H.B. 1
A BILL THAT WOULD RETROACTIVELY ELIMINATE A STATUTE OF LIMITATIONS AND REVIVE TIME-BARRED CLAIMS

TESTIMONY OF CARY SILVERMAN
ON BEHALF OF THE AMERICAN TORT REFORM ASSOCIATION

BEFORE THE MARYLAND HOUSE JUDICIARY COMMITTEE

MARCH 2, 2023

On behalf of the American Tort Reform Association (ATRA), thank you for the opportunity to express our concerns regarding H.B. 1, which proposes to retroactively remove any time limit to commence a civil action seeking damages for injuries stemming from alleged childhood sexual abuse.

I am a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P.'s Washington, D.C. office. I have written extensively on liability law and civil justice issues. I received my law degree and a Master of Public Administration from George Washington University, where I serve as an adjunct law professor. I serve as co-counsel to ATRA, a broad-based coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. I have testified across the country on bills similar to H.B. 1, including on earlier Maryland legislation.

Sexual abuse against a child is intolerable and should be punished through both criminal prosecution and civil claims. ATRA commends the Committee for considering steps to protect children and help survivors of abuse. My testimony today focuses on general principles underlying statutes of limitations, as well as the reasons why retroactive changes to these laws, and particularly reviving time-barred claims, are often viewed as unsound policy by legislatures and unconstitutional by courts.

Changes to any statute of limitations should be examined objectively based on core principles. ATRA believes that for statutes of limitations to serve their purpose of encouraging prompt and accurate resolution of lawsuits and to provide the predictability and certainty for which they are intended, they must be, at minimum: (1) finite; and (2) any changes must be prospective. ATRA is concerned because H.B. 1 strays from these principles by proposing to retroactively eliminate a statute of limitations. It would set a troubling precedent for other types of civil cases.

Statutes of Limitations: An Overview

Why do we have statutes of limitations? By encouraging claims to be filed promptly, statutes of limitations help judges and juries decide cases based on the best evidence available. They allow courts to evaluate liability (in negligence cases, what a person or organization should have done to fulfill its duty of care) when witnesses can testify, when records and other evidence is available, and when memories are fresh. As the U.S. Supreme Court has recognized, "the search for truth may be seriously impaired

by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."[1]

Tort law, by its very nature, often deals with horrible situations that have a dramatic impact on a person's life and the lives of others. No matter how tragic or appalling the conduct, or serious injury, Maryland law requires a plaintiff to file a lawsuit within a certain time. For example, in Maryland:

- When a person is seriously injured due to a drunk driver or an assault, he or she must file a civil lawsuit within three years, which is the general period that applies to personal injury claims.[2]

- A lawsuit alleging that a parent or child died because of someone's wrongful conduct must be filed within three years of the person's death.[3]

- Lawsuits alleging harm due to a doctor's carelessness must be filed within the earlier of five years of the injury or three years of discovery of the injury.[4]

- When a person is exposed to a toxic chemical in the workplace, develops cancer, and dies, his or her family must file a lawsuit within ten years of the death or three years after learning the cause of death, whichever is shorter.[5]

Yet, in Maryland, lawsuits over promissory notes and contracts under seal can be brought for twelve years,[6] and lawsuits seeking recovery of land can be filed for twenty years.[7]

What these examples show is that the length of a statute of limitations is <u>not</u> typically based on the severity of the injury or the heinousness of the conduct at issue. The length of time to file a claim typically reflects the nature of the evidence that is necessary to decide a claim. Claims involving hard evidence such as recorded documents or land tend to have longer statutes of limitations. Cases involving standards of care that heavily rely on witness testimony to determine what occurred or should have been done tend to have shorter periods to file a claim.

In addition to helping courts and juries reach accurate decisions and safeguarding due process, statutes of limitations also allow businesses and nonprofit organizations to accurately gauge their potential liability and make financial, insurance coverage, and document retention decisions accordingly.

