No. 22-30407

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN LOUSTEAU,

Plaintiff – Appellant

v.

HOLY CROSS COLLEGE, INCORPORATED; CONGREGATION OF HOLY CROSS MOREAU PROVINCE, INCORPORATED, incorrectly named as CONGREGATION OF HOLY CROSS SOUTHERN PROVINCE, INCORPORATED,

Defendants – Appellees

On Appeal from the United States District Court,
Eastern District of Louisiana, No. 2:21-cv-1457,
Honorable Jay C. Zainey, Presiding

BRIEF OF AMERICAN TORT REFORM ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND LOUISIANA ASSOCIATION OF SELF-INSURED EMPLOYERS, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that all of the interested persons and entities described in the fourth sentence of Rule 28.2.1 are listed in the Certificate of Interested Persons contained in the brief of the Plaintiffs-Appellants. The undersigned counsel of record further certifies that the only persons with an interest in this *amicus* brief are the listed *amici* and their counsel of record as listed in this brief.

/s/ Charles M. Pisano
Counsel for American Tort Reform Association, American Property Casualty Insurance Association, and Louisiana Association of Self-Insured Employers

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STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in Louisiana and their insurers. Accordingly, *Amici* have a substantial interest in ensuring that Louisiana law continues to adhere to traditional constitutional law principles recognizing that the attempted legislative revival of prescribed claims, such as Section 2 of 2021 Act 322, violates due process by impairing vested rights.[1]

American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases involving important liability issues.

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 more than 60 percent of the U.S. property-casualty insurance market and write more than $7 billion dollars in premiums in the

[1] The parties to this appeal have consented to the filing of this brief, and as such no motion for leave is required pursuant to Federal Rules of Appellate Procedure 29 (a)(2). No party's counsel authored this brief in whole or in part. No person other than the *amici curiae* contributed money that was intended to fund the preparation or submission of this brief.

State of Louisiana, including more than 70 percent of the liability insurance market. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus curiae* briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law.

Louisiana Association of Self-Insured Employers ("LASIE") was formed to protect and promote the right of businesses to self-insure, to represent the self-insurance industry on issues affecting workers' compensation and self-insurance, and to seek balanced treatment of employers and employees. LASIE represents the interests of Louisiana employers who are self-insured, either individually or through several authorized group self-insurance funds. LASIE members employ a significant portion of Louisiana's workforce and the thousands of businesses represented encompass a broad spectrum of trade and diverse business fields.

Amici support the Appellees' position that the district court's ruling should be upheld. To hold otherwise would undermine the centuries-old civil law principle of prescription and violate the Louisiana Constitution, for the reasons set forth more fully below. Such a result would violate the due-process rights of tort defendants and significantly undermine the stability of Louisiana's

insurance market. Therefore, *Amici* respectfully submit that the Court should affirm the district court's ruling.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Louisiana Legislature passed 2021 Act 322 with a revival provision, Section 2, that attempts to revive prescribed claims of sexual abuse of a minor. The district court interpreted the revival provision to revive all tort claims alleging sexual abuse of a minor, no matter when the abuse allegedly occurred, how long ago the claims prescribed, or whether such claims are against alleged third-party tortfeasors (via, *e.g.*, vicarious liability).

Amici strongly condemn the sexual abuse of minors and do not condone, in any way, the acts of any persons who have caused the sexual abuse of minors. Nonetheless, the full import of Act 322's revival provision, if allowed to stand, would dramatically and adversely affect the foundations of Louisiana law related to all causes of action, not just cases of sexual abuse. The district court's decision properly interpreted Louisiana's longstanding jurisprudence that Louisiana's Constitution does not permit the revival of prescribed claims or the elimination of vested rights. Eroding the doctrine of vested rights and empowering the Legislature to revive any claims it wishes would have far-reaching consequences for all areas of litigation and for the broader Louisiana insurance industry. This Court should affirm the district court's decision holding that Act 322's revival provision is unconstitutional and a violation of the long-established vested right to a prescription defense.

ARGUMENT

I. The Louisiana Supreme Court has consistently interpreted the Louisiana Constitution as prohibiting the legislative revival of prescribed claims.

