek to recover for injuries stemming from sexual abuse alleged to have occurred over forty years ago. They have not sued the perpetrator – the individual who abused them. Rather, they have sued several entities and individuals associated with the perpetrator's former diocese. They seek to bring these decades-old civil actions based on a 2019 law that purports to revive time-barred childhood sexual abuse claims against "perpetrators." This interpretation is not only counter to the plain meaning of the statutory text and the legislature's intent, it discards key distinctions in the issues and evidence involved when deciding cases against an abuser compared to an employer or other organization.

Even if the 2019 law's reviver applies to individuals or organizations who did not commit the abuse, such as schools, daycare centers, summer camps, youth programs, and religious institutions – and it does not – reviving time-barred claims is unconstitutional. Altering Rhode Island's constitutional law to allow laws that reopen the courthouse doors to long-expired claims would significantly undermine due process, not just in the context before this Court, but in any type of civil action. It would make determinations of liability in any type of case less accurate and more prone to deep-pocket jurisprudence, complicate the ability of organizations to evaluate liability risks, and subject organizations to a risk of indefinite liability.

ARGUMENT

I. THE LEGISLATURE'S DISTINCTION BETWEEN PERPETRATOR AND NON-PERPETRATOR DEFENDANTS IS CONSISTENT WITH PRINCIPLES UNDERLYING STATUTES OF LIMITATIONS

There is a substantial difference in the evidence involved when a jury evaluates whether an accused perpetrator sexually abused a person as a child compared to whether an organization took sufficient action to prevent, detect, or stop the abuse of an employee or volunteer decades ago. The time to bring a claim established by a statute of limitations reflects such evidentiary and policy concerns. The legislature understood these concerns in 2019, when it extended the statute of limitation for childhood sexual abuse and revived time-barred claims against

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perpetrator defendants, but carefully did not authorize revived claims seeking to impose liability on third parties, such as nonprofit organizations.

A. Statutes of Limitations Allow Judges and Juries to Decide Cases Based on the Best Evidence Available

Statutes of limitations are essential to a fair and well-ordered civil justice system. They are important because some period is needed to balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts from stale claims. *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 181 (R.I. 2008) (recognizing statutes of limitations are "the product of a balancing of the individual person's right to seek redress for past grievances against the need of society and the judicial system for finality—for a closing of the books"). Statutes of limitations allow judges and juries to evaluate an individual or business's liability when the best evidence is available. In addition, statutes of limitations provide predictability, certainty, and finality to nonprofit organizations and the business community. *See Hyde v. Roman Catholic Bishop of Providence*, 139 A.3d 452, 464 (R.I. 2016) ("We appreciate the sage logic of the late Chief Justice Joseph R. Weisberger that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'"). A statute of limitations allows organizations to accurately gauge their liability exposure and make financial, insurance coverage, and document retention decisions accordingly.

There is no magic number as to what is a fair length of time to bring a lawsuit. On the one hand, potential plaintiffs should have an adequate opportunity to bring a claim. On the other hand, defendants and the courts must be protected from cases in which the search for the truth may be seriously impaired. Statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Ryan*, 941 A.2d at 181 (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc*., 321 U.S. 342, 348-49 (1944)). The possibility of an unfair trial is heightened when heart-wrenching allegations are involved, as they are here.

Tort law, by its very nature, deals with horrible situations – accidents resulting in serious injuries that have a dramatic impact on a person's life, allegations that a defective product led to person's death, and diseases contracted through exposure to toxic substances, for example. The length of a statute of limitations, however, typically does not reflect the seriousness of the plaintiff's injury or heinousness of the defendant's alleged conduct. Rather, the amount of time to bring a claim ordinarily reflects the type of evidence that will be needed to accurately decide a claim. Claims that significantly rely on people's memories or statements or whether a person acted or did not act in the way society expected at that time generally must be brought in a relatively short period. Personal injury claims, such as claims

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alleging negligence, medical malpractice, and wrongful death, must generally be brought within three years, even when they may involve catastrophic life-long injuries. *See* R.I. Gen. Laws §§ 9-1-14(b), 9-1-14.1, 10-7-2. Claims that rely on hard, tangible evidence, which may involve purely economic loss, typically have longer periods. For example, lawsuits involving contracts or property disputes generally must be filed in four or ten years, respectively. *See* R.I. Gen. Laws § 6A-2-725(1) (contracts for sale); R.I. Gen. Laws § 9-1-13(a) (other actions).[1]