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[1] *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

[2] Md. Code, Ct. & Jud. Proc. § 5-101.

[3] *See id.* § 3-904(g).

[4] *Id.* § 5-109(a).

[5] *Id.*

[6] *Id.* § 5-102(a).

[7] *Id.* § 5-103(a).

Maryland's statutes of limitations reflect a legislative judgment that ordinarily a three or five-year period provides claimants in civil actions with an adequate time to pursue a claim while giving defendants a fair opportunity to contest complaints made against them. In addition, Maryland law recognizes that when the injury is to a child, he or she must have additional time to bring a claim. When a child is harmed, the clock generally does not begin until he or she becomes an adult (age 18).[8]

Maryland's Current Statute of Limitations for Lawsuits Alleging Injuries Resulting from Childhood Sexual Abuse

Until 2003, survivors of childhood sexual abuse were subject to the general statute of limitations for civil claims—three years from becoming an adult. That year, the General Assembly established a specific statute of limitations for childhood sexual abuse. The 2003 law more than doubled the previous time limit, providing survivors with seven years to file claims after becoming an adult.[9]

Just six years ago, the General Assembly revisited this law and again provided significantly more time for survivors of sexual abuse to file lawsuits. The 2017 law, which is in effect today:

- Provides 20 years for survivors to file lawsuits from when they become adults (until age 38).
- When a lawsuit claiming that someone other than a perpetrator is liable is filed more than seven years after a survivor of abuse becomes an adult, evidence must show that the organization was grossly negligent in how it acted or failed to act.
- A survivor can file a lawsuit within three years of a perpetrator's conviction of a crime, even if his happens long after the 20-year period ends.[10]

The General Assembly did not revive time-barred claims in 2003 or 2017. A reviver provision was initially included, but removed, from both bills. Instead, each of those bills, as enacted, stated: "this Act may not be construed to apply retroactively to revive any action that was barred by the application of the period of limitations applicable before" the effective date of the new law.

The Proposed Legislation

H.B. 1 would eliminate Maryland's special statute of limitations for childhood sexual abuse claims entirely. It provides that a lawsuit could be filed "at any time," which will apply "retroactively to revive any action that was barred by the application of the period of limitations applicable before October 1, 2023." This bill will allow claims based on allegations of negligent conduct that occurred 2017 or 1947. Maryland has never taken such an extraordinary approach for any type of civil claim.

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[8] *Id.* § 5-201.

[9] S.B. 68 (Md. 2003) (amending Md. Cts. & Jud. Proc. Code § 5-117).

[10] H.B. 642 (Md. 2017) (amending Md. Cts. & Jud. Proc. Code § 5-117).

It is critical to recognize that H.B. 1 does not distinguish between lawsuits filed against perpetrators that committed the abuse and organizations that are alleged to have failed to prevent it. In addition to nonprofit organizations and businesses, the bill would revive claims against public schools and other public entities such as those that offer recreational, social services, or juvenile justice programs.

H.B. 1 would allow claims based purely on negligence, meaning a lawsuit only needs to assert that an organization should have taken additional steps to detect, avoid, or stop abuse many years ago, or should have had better practices for hiring or supervising employees or volunteers. These lawsuits do *not* need to show that an organization knew of the abuse and allowed, enabled, or concealed it. In many cases, the perpetrator will be dead. In some cases, lawsuits will claim that an organization failed to take adequate steps in the 1950s or 1960s to protect the safety of the victim.

The bill also eliminates a current requirement that in older claims – those filed seven or more years after a survivor turns 18 – when an organization's records may have already been legitimately discarded, that a plaintiff show that the organization was grossly negligent in failing to protect a person from abuse.