The Louisiana Supreme Court has consistently ruled that the Due Process Clause of the Louisiana Constitution prohibits the retroactive revival of prescribed claims as a violation of vested rights: "[S]tatutes of limitation, like any other procedural or remedial law, cannot consistently with state and federal constitutions apply retroactively to disturb a person of a pre-existing right." *Lott v. Haley*, 370 So.2d 521, 523–24 (La. 1979). The right to plead prescription which has fully accrued as a defense is the type of vested right that may not be retroactively disturbed. *Elevating Boats, Inc. v. St. Bernard Par.*, 795 So.2d 1153, 1164 (La. 2001) ("[A]fter the prescriptive period on an obligation has run, an obligor gains the *right* to plead prescription. In such a situation, that *right* to plead prescription has already accrued and application of a lengthened prescriptive period to revive the obligation, and effectively remove the right to plead prescription, would 'modify or suppress the effects of a right already acquired.' Thus, we have noted that the Legislature is without the authority to revive a prescribed claim.") (quotation omitted) (emphasis original); *overruled in part on other grounds by Anthony Crane Rental, L.P. v. Fruge*, 859 So.2d 631 (La. 2003), 859 So.2d 631.

"[E]ven where the legislature has expressed its intent to give a law retroactive effect, that law may not be applied retroactively if it would impair

contractual obligations or disturb vested rights." *Bourgeois v. A.P. Green Indus., Inc.*, 783 So.2d 1251, 1257 (La. 2001) Thus, the Louisiana Supreme Court's precedent is clear that under Louisiana's Constitution, the Legislature has no power to remove a defendant's vested right to plead prescription by reviving prescribed claims.

The *Picone v. Lyons* case cited by Appellant has no relevance to the case at hand. *See* Appellant's Brief at 18; *Picone v. Lyons*, 601 So.2d 1375 (La. 1992). In *Picone*, the prescriptive period had not yet accrued. Therefore once suit was timely filed against one solidary obligor, it was interrupted (and thus timely) as to other solidary obligors. *Picone*, 601 So.2d at 1377 ("Picone's original petition was timely.").

While Appellant's quote that "[a] defendant has no vested interest in a particular period of prescription or limitation" may be accurate, it does not support his case. *See id.* There is no vested right in whether a prescriptive period is, for example, five years or ten years, provided that the Legislature changes the length of the period prior to the accrual of prescription. But when a prescriptive period has *accrued*, no matter the "particular period," the right to assert prescription as a defense is no longer "inchoate" and becomes *vested*, as the Louisiana Supreme Court has repeatedly declared. The district court also recognized the distinction both pre- and post-accrual: "[F]or instance, a defendant may be just a few days away from the accrual of liberative prescription when the Legislature can move the 'finish line' farther away by

adding additional time to the prescriptive period or even make the claim imprescribable." Opinion at 25.

Appellant seeks to persuade the Court that Louisiana jurisprudence has "conclusively turned away from anti-retroactivity and adopted nearly all key federal standards relating to retroactivity and vested rights," and that Louisiana's law now permits the retroactive removal of vested rights since the 1974 Constitutional Convention. *See* Appellant's Brief at 16, 18. This suggestion is not only incorrect, but also misconstrues and ignores the existing jurisprudence that holds the exact opposite.

The overwhelming majority of Louisiana Supreme Court cases discussing the inviolability of vested rights and anti-retroactivity were actually decided ***after*** the allegedly all-important 1974 constitutional changes highlighted by Appellant.[2] Indeed, just this year, the Louisiana Supreme Court reiterated its