B. The Legislature Provided More Time for Survivors of Childhood Sexual Abuse to File Claims, But Rationally Distinguished Revived Claims Against Perpetrators from Others

In applying these principles, the Rhode Island legislature has been sensitive to concerns that survivors of childhood sexual abuse may need more time to bring civil actions than plaintiffs who have experienced other types of injuries. The legislature has extended this statute of limitations three times over the past thirty

[1] Rhode Island law recognizes that when the injury is to a child, he or she must have additional time to file a claim. For that reason, in cases involving minors, the period for filing a claim does not begin to run until the child reaches 18 years of age. R.I. Gen. Laws § 9-1-19. In addition, Rhode Island law provides that if a person conceals from another the existence of a cause of action, the statute of limitations does not begin until the person who is entitled to sue discovers its existence. R.I. Gen. Laws § 9-1-20; *see also Ryan*, 941 A.2d at 183 (recognizing that "[t]he key consideration" in deciding whether to toll a claim for fraudulent concealment is "whether or not the defendant fraudulently represented material facts, thereby misleading the plaintiff into believing that no cause of action existed").

years. This is not the first time that the legislature has differentiated claims against perpetrators from lawsuits naming others as defendants.

In 1992, Rhode Island established a specific statute of limitations for childhood sexual abuse claims, which were previously subject to the three-year period for personal injury claims. *See* P.L.1992, ch. 84. That year, the legislature adopted a discovery-of-injury rule that effectively allowed lawsuits against *perpetrators* beyond the three-year period. The following year, the legislature increased the three-year period to seven years. P.L.1993, ch. 274, § 1. This period applied to claims based on "intentional conduct" for an injury suffered because of childhood sexual abuse. R.I. Gen. Laws § 9-1-51 (pre-2019 version). This seven-year period ran from last date of abuse (tolled until age 18) or from the time that the victim "discovered or reasonably should have discovered that the injury or condition was caused by the act," whichever is longer. *Id*. The 1992-93 laws did not alter the period for bringing lawsuits claiming that someone other than the perpetrator shared responsibility for the abuse through non-intentional conduct, such as through not exercising due care in hiring or supervising an employee or volunteer. Those types of claims against nonprofit organizations, schools, businesses, and others remained subject to Rhode Island's general three-year statute of limitations, which does not

begin to run until a minor turns 18. *See Kelly v. Marcantonio*, 678 A.2d 873, 876-77 (R.I. 1996).[2]

In 2019, the legislature passed S. 315, providing survivors of childhood sexual abuse with significantly more time to bring lawsuits. That legislation extended the statute of limitations from seven years to thirty-five years of turning 18 (age 53), and included a seven-year period to bring a claim from when a victim discovers or reasonably should have discovered the injury caused by the abuse. S. 315 Sub. A (R.I. 2019) (enacted and effective July 1, 2019) (amending R.I. Gen. Laws § 9-1-51). The 2019 law applied this extended period to claims against both a "perpetrator defendant" and to claims against "a non-perpetrator defendant" alleging "negligent supervision of a person that sexually abused a minor, or that the non-perpetrator defendant's conduct caused or contributed to the childhood sexual abuse by another person to include, but not be limited to, wrongful conduct, neglect or default in supervision, hiring, employment, training, monitoring, or failure to report and/or the concealment of sexual abuse of a child." R.I. Gen. Laws § 9-1-51(a)(1), (2). While the legislature applied the extended period to categories of potential defendants, it

[2] In addition, this Court left open the question of whether, where supported by reliable expert medical evidence, a court may toll the statute of limitations when a plaintiff alleges repressed recollection of past sexual abuse. *See Kelly*, 678 A.2d at 879. The Court revisited that question in 2016, and determined that repressed recollection would toll the statute of limitations when the plaintiff at issue met the standard for unsound mind under Rhode Island law. *Hyde*, 139 A.3d at 464-65.

limited the bill's retroactive application to "a perpetrator defendant." R.I. Gen. Laws § 9-1-51(a)(3). This was a reasonable distinction given the fundamental differences in evidence that fact finders face when deciding such claims.