The Senate version of the legislation includes a provision subjecting actions that are currently not viable, but that the bill revives, to damage limits. Assuming the same limits are added to H.B. 1, they would, for public entities, such as county boards of education, limit damages to $850,000 to a single claimant for injuries arising from a single incident or occurrence, which about double the existing $400,000 cap that applies to public entities facing tort claims. For private entities, including nonprofit organizations, the bill would provide that damages may not exceed $1.5 million for injuries arising from a single incident or occurrence. This limit may provide some predictability and reduce the potential for "nuclear" verdicts in decades-old cases, but would set the limit at a level that exceeds the average settlement or judgment.[11] As such, the cap will likely function as a level personal injury attorneys demand to settle each revived case. In addition, this language will result in substantial litigation over interpretation of a "single incident or occurrence" and the applicable statutory limit.

Retroactively Discarding a Statute of Limitations is Particularly Problematic for Businesses and Nonprofit Organizations

As discussed earlier, under Maryland law, every type of civil claim, no matter serious or tragic the injury, no matter how horrific the conduct, is subject to a finite statute of limitations. No plaintiffs' lawyer wants to have to tell an injured person, who is seeking help, that it is too late to sue. But finite statutes of limitations are a core part of the civil justice system. They promote accuracy in determining liability. And they provide predictability to businesses and other organizations that, at some known point, their liability exposure ends.

[11] For example, when considering the fiscal implications of similar legislation in Washington, that state's Office of the Attorney General indicated that the average state payout on a childhood sexual abuse case against public entities (where there is no cap on public entity liability) is about $1.2 million. *See* Multiple Agency Fiscal Note, Bill No. 1618 S. H.B. (Feb. 15, 2023).

While eliminating a statute of limitations is problematic, the retroactivity of the legislation significantly exacerbates this concern. At least when a statute of limitations is extended or eliminated prospectively, organizations can make rational and appropriate decisions to reduce their liability exposure and to be prepared if some day they are sued. If a business or nonprofit organization knows that Maryland has eliminated its statute of limitations for a particular claim *going forward* it can:

- Adopt a record retention policy that keeps employment or other relevant records forever rather than discard them after a certain number of years.

- Meticulously document steps it takes in the area in which it is subject to liability exposure, such as how it made hiring, disciplinary, and termination decisions, received and responded to reports of misconduct, any training it required employees or volunteers to undertake, and how it met the best practices at the time.

- Understanding the extraordinary liability exposure in a particular area, a person or organization can decide simply to not go into that line of business – not to offer a service or a product – because the risks are just too high. Or they may enter that line of business, but do so only if they are able to purchase substantial additional insurance to provide some security from that risk.

- In a similar vein, when a statute of limitations is extended prospectively, a business that is considering acquiring another business can do due diligence to investigate whether the company it is considering acquiring ever operated in an area subject to such extraordinary liability exposure and go back as far as the statute of limitations allows.

When a legislature eliminates a statute of limitations retroactively, however, a person or organization does not have these choices. Consider, for example, these possible situations:

- An organization, such as a YMCA, is sued for abuse that an employee allegedly committed fifty years earlier when the perpetrator died one year before the lawsuit was filed, any employment records were discarded after seven years, and the few staff members of that time who are still alive have little memory of either of them.

- A dentist or doctor who took over the family medical practice is served with a revived lawsuit alleging that her father or grandfather abused a patient. This may have occurred even before the current owner of the practice was born or went to medical school.

- A small business that provided exercise or sports programs to elementary schools is sued because an employee, who worked at the organization for just a few months, is accused of abuse thirty years earlier. The person who founded, owned, and managed the business at that time has long retired and moved away and the current owners have no knowledge of what occurred.

Reviving time-barred claims is also likely to result in a sudden surge of unexpected litigation. Even if an organization has the records, witnesses, institutional

knowledge available to defend itself, it will be challenging to respond to the litigation when facing multiple, decades-old cases at the same time.

This Approach Sets a Troubling Precedent

Discarding a statute of limitations and reviving-time barred claims sets a troubling precedent. Over time, there will be many sympathetic plaintiffs and important causes. There are also other past injustices that have not been remedied. Allowing revival of time-barred claims here will inevitably lead to future calls to permit claims asserting injuries based on conduct that occurred decades ago.