[2] *See Lott supra*, 370 So.2d at 523–24 (La. **1979**); *Graham v. Sequoya Corp.*, 478 So.2d 1223, 1226 (La. **1985**) ("[A] law will not be applied retroactively if its language evidences a contrary intent **or** the retroactivity would operate to disturb vested rights.") (emphasis added); *Hall v. Hall*, 516 So.2d 119, 120 (La. **1987**) ("The enactment of that article could not revive the already prescribed action."); *Louisiana Health Serv. & Indem. Co. v. McNamara*, 561 So.2d 712, 718 (La. **1990**) ("The patrimony of the obligor is increased when a claim prescribes, and his right to plead prescription in defense to a claim on the obligation is itself property that cannot be taken from him."); *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 816, n. 11 (La. **1992**) ("[N]o law can be retroactively applied so as to divest a party of a vested right."); *Bouterie v. Crane*, 616 So.2d 657, 659 (La. **1993**) ("Bouterie cannot benefit from the 1992 amendment because it could not operate retroactively to revive an already prescribed cause of action."); *Rousselle v. Plaquemines Par. Sch. Bd.*, 633 So.2d 1235, 1244 (La. **1994**) ("even where the legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights."); *Segura v. Frank*, 630 So.2d 714, 721 (La. **1994**) ("Thus, even where the legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb

unchanged jurisprudence on the doctrine of vested rights. *See Succession of Bradley*, 339 So.3d 608, 614 & n.5 (La. 2022) ("[E]ven interpretive legislation cannot operate retroactively to disturb vested rights.").

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vested rights"); *Manuel v. Louisiana Sheriff's Risk Mgmt. Fund*, 664 So.2d 81, 84 (La. **1995**) ("The principle that laws are to have a prospective and not retroactive effect is a basic principle of most legal systems."); *Keith v. U.S. Fid. & Guar. Co.*, 694 So.2d 180, 183 (La. **1997**) ("[E]ven where the Legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights."); *Sudwischer v. Estate of Hoffpauir*, 705 So.2d 724, 731 n.6 (La. **1997**) ("once an action has prescribed, the right to plead prescription is a substantive right which cannot be stripped away by the retroactive application of a new prescriptive period which would result in the revival of the prescribed cause of action"); *Falgout v. Dealers Truck Equip. Co.*, 748 So.2d 399, 407 (La. **1999**) ("When a party acquires a right, either to sue for a cause of action or to defend himself against one, that right becomes a vested property right and is protected by the due process guarantees."); *see Bourgeois supra*, 783 So.2d at 1257 (La. **2001**); *Morial v. Smith & Wesson Corp.*, 785 So.2d 1, 10 (La. **2001**) ("even where the legislature has expressed its intent to give a law retroactive effect, that law may not be applied retroactively if it would impair contractual obligations or disturb vested rights."); *see Elevating Boats, Inc. supra*, 795 So.2d at 1164 (La. **2001**); *Unwired Telecom Corp. v. Par. of Calcasieu*, 903 So.2d 392, 404 (La. **2005**) ("[E]ven when the Legislature has expressed its intent to give a substantive law retroactive effect, the law many not be applied retroactively if it would impair contractual obligations or disturb vested rights."); *Burmaster v. Plaquemines Par. Gov't*, 982 So.2d 795, 807 (La. **2008**) ("retroactive application of new legislation is constitutionally permissible only if it does not result in . . . divestiture of vested rights."); *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So.2d 16 (La. **2008**) *amended on reh'g* (Sept. 19, 2008) ("retroactive application of new legislation is constitutionally permissible only if it does not result in impairment of the obligations of contracts or in divestiture of vested rights.") (original emphasis, modifications, and quotation omitted); *Church Mut. Ins. Co. v. Dardar*, 145 So.3d 271, 279 n.10 & 281 (La. **2014**) ("Statutes enacted after the acquisition of [] a vested property right cannot be applied so as to divest a party of his or her vested right . . . because such a retroactive application would contravene due process guarantees."); *Faulk v. Union Pacific R.R. Co.*, 172 So.3d 1034, 1049 (La. **2015**) ("To the extent these changes in Louisiana's property law would disturb vested rights of the landowners, the revision of the law would not be applicable."); *Born v. City of Slidell*, 180 So. 3d 1227, 1235 (La. **2015**) ("[E]ven where the legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights.") (quotation omitted).

