Niagara County Clerk's Index No. E172556/20

New York Supreme Court

APPELLATE DIVISION – FOURTH DEPARTMENT

PB-36 DOE,

Plaintiff-Respondent,

Docket No.: CA 21-01223

against

NIAGARA FALLS CITY SCHOOL DISTRICT and LASALLE JUNIOR HIGH SCHOOL,

Defendants-Appellants,

and

ROBERT LEWIS,

Defendant.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

Scott A. Chesin
*Counsel of Record
SHOOK HARDY & BACON L.L.P.
1325 Avenue of the Americas,
28th Floor
New York, NY 10019
Tel: (212) 779-6106
Fax: (929) 501-5455
schesin@shb.com

Supreme Court of the State of New York
Appellate Division: Fourth Department

PB-36 DOE,

Plaintiff-Respondent,

against

NIAGARA FALLS CITY SCHOOL DISTRICT and LASALLE JUNIOR HIGH SCHOOL,

Defendants-Appellants,

and

ROBERT LEWIS,

Defendant.

Docket No.: CA 21-01223

NOTICE OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

PLEASE TAKE NOTICE that upon the affirmation of Scott A. Chesin, an attorney duly admitted to practice law before the courts of the State of New York, dated September 12, 2022, and the accompanying proposed *Amici Curiae* Brief in Support of Defendants-Appellants, the undersigned will move this Court at the Courthouse located at 50 East Avenue, Suite 200, Rochester, New York, on the 26th day of September, at 10 AM in the forenoon of that day or as soon thereafter as counsel may be heard, for an order granting the following relief:

(a) The Court will grant leave to the American Tort Reform Association and American Property Casualty Insurance Association to file a brief as *amici curiae* in

support of Defendants-Appellants. A copy of the affirmation of Scott Chesin in support of this motion and the proposed *amici curiae* brief are annexed hereto.

(b) For such further and different relief as this Court may deem just and proper.

Dated: September 14, 2022

Scott A. Chesin
SHOOK HARDY & BACON L.L.P.
1325 Avenue of the Americas, 28th Floor
New York, NY 10019
Tel: (212) 779-6106
Fax: (929) 501-5455
schesin@shb.com

Supreme Court of the State of New York
Appellate Division: Fourth Department

PB-36 DOE,

Plaintiff-Respondent,

against

NIAGARA FALLS CITY SCHOOL DISTRICT and LASALLE JUNIOR HIGH SCHOOL,

Defendants-Appellants,

and

ROBERT LEWIS,

Defendant.

Docket No.: CA 21-01223

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

Scott Chesin, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am duly admitted to practice law before the courts of the State of New York and a Partner in the law firm of Shook Hardy & Bacon L.L.P., attorneys for *amici curiae* American Tort Reform Association ("ATRA") and American Property Casualty Insurance Association ("APCIA") (collectively, "proposed *amici*"). I submit this affirmation in support of proposed *amici*'s Motion for Leave to File *Amici Curiae* Brief in Support of Defendants-Appellants.

2. Proposed *amici* are organizations that represent companies doing business in New York and their insurers. Accordingly, proposed *amici* have a substantial interest in ensuring that New York law adheres to traditional constitutional law principles recognizing that the legislative revival of time-barred claims, as in the Child Victims Act, violates due process.

3. 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 the instant case arises in the context of childhood sexual abuse, legislation of this type, left unchecked by courts, will spread to other cases involving sympathetic plaintiffs or causes, jeopardizing the predictability and reliability of the civil justice system.

4. APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market and write more than $10 billion in premiums in the State of North Carolina. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of

its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts, including this Court.

5. Proposed *amici* seek leave to file the accompanying brief to provide their broad perspective to the Court, and do not seek simply to replicate arguments made by the parties.

6. The proposed brief seeks to educate the Court on how allowing the Child Victims Act's revival of time-barred claims would significantly undermine New York's civil justice system and set a potentially disastrous precedent that enables unbounded future claims-revival legislation in the state. It discusses numerous efforts underway in states that have revived time-barred childhood sexual abuse claims to expand those provisions. The brief also examines how the majority of other jurisdictions hold that a legislature generally cannot adopt retroactive laws that revive a time-barred claim without violating defendants' due process rights, and how this constitutional analysis is consistent with New York law.