In lawsuits against an alleged perpetrator, a jury must decide a straight-forward question: Did the defendant sexually abuse the plaintiff? Lawsuits claiming that another individual or organization bears responsibility for the perpetrator's abuse, however, involve far more challenging factual issues than this binary yes-or-no question. What did the organization know about the perpetrator at the time? Were there warning signs? What policies or practices did the entity have in place to prevent or detect abuse? What practices were common or expected at that time? These types of determinations rely heavily on records and witnesses, such as staff from that period, and require looking back to determine the standard of care.

For an organization, reviving claims targeting actions it took, or may have failed to take, decades ago means that it may not have kept records from that period. Exculpatory evidence may have been lost due to no fault of its own.[3] The organization may not have purchased insurance to cover itself or, if it did, it may not

[3] *See, e.g.*, Xander Landen, *Lawsuits Against Center Will Move Forward Under New Vt. Child Sexual Abuse Law*, Valley New, June 10, 2019 (reporting that a nonprofit community resource center would face claims that its negligence in the 1980s allowed a former teacher to abuse pre-school students and that the center would have to defend itself without the records of a state agency investigation concluding no abuse occurred because the records were lost in a fire).

be able to locate the policy. Those who ran the organization and those who worked there at the time may be gone, and the perpetrator may no longer be alive. Whether the defendant is a day camp, a school, or a dentist's office – reviving time-barred claims may mean that the person who owns the business today, and is subject to the lawsuit, may have had nothing to do with that business at the time.

When an extended, lengthy statute of limitations period is applied prospectively, however, an organization can at least ensure not only that it has strong policies and practices to prevent abuse in place, but that it is closely documenting and retaining records of its hiring decisions, background checks, supervision of staff, and reporting procedures, and obtaining sufficient insurance, should it face a lawsuit in the future.

C. The Statutory Text, Legislative History, and Similar Laws Demonstrate That the Legislature Did Not Revive Any Type of Claim Against Third Parties

In enacting the 2019 law, the Rhode Island legislature could have sought to revive claims against third parties, but expressly chose not to do so. This is apparent from the text of the statute, its legislative history, and the choices made by other states when enacting similar laws.

The 2019 law revives claims against "a perpetrator defendant," while not reviving claims against "a non-perpetrator defendant." R.I. Gen. Laws 9-1-51(a)(3). When interpreting a statute, this Court "give[s] words their plain, ordinary

meanings." *Roe v. Gelineau*, 794 A.2d 476, 484 (R.I. 2002). The statutory text indicates that a revived claim against a perpetrator is one that is "based on conduct of sexual abuse." R.I. Gen. Laws 9-1-51(a)(3). In other words, a claim against a perpetrator is one for committing the abuse itself. On the other hand, a claim against a non-perpetrator, which is subject to a lengthy statute of limitations going forward but is not revived if it has expired, is one that alleges negligent supervision *or* that the person engaged in any form of "wrongful conduct" that "caused or contributed to the childhood sexual abuse *by another person*." *Id*. 9-1-51(a)(2) (emphasis added). The examples provided in the statute, which are offered for illustrative purposes ("include, but not be limited to"), include both negligent conduct ("negligent or default in supervision, hiring, employment, training, monitoring") and intentional conduct ("failure to report and/or concealment of sexual abuse"). *Id*. While the statute does not specifically reference "aiding and abetting," the terms invoked by Plaintiffs, such allegations fall within the broad, nonexclusive ambit of non-perpetrator claims.

The legislature understood this distinction. In *Kelly*, and again in *Hyde*, this Court recognized that the legislature provided more time to bring lawsuits against perpetrators of sexual abuse than others who allegedly share responsibility for what occurred. There, the Court recognized that the General Assembly "limited the application of repressed recollection via the discovery rule to actual abusers, because

it is the *perpetrator* of the abuse who is responsible for instilling the psychological defense mechanism leading to the repression," and that causal connection was what justified enacting 'a delayed discovery statute of limitation directed *specifically at the perpetrator* of the sexual abuse.'" *Hyde*, 139 A.3d at 465 (quoting *Kelly*, 678 A.2d at 878) (emphasis in original). The same justification underlies reviving time-barred claims and supports distinguishing between "actual abusers" and third parties.