Moreover, the majority (more than a dozen) of these post-1974 cases were also decided ***after*** the Louisiana Supreme Court's decision in *Chance v. American Honda Motor Co.*, 635 So.2d 177 (La. 1994), which Appellant incorrectly claims resulted in a "new standard for legislative revival of prescribed claims." *See* Appellant's Brief at 18.[3] Not only did these numerous cases after *Chance* reaffirm the pre-*Chance* jurisprudence prohibiting the revival of prescribed claims, but also the Supreme Court in *Sudwischer* specifically interpreted its prior decision in *Chance* in direct opposition to Appellant's position:

> This case is logically consistent with our holding in *Chance v. American Honda Motor Co., Inc.*, 93–2582 (La.4/11/94), 635 So.2d 177, 178, wherein we held that once an action has prescribed, the right to plead prescription is a substantive right which cannot be stripped away by the retroactive application of a new prescriptive period which would result in the revival of the prescribed cause of action.

Sudwischer, 705 So. 2d at 731 n.6.

Just weeks ago, the Louisiana Supreme Court reiterated that the *Chance* and *Cameron Parish* cases are only relevant to the threshold question of whether the Legislature "manifested an express intent" to revive claims. *See Doe v. Society of Roman Catholic Church of Diocese of Lafayette*, 22-00829, p. 1, (La. 2022) 347 So.3d 148, 148. The Supreme Court cited *Chance* and *Cameron Parish* when

[3] Most of the cases cited in Footnote 2 *supra* also were decided after the decision in *Cameron Parish Sch. Bd. v. ACandS, Inc.*, 687 So. 2d 84 (La. 1997), which Appellant claims "reaffirmed" and "applied" the so-called "new standard" set in *Chance*. *See* Appellant's Brief at 19-20.

instructing the Louisiana Third Circuit to determine whether Act 322 "manifested an express intent to revive all claims." *Id.* However, if the intent to revive was express, the Supreme Court then instructed the Third Circuit to determine whether "such a result would unconstitutionally impair relator's vested right in the defense of liberative prescription." *Id.* Notably, the Supreme Court did not cite *Chance* or *Cameron Parish* for the second step of the inquiry because neither is relevant to whether retroactive revival is constitutional.[4] Additionally, the Supreme Court once again stated, in accord with its unabrogated jurisprudence, that the defense of liberative prescription is a "vested right." It did not instruct the Third Circuit to inquire *whether* the defense of prescription is a vested right, only whether the result "would unconstitutionally impair relator's vested right." *Id.*

The Louisiana Supreme Court's jurisprudence prohibiting the retroactive disturbance of vested rights is clear and unambiguous. In dozens of decisions from the early 1800s to 2022, the Supreme Court has repeatedly stated that

[4] Both decisions expressly disclaimed any decision on the question of constitutionality, invoking the doctrine of constitutional avoidance. *See Chance*, 635 So.2d at 179 n.6 ("We will adhere to the well established principle that a court should not rule on the constitutionality of legislation unless it is necessary for the resolution of the matter before it."); *Cameron Parish Sch. Bd.*, 687 So.2d at 87 ("This court does not generally reach or determine constitutional issues unless, in the context of a particular case, the resolution of such issues is necessary to decide the case."). Because both opinions specifically declined to address the issue of constitutionality, neither can be read as a "departure from the past" rulings on vested rights, as the district court suggested. *See* Opinion at 30. Moreover, as is evident in Footnote 2 above, the majority of Supreme Court jurisprudence on this issue has been decided after *Chance* and *Cameron Parish*, making it abundantly clear that neither case indicates a departure from prior Louisiana jurisprudence prohibiting the revival of prescribed claims. *See, e.g., Sudwischer supra*, 705 So.2d at 731 n.6.

vested rights may not be retroactively impaired and that an accrued prescription defense is a vested right. There is no need to seek certification of a question that the Louisiana Supreme Court has already repeatedly answered, especially when no Supreme Court case to the contrary exists.

Moreover, if there were any doubt that the Louisiana Supreme Court's jurisprudence remained constant, the Court laid such doubt to rest in its recent order in *Doe v. Society of Roman Catholic Church of Diocese of Lafayette*, 22-00829, p. 1, (La. 2022) 347 So.3d 148. In that case, the Supreme Court vacated the Louisiana Third Circuit's decision, which found no error in the trial court's upholding of 2021 Act 322, and ordered the Third Circuit to re-evaluate the constitutionality of the statute, explicitly stating that the defense of liberative prescription is a vested right.