7. No party or its counsel authored the accompanying *amici curiae* brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amici curiae* or their counsel—contributed money intended to fund preparing or submitting the brief.

WHEREFORE, I respectfully request an order granting proposed *amici* leave to file the accompanying *Amici Curiae* Brief in Support of Defendants-Appellants.

Dated: September 14, 2022

Scott A. Chesin
SHOOK HARDY & BACON L.L.P.
1325 Avenue of the Americas, 28th Floor
New York, NY 10019
Tel: (212) 779-6106
Fax: (929) 501-5455
schesin@shb.com

Niagara County Clerk's Index No. E172556/20

New York Supreme Court

APPELLATE DIVISION – FOURTH DEPARTMENT

PB-36 DOE,

Plaintiff-Respondent,

Docket No.: CA 21-01223

against

NIAGARA FALLS CITY SCHOOL DISTRICT and LASALLE JUNIOR HIGH SCHOOL,

Defendants-Appellants,

and

ROBERT LEWIS,

Defendant.

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

Scott A. Chesin
*Counsel of Record
SHOOK HARDY & BACON L.L.P.
1325 Avenue of the Americas,
28th Floor
New York, NY 10019
Tel: (212) 779-6106
Fax: (929) 501-5455
schesin@shb.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

CONSITUTIONAL PROVISIONS

STATUTES

LEGISLATION

OTHER AUTHORITIES

QUESTION PRESENTED

Whether the provision of the Child Victims Act ("CVA") (codified at CPLR 214-g) that purports to revive previously time-barred claims violates the Due Process Clause of the New York State Constitution (N.Y. Const. Art. 1, § 6)?

Proposed Answer: Yes. Reviving time-barred claims undermines the ability to decide civil cases fairly when the best evidence is available, and exposes New York's residents and businesses to the risk of indefinite liability. For these sound reasons, most states have ruled that their constitutions do not permit reviving time-barred claims. New York law is consistent with these principles. The Due Process Clause of the New York State Constitution limits the Legislature's ability to revive time-barred claims to rare circumstances in which the enactment provides "a reasonable response in order to remedy an injustice." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 400 (2017). This "functionalist approach" weighs the "defendant's interests in the availability of a statute of limitations defense with the *need* to correct an injustice." *Id.* at 394 (emphasis added). Here, the Legislature's decision to broadly revive claims dating back decades, including the claims of those who were not prevented from filing a claim in a timely manner, is neither a needed nor a reasonable response to remedy an "injustice." That is especially clear in this case, since it is undisputed Plaintiff had actual knowledge of the abuse and had the ability to file a timely claim.

INTEREST OF *AMICI 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 alleged sexual abuse of a minor, 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.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market and write nearly $28 billion in premiums in the State of New York. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

STATEMENT OF THE CASE AND FACTS

Plaintiff brought an action under the CVA alleging she was sexually abused in 1985 by the codefendant school teacher while attending a high school operated by the Niagara Falls City School District ("District") (R: 23). Plaintiff alleges the District did not exercise reasonable care in hiring and retaining the teacher and failed to properly investigate the teacher's background and employment history (R: 29). The District moved to dismiss Plaintiff's complaint on the basis the CVA provision purporting to revive previously time-barred claims for a one-year period (which was extended an additional year in 2020) violates the Due Process Clause of the New York State Constitution (R: 15). The motion court denied the District's motion to dismiss the complaint, and this appeal followed.

SUMMARY OF THE ARGUMENT

Plaintiff seeks to recover for injuries stemming from sexual abuse alleged to have occurred nearly forty years ago. She relies upon a provision of the CVA, codified at CPLR 214-g, to revive her time-barred claim even though it is undisputed she possessed actual knowledge of the alleged abuse and was never prevented from filing a timely claim. *Amici* submit this brief because allowing such a claims-revival law to pass constitutional muster would significantly undermine New York's civil justice system and set a potentially disastrous precedent that enables unbounded future claims-revival legislation in the state.