ATRA has already observed several such attempts in other states. For example, efforts are underway in states that have revived time-barred childhood sexual abuse claims to expand these provisions. Legislation recently took effect in New York that revives claims brought by those who allege injuries from sexual abuse as adults.[12] California enacted similar legislation reviving claims against entities alleging damages from sexual assault experienced as adults, adding related employment claims.[13] Vermont almost immediately expanded its 2019 childhood sexual abuse claims-revival law to apply to *physical* abuse claims.[14] Now, Vermont is considering legislation that would further extend this reviver to "emotional abuse" claims.[15]

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 statute of limitations for product liability claims from six to fifteen years.[16] Oregon considered a bill that would have revived time-barred asbestos claims during a two-year window.[17] Last October, New York revived claims by water suppliers alleging injuries related to an "emerging contaminant."[18] States have also considered proposals to retroactively allow lawsuits alleging 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.[19]

ATRA's concern is that opening the door here sets a precedent that will be used in other areas. If the legislature is willing to discard statutes of limitations, individuals and businesses in Maryland will face a risk of indefinite liability for any type of claim. As discussed earlier, taking this approach makes the civil justice system unpredictable, unreliable, and unfair.

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[12] S. 66 (N.Y. 2022).

[13] A.B. 2777 (Cal. 2022). As introduced, the California legislation would have broadly revived claims seeking to recover damages for "inappropriate conduct, communication, or activity of a sexual nature." A.B. 2777 (Cal., introduced Feb. 18, 2022).

[14] S. 99 (Vt. 2021).

[15] H. 8 (Vt., introduced Jan. 5, 2023).

[16] LD 250 (Maine 2019) (reported "ought not to pass").

[17] S.B. 623 (Or. 2011) (died in committee).

[18] S. 8763A (N.Y. 2022).

[19] A.B. 15 (Cal., as amended Mar. 26, 2015) (proposing 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) (claims-revival provision removed and legislation made prospective before enactment).

Most States Have Not Taken the Extreme Approach Proposed in H.B. 1618

Over the past two decades or so, state legislatures have considered hundreds of bills to lengthen the statute of limitations for civil claims alleging injuries from childhood sexual abuse. Most legislatures have responded by prospectively increasing the statute of limitations, even if a bill started out with a more extreme approach. They have retained finite limits and decided not to revive time-barred claims. Here are some recent examples:

- Alabama, one of the few states that had no special statute of limitations for childhood sexual abuse claims, prospectively established a statute of limitations for childhood sexual abuse requiring claims to be filed by age 25.[20]

- Tennessee prospectively changed its law from requiring an action to be filed within 3 years of discovery to 15 years of turning 18 (age 33) or 3 years of discovery of the abuse.[21]

- Texas prospectively extended the statute of limitations from 15 years to 30 years of majority (age 48).[22]

In fact, two weeks ago, North Dakota's Senate Judiciary Committee, which was considering legislation similar to H.B. 1, amended the bill to eliminate an open-ended reviver and, instead, prospectively apply an extended, finite statute of limitations.[23]

By our count, 24 states and the District of Columbia have revived childhood sexual abuse claims in some form since California did so in 2002. It is important for the Committee to recognize, however, that few of these states adopted the broad, unbounded type of reviver contained in H.B. 1. Most other states placed significant constraints on the claims that they revived.

Three states limited revivers to the perpetrator of the abuse, recognizing the problems with evaluating negligence after decades have passed. By contrast, intentional tort claims involve crimes with the simple question of whether the defendant committed the abuse or not.

- Massachusetts extended its statute of limitations from 3 years of becoming an adult (the general period for personal injury claims) to 35 years of age 18 or 7 years of discovery of the injury in 2014. The new period applied retroactively

[20] S.B. 11 (Ala. 2019) (to be codified at Ala. Code Ann. § 6-2-8(b)).