If there is an ambiguity in the statutory text, the Court may "apply the meaning most consistent with the intended policies and purposes of the Legislature." *Gelineau*, 794 A.2d at 484. The legislative history of the statute indicates that the legislature did not intend to revive time-barred claims against third parties. As introduced, the 2019 legislation would have broadly revived claims for which the statute of limitations had expired, regardless of whether the defendant was a perpetrator or entity. Originally, S.B. 315 provided a three-year window during which victims of child sexual abuse who had been barred from filing suit could bring such a claim "against their abusers" or against a "institution, agency, firm, business, corporation, or other public or private entity that owed a duty of care to the victim." *See* S.B. 315 (R.I., introduced Feb. 13, 2019) (amending R.I. Gen. Laws 9-1-51(a)(3)). During legislative hearings, some witnesses (including those representing *amicus curiae*) urged the legislature to either eliminate the reviver based on both public policy and constitutional concerns, or, at minimum, place constraints on the

reviver as several other state legislatures had done.[4] In response, the General Assembly amended the bill to permit time-barred claims against "perpetrators" only. It retroactively applied the extended statute of limitations to perpetrator defendants, while eliminating the need for plaintiffs to file these revived claims within a three-year window.

While the legislature could have opted to attempt to revive time-barred claims against organizations alleging a higher level of culpability than negligence (placing constitutional problems aside), it did not do so. In fact, when Utah revived time-barred child abuse claims in 2016, its legislature took an approach similar to what Plaintiffs and the Attorney General argue Rhode Island did here. The Utah law revived claims against a person who "intentionally perpetrated the sexual abuse" or "would be criminally responsible for the sexual abuse in accordance with Section 76-2-202," referencing the state statute providing criminal aiding and abetting liability. Utah Code § 78B-2-308(b). The Utah law, however, only revived claims against a "living individual" in a Ghislaine Maxwell-like situation, not an entity. *Id*. (As discussed *infra*, the Utah Supreme Court struck down even this limited

[4] *See* Testimony of Cary Silverman on Behalf of the Am. Tort Reform Ass'n Before the Rhode Island Senate Comm. on the Judiciary, S.B. 315, Mar. 12, 2019; *see also* Katherine Gregg, *Graphic and Painful Testimony on Sex Abuse*, Newport Daily News, Feb. 27, 2019 (discussing "serious flaws" in legislation identified by the Rhode Island Catholic Conference during House Judiciary Committee hearing).

reviver as unconstitutional. *See Mitchell v. Roberts*, 469 P.3d 901, 903, 913 (Utah 2020)).

Rather than attempt this approach, the Rhode Island General Assembly drew a bright line between perpetrators and non-perpetrators in 2019. In doing so, it favored the approaches of neighboring Massachusetts in 2014 and Georgia in 2015. Like the Rhode Island legislation, Massachusetts extended its statute of limitations for civil claims alleging injuries from childhood sexual abuse to 35 years of age 18 or 7 years of when a plaintiff discovers or reasonably could have discovered the injury caused by the abuse. *See* 2014 Mass. Acts 145 (June 26, 2014) (codified at Mass. Gen. Laws ch. 260, §§ 4C, 4C 1/2). The Massachusetts law distinguishes "[a]ctions of tort alleging the defendant sexually abused a minor," Mass. Gen. Laws ch. 260, § 4C, from "[a]n action of tort alleging that the defendant negligently supervised a person who sexually abused a minor or that the defendant's conduct caused or contributed to the sexual abuse of a minor by another person," *id*. § 4C ½. The Massachusetts legislation retroactively applied the 35-year period to revive time-barred claims against perpetrators, *see Sliney v. Previte*, 41 N.E.3d 732 (Mass. 2015), but not negligence or other "caused or contributed to" claims against others.[5]

[5] The retroactivity of the Massachusetts law has been understood to apply to perpetrators, not entities. *See, e.g.,* Travis Andersen, *Bill Extends Time Limit on Sexual Abuse Lawsuits*, Boston Globe, June 20, 2014 ("The bill would extend the statute of limitations for filing suits against alleged perpetrators and, in future cases, the people or institution supervising them.").

Likewise, Georgia's 2015 law revived claims against perpetrators ("the individual alleged to have committed the act of childhood sexual abuse"), but not claims against an entity. Ga. Code Ann. § 9-3-33.1(c)(1), (d).