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, products that allegedly cause a person's death, and diseases that may have been contracted through exposure to toxic substances, for example. Statutes of limitations exist in these situations, and for all civil actions, because these limits are "fundamental to a well-ordered judicial system." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). The CVA's purported claims-revival, in contrast, eliminates the finality a limitations period provides, and does so regardless of whether claimants could have otherwise filed a timely claim. Upholding the law would effectively nullify any meaningful constitutional constraint on the revival of time-barred claims in New York, allowing the Legislature to reopen the courthouse doors to the stale claims of sympathetic plaintiffs whenever it chooses. This would make determinations of liability in any type of case less accurate and more prone to deep-pocket jurisprudence, frustrate the ability of individuals and organizations to properly evaluate liability risks, and subject entities to a risk of indefinite liability.

Such a decision would also move New York outside the legal mainstream with respect to due process protections. The "great preponderance" of state appellate courts have long rejected legislation purporting to revive time-barred claims. *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996). These courts often

reason that doing so violates due process. *See, e.g., Mitchell v. Roberts*, 469 P.3d 901, 903 (Utah 2020).

New York law is consistent with the majority approach among states. The Court of Appeal's interpretations of the Due Process Clause of the New York State Constitution instructs that the Legislature's authority to revive time-barred claims is rarely permissible and limited to reasonably tailored efforts that "correct an injustice." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 394 (2017) [hereafter "*In re World Trade Ctr.*"]. A unifying principle of the state high court's jurisprudence dating back a century is that the plaintiff's ability to bring a timely action must be rendered "almost illusory" by circumstances beyond the plaintiff's control. *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 280 (1924). That is not the case here.

For these reasons, the Court should reverse the ruling below and grant the District's motion to dismiss the complaint.

ARGUMENT

I. REVIVING TIME-BARRED CLAIMS UNDERMINES NEW YORK'S CIVIL JUSTICE SYSTEM

The CVA's claims-revival provision, like other disfavored "species" of retroactive legislation, *In re World Trade Ctr.*, 30 N.Y.3d at 400, "defies the essential premise of temporal finality embodied in Statutes of Limitation." *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 542 (1994). While "the primary

purpose of a limitations period is fairness to a defendant," *Duffy v. Horton Mem'l Hosp.*, 66 N.Y.2d 473, 476 (1985), statutes of limitations are essential to a fair and well-ordered civil justice system overall. This is 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. "As time passes, the defense of an action may become more difficult," *McCarthy v. Volkswagen of Am.*, 55 N.Y.2d 543, 548 (1982), especially where "memories have faded, witnesses have died or disappeared, and evidence has been lost." *Nussenzweig v. diCorcia*, 9 N.Y.3d 184, 188 (2007) (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

Statutes of limitations allow judges and juries to evaluate an individual or business's liability when the best evidence is available. In that regard, statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber." *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.

Statutes of limitations also allow businesses and other organizations to accurately gauge their liability exposure and make financial, insurance coverage, and document retention decisions accordingly. The enactment of a claims-revival law, however, can eviscerate entities' "reasonable expectation that the slate has

been wiped clean of ancient obligations." *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969) (cleaned up).

The loss of temporal finality is particularly problematic with respect to insurance. By assuming and managing risk, insurers play an indispensable role in modern life. But a necessary precondition to "managing" risk is the ability to identify and quantify it to establish reserves sufficient to cover all potential exposure for all covered types of losses. Although access to historical data and sophisticated statistical models allows insurers to perform this complex task with ever-increasing accuracy and efficiency, the process still depends on a measure of predictability and stability. Insurers must be able to locate a point at which historically-distant events no longer pose a current and future risk—where "the past" is definitively and conclusively past.

Without a clear line of demarcation, risk assessments and other basic ordering by organizations, insurers, and other entities become uncertain, unreliable, and even speculative. Entities face the risk that they may be "left potentially liable in perpetuity." *Jensen v. Gen. Elec. Co.*, 82 N.Y.2d 77, 87 (1993).