II. Federal jurisprudence and tests related to substantive due process are irrelevant to the inquiry of whether vested rights may be violated under Louisiana law

Although Appellant argues that federal jurisprudence has moved away from protecting vested rights (*see* Appellant's Brief at pp. 11-12) that argument is immaterial to this case. The district court's decision did not depend on federal jurisprudence. This case is about whether the Louisiana Constitution permits the Legislature to revive prescribed claims, despite the Due Process Clause's prohibition on disturbing vested rights.

Appellant's reliance on *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) for the permissibility of reviving time-barred claims is misplaced. In

Chase Securities, the Supreme Court of the United States specifically noted that "the analogous civil law doctrine of prescription" "extinguishes the claim and destroy[s] the right itself" citing *Goddard's Heirs v. Urquhart*, 6 La. 659, 673-74 (La. 1834).[5] *Chase Securities*, 325 U.S. at 313 n. 11.

Appellant's dozen mentions of *Chase Securities* in his brief are illustrative to be sure, but completely overlook the U.S. Supreme Court's acknowledgement that Louisiana law on the revival of prescribed claims differs from federal common law jurisprudence because prescribed claims cannot be revived under Louisiana's civil law. And none of the cases cited by Appellant for the proposition that Louisiana's Due Process Clause includes the same protections as federal due process relate to vested rights or the retroactive revival of prescribed claims.

Appellant's brief repeatedly discusses the concepts of substantive due process (thirteen times) and rational basis review (fifteen times), as if repeated invocations will make them relevant. Yet the concept of vested rights is distinct from the theory of substantive due process, and none of the Louisiana Supreme

[5] The *Goddard's Heirs* case illustrates how the prohibition against disturbing the vested right of prescription is historically entrenched in Louisiana law. The decision is from the first decade of Louisiana's Civil Code and draws upon the underlying French civil law tradition: "when a new law alters the period of prescription, whether it makes it shorter or longer the time which elapsed before the change is to be reckoned according to the former law and vice versa. Such appears to have been the practice under a decision of the Court of Cassation in France…We believe we give a sound construction to our Code, in adopting the opinion of the Court o[f] Cassation in France, which determines that…the time which preceded the change of legislation or altering the period of prescription, should be reckoned according to the ancient law, and that which followed according to the new law." *Goddard's Heirs*, 6 La. at 673-74.

Court cases discussing vested rights or the retroactive revival of prescribed claims equates the constitutional analysis to a "substantive due process" inquiry. Nor do any of the relevant Supreme Court cases permit vested rights to be violated if the "rational basis" test is met.[6]

III. To permit the violation of vested rights would undermine the purpose of prescription defenses generally, significantly damaging the balance of litigation interests and the stability of insurance markets.

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. Prescriptive periods exist in these situations, and for all civil actions, because such limits are "fundamental to a well-ordered judicial system." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

The importance of the vested right of prescription defenses to defendants is better understood by examining the purpose of prescription defenses. "Prescription statutes find their justification in the desire to avoid unfair prejudice to the defendant by requiring him to defend a stale claim and to be put to a defense after memories have faded, witnesses are gone, and evidence has been lost; and to avoid prejudice to a defendant who was in ignorance of the

[6] Nor do any of the Louisiana Supreme Court's cases prohibiting the revival of prescribed claims require a "final, non-appealable judgment" before a prescription defense becomes vested, as incorrectly claimed by Appellant. *See* Appellant's Brief at 36-38; *compare* cases in Footnote 2 *supra*.

asserted obligation." *Odessa House v. Goss*, 83-548 (La. App. 3 Cir. 6/14/84); 453 So.2d 299, 302. If the courts are forced to cease enforcing the prescriptive periods applicable at the time a cause of action arose because the Legislature decides to revive prescribed causes of action, vested right defenses on which businesses and employers have relied will disappear. The result is that the right to fair civil trials will be drastically undermined.