The Court should respect the General Assembly's "weigh[ing] the competing policies and respective interests of plaintiffs and defendants" in reaching its decision in this "complex and controversial area of tort liability," as it has done in the past. *Hyde*, 139 A.3d at 465. The legislature made a conscious, specific, and reasoned decision to revive time-barred claims against actual perpetrators, but not against organizations or others that did not commit abuse.

II. REVIVING TIME-BARRED CLAIMS VIOLATES DUE PROCESS

The Plaintiffs have focused their appeal on whether the 2019 law's revival of time-barred claims against a "perpetrator defendant" can extend to claims against organizations. While the trial court did not reach the constitutionality of the statute because it found the law did not revive claims against organizations, this Court should reaffirm that reviving a time-barred claim against any person or organization violates due process.

A. This Court Should Reaffirm the Established Constitutional Principle that the Legislature May Not Revive Time-Barred Claims

After the legislature extended the statute of limitations for claims against perpetrators in 1993, the Court indicated in *Kelly v. Marcantonio* that Rhode Island's adoption of a due process clause applicable to civil cases in 1986 answers the

question of when an extension of a statute of limitations may and may not apply retroactively. The answer to that question has not changed. Retroactive application of a statute of limitations is not permitted if the new or amended statute would revive a time-barred claim.

As the Court explained in *Kelly*:

> Although it is permissible for the General Assembly to enlarge an already existing action limitation period that would be applicable to causes of action thereunder not already time-barred without offending any vested substantive right of the parties, the amendment to art. I, sec. 2, precludes legislation with retroactive features, permitting revival of an already time-barred action that would impinge upon a defendant's vested and substantive rights and would offend a defendant's art. 1, sec. 2, due process protections.

678 A.2d at 883. This Court concluded that "our State Constitution bars the retroactive application of § 9-1-51 to claims already time-barred by a statute of limitations in effect prior to the effective date of § 9-1-51." *Id*. at 884; *see also Spunt v. Oak Hill Nursing Home, Inc*., 509 A.2d 463, 465-66 (R.I. 1986) (holding that the legislature's extension of the statute of limitations for wrongful death claims from two to three years could retroactively apply when it "does not act to revive a dead cause of action because the plaintiff's claim was never time barred").

It is now firmly established the Rhode Island Constitution does not permit the legislature to revive time-barred claims. The Court reaffirmed this principle in 2003, when it found that a law extending the time to sue a dissolved corporation could not apply retroactively to allow claims after the two-year period that applied at the time

had expired. *See Theta Properties v. Ronci Realty Co*., 814 A.2d 907, 916-17 (R.I. 2003) ("*Kelly* held that it would be permissible for the General Assembly to enlarge a limitation period and apply the amendment retroactively to pending cases that were not yet time-barred, but that due process, under the amended constitutional provision, precluded legislation that retroactively revived a time-barred action. *Id*. Thus, we concluded, such legislation would violate a defendant's vested and substantive rights to defend on statute of limitation grounds.").

This construction of the due process clause protects both plaintiffs and defendants from unfair, retroactive amendments to statutes of limitations. Just as protection of vested rights prohibits the legislature from extending a statute of limitation in a manner that revives an expired claim, it also prohibits the legislature from retroactively shortening the period, cutting off a plaintiff's ability to bring an accrued claim or leaving an unreasonable and inadequate time to do so. *See Rotchford v. Union R. Co*., 54 A. 932, 933 (R.I. 1903) (interpreting a reduction of the statute of limitations for personal injury actions from six years to two years to not apply retrospectively to accrued claims); *see also Guzman v. C.R. Epperson Const., Inc*., 752 N.E.2d 1069, 1076 (Ill. 2001) (holding that even if the legislature has expressed a retroactive intent, "an amendment shortening a statute of limitations will not be applied retroactively so as to terminate a cause of action unless the party has had a reasonable period of time after the amendment's effective date in which to

file an action"); *Lott v. Haley*, 370 So. 2d 521, 523-24 (La. 1979) (holding that statutes of limitation . . . cannot consistently with state and federal constitutions apply retroactively to disturb a person of a pre-existing right" and that "a newly-created statute of limitation or one which shortens existing periods of limitation will not violate the constitutional prohibition against divesting a vested right provided it allows a reasonable time for those affected by the act to assert their rights"). In other words, just as the legislature cannot retroactively change a statute of limitations from three years to six months, taking away an injured plaintiff's vested right to an accrued claim, it cannot retroactively extend a statute of limitation from three years to thirty years, eliminating a defendant's vested right to no longer be subject to that claim.