The fundamental due process issues that arise as a result of reviving time-barred claims are evident in the wake of the CVA, which contains no time constraint at all during its "window." The opportunity to bring lawsuits based on alleged conduct that occurred decades ago led to a rush to the courthouse. In 2019,

Marci Hamilton, the founder and CEO of Child USA, a driving force behind the movement to eliminate statutes of limitations in abuse cases, estimated that the CVA's claims-revival would result in between 2,000 and 3,000 new lawsuits. *See* Gloria Gonzales, *Insurers Try to Measure Exposure to Childhood Sex Abuse Claims*, Bus. Ins., Aug. 20, 2019. That prediction fell far short of the mark. When the window closed in August 2021, after a one-year extension, personal injury lawyers had filed nearly 11,000 revived claims against a wide range of individuals and organizations. *See* Jay Tokasz, *Nearly 11000 Child Victims Act Lawsuits Filed in New York State*, Buffalo News, Sept. 26, 2021 (citing Office of Court Administration statistics).

This experience shows that when the Legislature indefinitely opens the door to expired claims, where evidence is compromised, aggressive attorney advertising will generate far more claims than contemplated. In fact, even before enactment of the CVA, law firms began to flood television and the internet with advertisements to file a lawsuit. *See* Rachel Silberstein, *Abuse Survivors Bombarded with Attorney Ads*, Times Union, May 3, 2019. "Everyone wanted a piece of the CVA pie." *Id*. (quoting child victim advocate Asher Lovy). As the deadline to file revived claims approached, these ads continued to surge. *See* Nate Raymond, *Lawyer Ads Seeking Catholic Church Abuse Victims Surge, Report Finds*, Reuters, Oct. 1, 2021 (reporting that spending on television ads seeking plaintiffs for child sexual abuse

claims against the Catholic Church jumped 55% to $2 million in the two months prior to the CVA deadline). The result included claims dating as far back as sixty years[1] and that named not only public schools, as here, but also churches, hospitals, summer camps, youth groups, baseball leagues, music schools, after-school clubs, and a martial arts association as defendants. *See* Corinne Ramey & Tom McGinty, *New York Sex-Abuse Law Brings Forth Hundreds of New Cases*, Wall St. J., Sept, 29, 2019.

Facing a sudden barrage of old claims and the challenges of defending them given the passage of time, loss of records, witnesses, and institutional memory, and nature of the allegations involved, several organizations have filed for bankruptcy protection, including four of New York's eight Catholic dioceses, as well an operator of youth centers in New York City. *See* Dietrich Knauth, *New York Youth Club Seeks to Mediate 140 Sex-abuse Claims in Bankruptcy*, Reuters, July 1, 2022; Alex Wolf, *New York Catholic Diocese Bankruptcies Put Abuse Claims in Limbo*, Bloomberg Law, Feb. 12, 2021. Now, schools and nonprofits are facing "increased insurance costs and difficulties finding old insurance providers as they confront lawsuits regarding crimes dating back decades. Some have lost coverage for sexual

[1] *See, e.g.*, Rick Rojas, *He Says a Priest Abused Him. 60 Years Later, He Can Now Sue*, N.Y. Times, Aug. 13, 2019.

abuse altogether." Kay Dervishi, *Child Victims Act Leads to Insurance Woes*, City & State, Feb. 10, 2020.

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. *See Zumpano v. Quinn*, 6 N.Y.3d 666, 673 (2006) (recognizing that limitations periods can have a "harsh effect" but that this does not make them unreasonable). Allowing revival of time-barred claims here would inevitably lead to future calls to permit claims alleging physical or economic injuries based on alleged conduct that occurred decades ago to proceed in New York courts.

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. Even as the CVA window closed, the Legislature enacted a new window that revives claims brought by those who allege injuries from sexual abuse as *adults*. *See* S. 66 (N.Y. 2022).[2] California legislation has gone even further by proposing to revive 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. *See*

[2] This enactment undercuts a principal constitutional argument of proponents of the CVA's claims-revival provision, namely that child sexual abuse presents an exceptional situation compared to other tort claims. *See* Pl. Br. at 20-24.