The defense of prescription is essential to any person seeking a stable landscape for conducting business. Without the legal finality of knowing prescribed claims are barred, there can be no future security for businesses or their insurers. Prescriptive periods allow businesses and other organizations to accurately gauge their liability exposure and make financial, insurance coverage, and document retention decisions accordingly. If prior claims of any type – other torts, breach of contract, federal claims that rely on state law for state prescriptive periods, and any other type of claim allowed under Louisiana law – from any time in the past can be revived in the future, then businesses, government entities, and their insurers will find it difficult to quantify and calculate risks over extended time periods, an uncertainty that will be passed along in additional costs to insured entities or the public.

Businesses and other organizations would be forced to maintain all documents and keep track of all employees who could be potentially relevant over the course of innumerable decades, a herculean if not impossible task. And this measure alone, even if successfully undertaken, would provide a woefully

inadequate guarantee of due process, since witnesses may be dead or otherwise unavailable, and any memories of decades-old events are likely unreliable. Nor is the time period of such revived claims limited by the lifespan of particular plaintiffs. Under the theory of the revival provision proposed by Appellant, claims from any time in the past could be revived by the Legislature. Representatives of a decedent's estate could continue to bring claims decades after the original injured party's death if such claims may be revived by the Legislature.

The loss of security and stability 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.

Amici also call this Court's attention to the very real impact that allowing prescribed claims to be revived would have on the ability to insure. Both individuals and businesses need insurance coverage to live their lives and function without fear of bankruptcy or dissolution. In the insurance world, the

one factor that must exist for insurance to be written is some degree of predictability. If the legislature is permitted to revive previously prescribed claims, that predictability disappears. With that loss of predictability, the willingness of insurers to underwrite, assess risk, and calculate necessary premium could be lost. Allowing prescription rules to be changed in the middle of the game (actually after the game is over) creates the clear and present danger of jeopardizing insurance availability. Allowing previously prescribed claims of any sort to be revived, creates the potential to seriously upset the insurance market, adversely affect the availability and affordability of insurance, and endanger the ability of Louisiana citizens and businesses to affordably insure or perhaps even expensively insure themselves.

Without a clear line of demarcation, risk assessments and other basic ordering by organizations, insurers, and other entities become uncertain, unreliable, and even speculative. Given the passage of time, nature of the allegations involved, and loss of records, witnesses, and institutional memory involved in many of the claims that have been and may be filed under 2021 Act 322, the costs of these claims will be borne mainly by schools, nonprofit organizations, and other entities that provided services to children. These entities can expect increased insurance costs and difficulties obtaining insurance in the future, in addition to their significant new liability exposure for otherwise-time barred claims. Moreover, self-insured employers would be

doubly penalized by both the business and insurance costs of guarding against the future risks of revived claims.

Permitting the revival of time-barred claims would also place Louisiana outside the legal mainstream with respect to due process protections. The "great preponderance" of state appellate courts, like the Louisiana Supreme Court, 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).

As several state high courts have recognized, the majority rule among jurisdictions continues to be that a legislature cannot adopt retroactive laws that revive a time-barred claim without violating defendants' due process rights.[7] Contrary to Appellant's claim (*see* Appellant's Brief at 10) that the

[7] *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 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

doctrine of vested rights has fallen out of favor "in most of the states," these states generally apply a vested-rights analysis that is consistent with Louisiana 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.[8] 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.

Amicus Child USA's claim that "[n]early all courts that have considered the constitutionality of these revival laws upheld them" and its illustrative chart are misleading for several reasons. *See* Child USA Brief at 16-22. First, as noted above, the majority rule in most states where the issue has been decided is that time-barred claims may not be revived. *See* Footnotes 7 & 8 supra.

Second, Child USA's chart is inconsistent in how it labels states with pending litigation over revival laws. For example, New Jersey and New York are

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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.").