B. Rhode Island's Constitutional Law is Consistent With the Majority of States in Prohibiting Revival of Time-Barred Claims

Rhode Island follows the approach of the "great preponderance" of state appellate courts, which, as this Court recognized in *Kelly*, do not permit reviving-time barred claims. 678 A.2d at 883. As other state high courts have similarly recognized, "The weight of American authority holds that the [statute of limitations] bar does create a vested right in the defense" that does not allow the legislature to revive a time-barred claim.[6]

[6] *Johnson v. Garlock, Inc.*, 682 So.2d 25, 27-28 (Ala. 1996); *see also Johnson v. Lilly*, 823 S.W.2d 883, 885 (Ark. 1992) ("[W]e have long taken the view, along

These states generally apply a vested-rights analysis that is consistent with Rhode Island law, whether they do so through applying due process safeguards, a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, or another state constitutional provision.[7] Courts have applied these

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with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred."); *Frideres v. Schiltz*, 540 N.W.2d 261, 266-67 (Iowa 1995) ("[I]n the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute of limitations had run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action."); *Dobson v. Quinn Freight Lines, Inc*., 415 A.2d 814, 816-17 (Me. 1980) ("The authorities from other jurisdictions are generally in accord with our conclusion" that there is vested right in a statute of limitations after the prescribed time has completely run and barred the action); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341-42 (Mo. 1993) (recognizing constitutional prohibition of legislative revival of a time-barred claim "appears to be the majority view among jurisdictions with constitutional provisions"); *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-71 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and this violates due process."); *Roark v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995) ("In refusing to allow the revival of time-barred claims through retroactive application of extended statutes of limitations, this court has chosen to follow the majority rule.").

[7] *See, e.g*., *Garlock*, 682 So.2d at 27-28; *Lilly*, 823 S.W.2d at 885; *Jefferson County Dept. of Social Services v. D.A.G*., 607 P.2d 1004 (Colo. 1980); *Wiley v. Roof*, 641 So.2d 66, 68-69 (Fla. 1994); *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475, 484-85 (Ill. 2009); *Skolak v. Skolak*, 895 N.E.2d 1241, 1243 (Ind. Ct. App. 2008); *Frideres*, 540 N.W.2d at 266-67; *Johnson v. Gans Furniture Indus., Inc*., 114 S.W.3d 850, 854-55 (Ky. 2003); *Hall v. Hall*, 516 So.2d 119, 120 (La. 1987); *Henry v. SBA Shipyard, Inc.*, 24 So.3d 956, 960-61 (La. Ct. App. 2009); *Dobson*, 415 A.2d at 816-17; *Doe*, 862 S.W.2d at 341-42; *Givens v. Anchor Packing, Inc*., 466 N.W.2d 771, 773-75 (Neb. 1991); *Gould v. Concord Hosp*., 493 A.2d 1193, 1195-96 (N.H. 1985); *Colony Hill Condominium Ass'n v. Colony Co*., 320 S.E.2d 273 (N.C. 1984); *Wright v. Keiser*, 568 P.2d 1262, 1267 (Okla. 1977); *Lewis v. Pennsylvania R. Co*.,

constitutional principles to not permit revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others.

This majority rule in the states has not shifted since *Kelly*. For example, in 2020, the Utah Supreme Court became the latest state high court to find a law reviving time-barred claims unconstitutional after the state legislature permitted such claims against perpetrators of childhood sexual abuse. *Mitchell v. Roberts*, 469 P.3d 901 (Utah 2020). While the court "appreciated the moral impulse and substantial public policy justifications" for the reviver, the court unanimously held that the principle that the legislature violates due process by retroactively reviving a time-barred claim is "well-rooted in our precedent," "confirmed by the extensive historical material," and has been repeatedly reaffirmed for "over a century." *Id*. at 903, 913.

A minority of states, about one-third, find that legislation reviving time-barred claims is permissible or appear likely to reach that result. These states generally follow the approach taken under the U.S. Constitution, which contains an "Ex Post

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69 A. 821, 822-23 (Pa. 1908); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005); *Doese*, 501 N.W.2d at 369-71; *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696-97 (Tenn. 1974); *Baker Hughes, Inc. v. Keco R. & D., Inc*., 12 S.W.3d 1, 4 (Tex. 1999); *Roark*, 893 P.2d at 1062-63; *Murray v. Luzenac Corp*., 830 A.2d 1, 2-3 (Vt. 2003); *Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992); *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 399-402 (Wis. 2010).