A.B. 2777 (Cal. 2022) (as amended in Senate June 16, 2022).[3] Vermont almost immediately expanded its 2019 childhood sexual abuse claims-revival law to apply to claims alleging *physical* abuse. *See* S. 99 (Vt. 2021).[4]

Plaintiffs' lawyers and advocacy groups will also seek to revive other types of tort claims – and they are already doing so. 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. *See* LD 250 (Maine 2019) (reported "ought not to pass"). Oregon considered a bill that would have revived time-barred asbestos claims during a two-year window. *See* S.B. 623 (Or. 2011) (died in committee). New York is on the cusp of enacting legislation that would revive certain claims by water suppliers alleging injuries related to an "emerging contaminant." S. 8763A (N.Y. 2022) (awaiting transmission to Governor).

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 moral values to conduct that occurred long ago. For

[3] The California Legislature ultimately passed an amended bill that revives claims alleging that an entity is legally responsible for damages stemming from a sexual assault by an alleged perpetrator that occurred when the plaintiff was an adult. *See* A.B. 2777 (Cal., presented to Gov. Sept. 6, 2022).

[4] 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).

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. *See* 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 for events that occurred up to 115 years earlier. *See* A.B. 15 (Cal., as amended Mar. 26, 2015) (claims-revival provision removed and legislation made prospective before enactment).

While most of these proposals have failed to gain sufficient support for enactment, should this Court widen New York's narrow constitutional basis to revive time-barred claims by allowing the CVA's claims-revival, more of these types of proposals should be expected in the state. Calls for discarding statutes of limitations and reviving time-barred claims will become more frequent and louder. As a result, individuals and businesses in New York 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 being decided based on sympathy and bias, rather than law and evidence.

II. INVALIDATING THE CVA'S CLAIMS-REVIVAL PROVISION IS CONSISTENT WITH THE MAJORITY APPROACH AMONG STATES

Fundamental fairness and other public policy concerns with reviving time-barred claims have led the majority of courts to reject claims-revival statutes for well over a century. *See* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 237 (1927) (recognizing the "constitutional orthodoxy" that an accrued statute of limitations defense was a vested right for due process purposes).[5] As several state high courts have recognized, the majority rule among jurisdictions continues to be that a legislature generally cannot adopt retroactive laws that revive a time-barred claim without violating defendants' due process rights.[6] These states

[5] *See also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L. J. 1672, 1739 (2012) (stating it was "orthodox constitutional theory" that "due process" prohibited retroactive legislation that interfered with vested rights).

[6] *See Johnson v. Garlock, Inc*., 682 So. 2d 25, 28 (Ala. 1996) ("The weight of American authority holds that the bar does create a vested right in the defense."); *Johnson v. Lilly*, 823 S.W.2d 883, 885 (Ark. 1992) ("[W]e have long taken the view, along 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 a substantive 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

apply varying analyses to arrive at this conclusion, including pursuant to due process safeguards, a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, or another state constitutional provision.[7] Courts have also applied these constitutional principles to reject the legislative revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others.

---

prohibition of legislative revival of a time-barred claim "appears to be the majority view among jurisdictions with constitutional provisions"); *Kelly*, 678 A.2d at 883 (recognizing the "great preponderance of state appellate courts" reject claims-revival laws under due process analysis) (cleaned up); *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.").

[7] *See, e.g.*, *Garlock*, 682 So. 2d at 27-28; *Lilly*, 823 S.W.2d at 885; *Jefferson County Dep't 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); *Wilkes County v. Forester*, 167 S.E. 691, 695 (N.C. 1933); *Colony Hill Condo. Ass'n v. Colony Co.*, 320 S.E.2d 273 (N.C. Ct. App. 1984); *Wright v. Keiser*, 568 P.2d 1262, 1267 (Okla. 1977); *Lewis v. Pennsylvania R. Co.*, 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 v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995); *Murray*, 830 A.2d at 2-3; *Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992); *Society Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 399-402 (Wis. 2010).