[8] *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); *Connell v. Welty*, 725 N.E.2d 502, 506 (Ind. 2000); *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W.3d 850, 854-55 (Ky. 2003); *Dobson*, 415 A.2d at 816-17; *Univ. of Miss. Med. Ctr. V. Robinson*, 876 So.2d 337, 340 (Miss. 2004); *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); *Williams Cos. v. Dunkelgod,* 295 P.3d 1107, 1112 (Okla. 2012); *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); *In re A.D.*, 73 S.W.3d 244, 248 (Tex. 2002); *Roark v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995); *Society Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 399-402 (Wis. 2010).

categorized as having definitively "[c]onstitutional" revival laws, whereas the cited cases are federal district court and state trial court decisions with multiple pending appeals noted. *See* Child USA Brief at 20. In contrast, North Carolina's revival law, which was struck down as unconstitutional by a state appellate court, is categorized as uncertain with a label of "[c]hallenge pending" *Id.* at 21.

Third, states in which the state supreme court has already held that the revival of time-barred claims would be unconstitutional are listed as "[n]ot challenged" because no pending lawsuit has yet been filed related to the recent revival law, though this does not clearly convey that the law of the state would hold such laws as unconstitutional.[9]

Fourth, though ultimately immaterial to the legal question of constitutionality, Child USA's chart does not distinguish between the nature of the various revival laws, which vary greatly in terms of specifics. None of the states listed by Child USA as having "[c]onstitutional" revival laws has enacted laws as broad and sweeping as Appellant's interpretation of Act 322, which demonstrates what an extreme outlier Louisiana's revival law truly is.[10]

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[9] For example, Arkansas and Kentucky are listed as "[n]ot challenged" despite state supreme court precedent foreclosing revival. *See* Child USA Brief at 17, 19; *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."); *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W.3d 850, 854-55 (Ky. 2003) ("Although an amendment that extends the period of limitation may be applied to a claim in which the period has not already run, it may not be applied to revive a claim that has expired without impairing vested rights.").

[10] For example, revival laws in Arizona, California, Delaware, and Hawaii require a higher burden of proof for revived claims against third parties. In Georgia, claims are not even revived against third parties. The revival windows in New Jersey and New York are shorter

Statutes of limitations and prescriptive periods are essential to a fair and well-ordered civil justice system 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. Prescriptive periods allow judges and juries to evaluate an individual or business's liability when the best evidence is available. This is especially important when heart-wrenching allegations are involved, as they are here, because the possibility of an unfair trial is heightened.

It is never easy to tell injured persons that their time to sue has ended. This is why separation of powers and due process prohibits legislatures from acting retrospectively, so that society can appropriately order itself and know the law. Allowing revival of prescribed claims in this case would inevitably lead to future calls to revive claims in other areas of the law, first in those related to physical or economic injuries, but later in myriad other claims that cannot be enumerated here. As a result, individuals and businesses in Louisiana will face the risk of indefinite liability, further exacerbated by the inability of judges and juries to accurately evaluate such liability given the loss of witnesses and records, faded memories, and changes in societal expectations.

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than the one in Louisiana, and New Jersey's revival law restricts revival of claims to seven years after discovery. Moreover, many of the "[n]ot challenged" states on Child USA's chart also have stricter revival laws than Louisiana. States such as Kentucky and Minnesota do not allow revival of vicarious liability claims against third parties. Montana and Vermont have higher burdens of proof against third parties, and Michigan has a higher burden of proof for all revived claims.

CONCLUSION

This Court should recognize that altering Louisiana's constitutional analysis to permit the revival of prescribed claims would significantly undermine due process and the finality of prescriptive periods, not just in the context of this case, but in any type of civil action. It would make determinations of liability in any type of civil action 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.

As the district court correctly held, the Louisiana Supreme Court's jurisprudence cited above clearly prohibits the Legislature from reviving causes of action, no matter how express its intent. If the decision of the district court is reversed and the revival provision is permitted to stand, nothing would then limit the power of the Legislature to revive other prescribed claims of any kind. Allowing Act 322's revival provision to pass constitutional muster would effectively nullify any constitutional safeguards on the Legislature's ability to reopen the courthouse doors to stale claims in which records and witnesses are no longer available.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2022, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service on all parties will be accomplished by the appellate CM/ECF system.

/s/ Charles M. Pisano

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5,930 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font with footnotes in 12-point Century font as permitted by Fifth Circuit Rule 32.1.

/s/ Charles M. Pisano