Facto" clause that prohibits retroactive criminal laws,[8] including retroactive revival of time-barred criminal prosecutions,[9] but does not similarly prohibit retroactive laws affecting civil claims.[10] For that reason, while retroactive legislation is disfavored under federal law,[11] under the U.S. Constitution, there is no vested right in a statute of limitations defense that prohibits reviving an otherwise time-barred claim. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Campbell v. Holt*, 115 U.S. 620, 628 (1885). Delaware, for example, follows the federal approach. *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247,

[8] U.S. Const. art. I, § 9, cl. 3 ("No bill of attainder or ex post facto Law shall be passed.").

[9] *See Stogner v. California*, 539 U.S. 607 (2003) (holding that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution").

[10] A petition for certiorari pending before the U.S. Supreme Court asks the Court to consider whether the Ex Post Facto Clause allows retroactive legislation that was enacted with a punitive purpose and imposes additional punitive liability for past conduct, as well as whether the Due Process Clause of the U.S Constitution permits a state to revive time-barred claims multiple times. *See* Pet. for Writ of Certiorari, *Roman Catholic Archbishop of Los Angeles v. Super. Ct. of Cal. in & for the County of Los Angeles*, No. 21-1377 (docketed Apr. 25, 2022).

[11] While the U.S. Supreme Court has provided Congress with more of a free hand to enact retroactive legislation, it has also expressed strong concern with such a long "disfavored" approach. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("[R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

1258-59 (Del. 2011) (recognizing that Delaware, in interpreting "due process of law" under its own Constitution, accords that phrase the same meaning as under the U.S. Constitution, following *Chase* and *Campbell*).

The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Chase*, 325 U.S. at 312-13. Many states, including Rhode Island, do so. In fact, when the Connecticut Supreme Court ruled that its constitutional law favored the minority federal approach, it recognized that Rhode Island is among those states that "have rejected the United States Supreme Court's approach to this issue . . . and held, as a matter of state constitutional law, that the retroactive expansion of the statute of limitations, which revives an otherwise time-lapsed claim, is an incursion on a vested property right that amounts to a per se violation of substantive due process." *Doe v. Hartford Roman Catholic Diocesan Corp*., 119 A.3d 462, 511-12 (Conn. 2015) (citing *Kelly*, 678 A.2d at 883). The Connecticut Supreme Court went to special lengths to explain that while the Rhode Island Supreme Court had earlier and reluctantly followed the federal approach, "[f]ollowing the 1986 amendment of the state constitution to include a civil due process clause, the Rhode Island Supreme Court adopted Justice Bradley's approach as a matter of state constitutional law, to preclude 'legislation with

retroactive features permitting revival of an already time-barred action that would impinge upon a defendant's vested and substantive rights. . . .'"). *Id*. at 511-12 n. 56.

Amicus curiae are not aware of any state high court abandoning stare decisis to allow revival of time-barred claims over the past thirty years.[12] Such a ruling would have significant implications for both plaintiffs and defendants in any civil action.

C. Opening the Constitutional Door to Reviving Time-Barred Claims Will Begin a Slippery Slope That Will Undermine Rhode Island's Civil Justice System

Over time, there will be many other sympathetic plaintiffs, important causes, and unpopular industries and defendants. It is never easy to tell an injured person that their time to sue has ended. Allowing revival of time-barred claims here will result in future calls to permit claims alleging physical or economic injuries based on alleged conduct that occurred decades ago to proceed in Rhode Island courts.

[12] *Amicus curiae* expect courts in other states that have recently revived time-barred claims despite a state constitutional prohibition on such action to eventually invalidate such laws. For example, a North Carolina court found that state's 2019 revival of childhood sexual abuse claims "directly runs afoul of the case law to which a majority of this panel is bound." *McKinney v. Goins*, No. 21 CVS 7438, at 8 (Wake County, N.C. Super. Ct. Dec. 20, 2021) (appeal pending, N.C. Ct. App. No. 22-261, N.C. Sup. Ct. petition for discretionary review pending, No. 109P22); *see also* Will Doran, *Key Part of Law Helping Child Sex Abuse Victims Sue Is Unconstitutional, NC Court Rules*, Winston Salem J., Dec. 20, 2021. A challenge to Louisiana's reviver is also pending. *Sam Doe v. The Society of the Roman Catholic Church of the Diocese of Lafayette*, No CW 22-120 (La. 3d Cir. Ct. App., Pet. for Supervisory Writ filed Feb. 23, 2022) (on appeal from Parish of Lafayette, No. 2020-4792).