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. *See Mitchell*, 469 P.3d at 901. While the court "appreciated the moral impulse" underlying the claims-revival provision and expressed "enormous sympathy for victims of child sex abuse," it maintained that the issue was one of basic protection for defendants. *Id.* at 914. The court unanimously held that the principle that the legislature violates due process by retroactively reviving a time-barred claim is "well-rooted," "confirmed by the extensive historical material," and has been repeatedly reaffirmed for "over a century." *Id*. at 903, 913. Thus, the court followed the "majority rule." *Roark v. Crabtree*, 893 P.2d 1058, 1063 (Utah 1995).[8]

In comparison, a minority of states, about one-third, find that legislation reviving time-barred claims is generally permissible or appear likely to reach that result. These states, unlike New York, follow the approach taken under the U.S. Constitution, which contains an "Ex Post Facto" clause that prohibits retroactive

[8] While some state legislatures have recently revived time-barred childhood sexual abuse claims despite clear state constitutional prohibitions, as in Utah, *amici* expect courts to ultimately invalidate these 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. Sup. Ct., No. 109P22).

criminal laws,[9] including retroactive revival of time-barred criminal prosecutions,[10] but does not similarly prohibit retroactive laws affecting civil claims. For that reason, while retroactive legislation is disfavored under federal law,[11] under the U.S. Constitution, there is ordinarily no vested right in a statute of limitations defense that prohibits reviving a time-barred claim. *See Chase*, 325 U.S. at 314; *Campbell v. Holt*, 115 U.S. 620, 628 (1885).

The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Chase*, 325 U.S. at 312-13. Many states, including New York, do so. *See In re World Trade Ctr.*, 30 N.Y.3d at 394.[12]

---

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

[10] *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").

[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.").

[12] *See also Myers v. Schneiderman*, 30 N.Y.3d 1, 14 (2017) (recognizing that "State Due Process Clause provides greater protections than its federal counterpart").

Although New York's due process standard does not turn on the "formal distinction between claim-revival statutes that intrude upon a 'vested' property interest and those that do not," *id.*, this approach is consistent with the due process and public policy concerns recognized by other states that do not permit reviving time-barred claims. In fact, when the Connecticut Supreme Court ruled that its constitutional law favored the minority federal approach, it recognized that New York "navigate[s] between the poles of the broadly permissive federal approach … and the absolute bar analysis" employed in many jurisdictions. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 512 (Conn. 2015) (citing *Gallewski v. H. Hentz & Co.*, 301 N.Y. 164, 174-75 (1950)).

Invaliding the CVA's claims-revival provision will ensure that New York's "more stringent" constitutional analysis under the State Due Process Clause remains consistent with the majority approach among states to provide greater due process protections. *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 514 (1989). The Court of Appeals has consistently emphasized the importance of "finality, predictability, fairness and repose served by statutes of limitations," *Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 372 (2020), which from the District's perspective ensure that the "operation of government not be trammeled by stale litigation and stale determinations." *Solnick v. Whalen*, 49 N.Y.2d 224, 232 (1980) (citation omitted). For such interests to have any meaning,

there must be robust constitutional protections. That is not the case if this Court's analysis more closely tracks the permissive minority approach and permits the CVA's claims-revival of any alleged sexual abuse looking back any period of time.

III. THE CVA'S REVIVAL OF TIME-BARRED CLAIMS VIOLATES DUE PROCESS UNDER THE NEW YORK STATE CONSTITUTION

Justice Cardozo wisely observed a century ago, while serving on the Court of Appeals, that "[r]evival is an extreme exercise of legislative power." *Hopkins v. Lincoln Trust Co.*, 233 N.Y. 213, 215 (1922). The Court of Appeals has since recognized "a persisting aversion to retroactive legislation," *Matter of Hodes v Axelrod*, 70 N.Y.2d 364, 370-71 (1987), a "species" of which are claims-revival statutes, while also acknowledging that the Legislature is not constitutionally prohibited from this extreme exercise when it serves as "a reasonable response in order to remedy an injustice." *In re World Trade Ctr.*, 30 N.Y.3d at 400.

Over the past century, a "functionalist approach" has emerged to analyze claims-revival laws under New York State's Due Process Clause, which weighs the "defendant's interests in the availability of a statute of limitations defense with the need to correct an injustice." *Id.* at 394. Each application of this approach underscores the narrow grounds and extreme circumstances in which claims-revival is constitutionally valid, none of which exist in this case.

In *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271 (1924), where the Court of Appeals first addressed this due process issue, the plaintiff obtained workers' compensation benefits as the exclusive remedy for the workplace death of her husband, only to have those benefits erased completely two years later by a U.S. Supreme Court decision invalidating the workers' compensation law. Because the Supreme Court struck down the law after the expiration of the limitations period to bring a wrongful death claim, the plaintiff was left without a remedy despite having dutifully and successfully pursued her available legal recourse. *See id.* at 275. The Legislature responded by enacting a one-year claims-revival law "solely for the purpose" of addressing this "unforeseen result," which the Court of Appeals upheld. *Id.* at 276, 280. The Court explained that the plaintiff effectively had her remedy taken from her, and her opportunity to bring a claim for an alternative remedy rendered "almost illusory." *Id.* at 280. Accordingly, the Court found that invalidating the Legislature's claims-revival law would be "contrary to all prevailing ideas of justice." *Id.* at 279.

In *Gallewski v. H. Hentz & Co.*, 301 N.Y. 164 (1950), the state high court considered a claims-revival law enacted in response to the "compelling and extraordinary" circumstances of World War II. *Id.* at 172 (quoting Appellate Division decision). In that instance, the plaintiff, a citizen and resident of the Netherlands, failed to commence a timely action against a New York brokerage

firm for a series of unauthorized securities transactions because he had been arrested and deported to a concentration camp, where he was later murdered, following the invasion of the Netherlands by Nazi Germany in 1940. *See id.* at 168. The Legislature enacted a law to allow otherwise time-barred claims by non-enemies in an enemy country or enemy-occupied territory. *See id.* at 172. The Court of Appeals, recognizing "World War II was an upheaval of unparalleled magnitude," upheld the constitutionality of the law. *Id.* at 174.

In doing so, the Court explained that the plaintiff, as a resident of an enemy-occupied country, was technically an enemy under federal law and, therefore, legally "prohibited from maintaining any actions in the courts" of New York during the wartime occupation. *Id.* at 169-70. This "practical and total inability to commence action in the courts" of New York led the Court to conclude that invalidating the claims-revival on due process grounds would offend "elementary notions of justice and fairness." *Id.* at 175.

In *McCann v. Walsh Constr. Co.*, 306 N.Y. 904 (1954), the state high court considered a claims-revival law that allowed workers diagnosed with caisson disease, a disease caused by exposure to compressed air, additional time to bring a claim beyond a one-year statute of limitations. The Legislature adopted the law to respond to the disease's "slow-starting" nature, whereby disease typically did not manifest until after a year, *McCann v. Walsh Constr. Co.*, 282 App. Div. 444, 447

(3rd Dep't 1953); a fact that rendered the limitations period "almost illusory." *Robinson*, 238 N.Y. at 280. The Court of Appeals affirmed, without opinion, an Appellate Division ruling that upheld the law. *See McCann*, 306 N.Y. at 904.

In *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487 (1989), the Court of Appeals considered another claims-revival law involving "exceptional circumstances" where the drug diethylstilbestrol ("DES"), prescribed to prevent miscarriages, was alleged to cause personal injuries after a "long latency period." *Id.* at 503, 507. Compounding matters, the "pregnant women who took DES generally never knew who produced the drug they took, and there was no reason to attempt to discover this fact until many years after ingestion, at which time the information [was] not available." *Id.* at 503. Consequently, many plaintiffs' claims were barred before an injury manifested, and in any event, they had no practical way of knowing whom to sue. The Legislature responded by reviving time-barred DES claims for a one-year period. *See id.* at 504. The Court of Appeals upheld the law on due process grounds because this "unusual scenario" and "singular" situation called for the "recognition of a realistic avenue for relief." *Id.* 507-08.

Finally, in *In re World Trade Ctr.*, the Court of Appeals considered a latent disease claims-revival law adopted in response to a specific, unparalleled event in American history, the 9/11 terrorist attack on the World Trade Center. The Legislature adopted the law to allow 9/11 cleanup workers with latent diseases to

pursue otherwise time-barred personal injury claims against a public corporation. *See id.* at 382. In upholding the law, the Court of Appeals examined each of the claims-revival cases discussed, finding they "fall into the same pattern." *Id.* at 399.