Amici have already observed several such attempts. Efforts are underway in states that have revived time-barred childhood sexual abuse claims to expand these provisions. Legislation recently enacted in New York would revive claims brought by those who allege injuries from sexual abuse as *adults*. S. 66 (N.Y. 2022). California legislation goes even further, reviving claims involving anything that might be considered "inappropriate conduct, communication, or activity of a sexual nature" decades ago, which would spark stale employment litigation and other claims. A.B. 2777 (Cal. 2022) (as amended in Assembly May 4, 2022). Vermont almost immediately expanded its 2019 childhood sexual abuse reviver to apply to claims alleging *physical* abuse. S. 99 (Vt. 2021) (amending Vt. Stat. Ann. tit. 12, § 522).[13]

Plaintiffs' lawyers and advocacy groups will also seek to revive other types of tort claims. For example, legislation proposed in Maine would have retroactively expanded the state's statute of limitations for product liability claims from six to fifteen years. LD 250 (Maine 2019) (reported "ought not to pass"). Oregon considered a bill that would have revived time-barred asbestos claims during two-

[13] Vermont's revival of time-barred claims appears unlikely to survive a constitutional challenge, as the Vermont Supreme Court has indicated that while the legislature may extend a statute of limitation for a viable claim, it can only do so "where the time limitation has not run and thereby barred the action." *Murray v. Luzenac Corp*., 830 A.2d 1, 3 (Vt. 2003); *see also Sanz v. Douglas Collins Constr*., 910 A.2d 914, 918 (Vt. 2006) (recognizing *Murray* indicates there is a vested right once the statute of limitations time limit has lapsed).

year window. S.B. 623 (Or. 2011) (died in committee). New York has also passed legislation that would revive certain claims alleging water contamination stemming from an "emerging contaminant." S. 8763 (N.Y. 2022).

States have also considered proposals to retroactively permit novel theories of liability. Bills have attempted to allow claims addressing social and political causes by applying today's values to conduct that occurred long ago. For instance, a California bill would have revived time-barred actions under the state's unfair competition law alleging that businesses deceived, confused, or misled the public on the risks of climate change or financially supported activities that did so. S.B. 1161 (Cal. 2016) (reported favorably from committee, but died without floor vote). Another California bill proposed a ten-year statute of limitations for torts involving certain human rights abuses that would have applied retroactively to revive time-barred claims that occurred up to 115 years earlier. A.B. 15 (Cal., as amended Mar. 26, 2015) (reviver provision removed and legislation made prospective before enactment).

While most of these proposals have failed to gain sufficient support for enactment, should this Court open the constitutional door to reviving time-barred claims, more of these types of proposals should be expected in Rhode Island. Calls for discarding statutes of limitations and reviving time-barred claims will become more frequent and louder. As a result, individuals and businesses in Rhode Island

will face a risk of indefinite liability. In addition, when adopted, these proposals will undermine the ability of judges and juries to accurately evaluate liability given the loss of witnesses and records, faded memories, and changes in societal expectations. Cases will become more susceptible to be decided based on sympathy and bias, rather than law and evidence.

CONCLUSION

Amicus curiae respectfully request that the Court affirm the lower court's decision, finding that Section 9-1-51 does not revive claims against entities whose conduct, decades ago, allegedly failed to prevent, detect, or stop abuse by another. The Court should also reaffirm its decision in *Kelly*, 884 A.2d at 884, and find that the due process clause of the Rhode Island Constitution, Article I, Section 2, "bars the retroactive application of § 9-1-51 to claims already time-barred by a statute of limitations in effect" prior to the 2019 legislation.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(B)

1. This brief contains 6,493 words, excluding the parts exempted from the word count rule by Rule 18(b).

2. This brief complies with the font, spacing, and type-size requirement stated in Rule 18(b).

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 13th day of July, 2022, I filed and served this Brief of Amicus Curiae through the electronic filing system on the following, and the document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System:

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