This pattern, as discussed, involves undisputed and fundamental injustices where "exceptional circumstances" or "extraordinary events," *id.* (citations omitted), create an "inability" for a plaintiff to assert a timely claim, *Gallewski*, 301 N.Y. at 175, or otherwise render the opportunity to bring a timely claim "almost illusory." *Robinson*, 238 N.Y. at 280. Here, there is no need for this Court to breach this longstanding pattern with respect to the *general category* of alleged sexual abuse involving a minor, and the myriad circumstances in which such abuse may occur in society, when it is undisputed Plaintiff had actual knowledge of the alleged abuse and was never prevented from filing a timely claim.

The Court of Appeals has also explained with respect to statutes of limitations for injuries stemming from sexual abuse that "however reprehensible the conduct alleged, these actions are subject to the time limits created by the Legislature." *Zumpano*, 6 N.Y.3d at 677 (rejecting equitable tolling arguments by plaintiffs alleging childhood sexual abuse where "plaintiffs were fully aware that they had been abused"). Abhorrent alleged conduct alone, or, as here, alleged negligence in failing to prevent misconduct, is not exceptional or extraordinary with respect to the type of legal "injustice" required to sustain a claims-revival

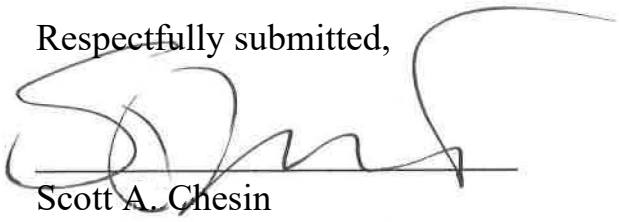
statute under the State Due Process Clause. Emotional trauma and difficulty processing a tragic injury is an unfortunate reality throughout the tort system, whether the plaintiff is a survivor of sexual assault, rendered a quadriplegic in a car accident, or lost a child due to medical negligence.

Statutes of limitations exist for all tragic circumstances and vary limitations periods accordingly. These periods can be changed prospectively, as with the CVA's extension of the limitations period for a minor to bring a sexual abuse claim until age 55. *See* CPLR § 208. However, under New York law, they cannot be revived after the statute of limitations has expired without a showing of some truly exceptional circumstance or extraordinary event beyond the plaintiff's control that prevents filing a timely claim. To find otherwise would effectively remove any meaningful constitutional constraint on the revival of time-barred claims in New York, allowing the Legislature free rein to revive entire categories of tort claims involving sympathetic plaintiffs—of which there are many—regardless of whether plaintiffs can demonstrate any actual or practical inability to bring a timely claim or the illusory nature of a remedy. As discussed, the implications of opening the door to such claims would be disastrous for New York's civil justice system.

CONCLUSION

For these reasons, the Court should reverse the ruling below and grant the District's motion to dismiss the complaint.

Respectfully submitted,



Scott A. Chesin
(Counsel of Record)

SHOOK HARDY & BACON L.L.P.
1325 Avenue of the Americas, 28th Floor
New York, NY 10019
Tel: (212) 779-6106
Fax: (929) 501-5455
schesin@shb.com

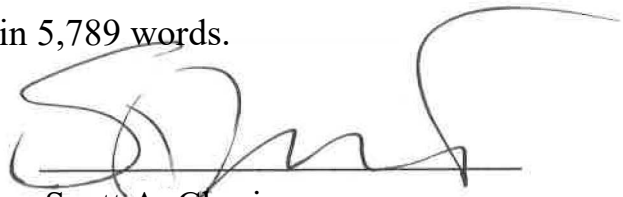
Cary Silverman (*pro hac vice* pending)
Christopher E. Appel (*pro hac vice* pending)
SHOOK HARDY & BACON L.L.P.
1800 K Street N.W., Suite 1000
Washington, D.C. 20006
Tel: (202) 783-8400
Fax: (202) 783-4211
csilverman@shb.com
cappel@shb.com

Attorneys for *Amici Curiae*

Dated: September 14, 2022

PRINTING SPECIFICATIONS STATEMENT

I certify pursuant to 22 N.Y.C.R.R. § 1250.8(j) that this brief was prepared on a computer using Times New Roman proportionally spaced typeface in 14-point font. The portions of the brief that must be included in the word count pursuant to 22 N.Y.C.R.R. § 1250.8(f)(2) contain 5,789 words.



Scott A. Chesin

Dated: September 14, 2022