[21] H.B. 565 (Tenn. 2019).

[22] H.B. 3809 (Tex. 2019).

[23] S.B. 2282 (N.D. 2023) (as amended by the Senate Judiciary Committee on Feb. 15, 2023 to require claims to be filed within 21 years the abuse or 21 years of age 15, which unanimously passed the Senate on Feb. 16, 2023).

to revive time-barred claims against perpetrators only.[24] Massachusetts also has a low cap on damages in civil claims against charitable organizations.

- Georgia extended its statute of limitations to age 23 or 2 years of discovery and enacted a 2-year window reviving time-barred claims against perpetrators only in 2015.[25]

- Rhode Island extended its statute of limitations for childhood sexual abuse cases from 7 years to 35 years of turning 18, and provided a 7-year period to bring a claim from when a victim discovers or reasonably should have discovered the injury caused by the abuse. Before enacting this law, the General Assembly removed a 3-year window that would have permitted time-barred claims. Instead, the enacted legislation applies the extended period retroactively for claims brought against perpetrators only and explicitly does not revive time-barred claims against entities.[26]

Several other states required revived claims against an entity to show the entity had actual knowledge or committed criminal misconduct.

- In 2009, Oregon extended its statute of limitations to permit claims until age 40 against perpetrators or claims alleging that an entity knowingly allowed, permitted, or encouraged child abuse, and applied that new period retroactively.

- Utah adopted a statute of limitations that allows claims to be filed within 35 years of turning 18 and enacted a 3-year window for claims against perpetrators and those who would be criminally responsible in 2016.[27] The Utah Supreme Court found that reviver unconstitutional in 2020.

- Michigan prospectively extended its statute of limitations to age 28 or 3 years of discovery, and adopted a 90-day reviver window tailored for victims of a convicted criminal, Dr. Larry Nasser in 2018.[28]

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[24] Mass. Act ch. 145, § 8 (2014) (codified at Mass. Gen. Laws ch. 260, § 4C, 4C 1/2). The Massachusetts law's 35-year period for filing a claim is "limited to all claims arising out of or based upon acts alleged to have caused an injury or condition to a minor which first occurred after the effective date of this act" and did not revive time-barred claims. The Massachusetts law's seven-year discovery period, however, applied retroactively.

[25] Ga. Code Ann. § 9-3-33.1(d)(1) ("The revival of claim…shall not apply to [a]ny claim against an entity.").

[26] S.B. 315 Sub. A (R.I. 2019) (amending R.I. Gen. Laws § 9-1-51).

[27] Utah Code Ann. § 78B-2-308(7) (reviving a civil action against an individual who "(a) intentionally perpetrated the sexual abuse;" or "(b) would be criminally responsible for the sexual abuse").

[28] Mich. Public Act 183 (S.B. 872) (signed June 12, 2018) (amending Mich. Comp. Laws § 600.5805 and adding § 600.5851b). The Michigan law revived claims revived claims filed by an individual who, while a minor, was a victim of criminal sexual conduct after December 31, 1996 when the person alleged to have committed the criminal sexual conduct was convicted of criminal sexual conduct and that defendant was (a) in a position of authority over the victim as the victim's physician and used that authority to coerce the victim to submit, or (b) engaged in purported medical treatment or examination of the victim in a manner that is, or for purposes that are, medically recognized as unethical or unacceptable.

- Arizona extended its statute of limitations to 12 years of age 18 in 2019. It adopted a window that is about 1 1/2 years long that revives claims only where there is clear and convincing evidence that an entity knew an employee or volunteer engaged in sexual abuse.[29]

- West Virginia adopted a statute of limitations of 18 years of becoming an adult or four years of discovery of the abuse, for claims against perpetrators, in 2020. For claims against entities, it adopted an 18-year period (age 36) without the potential to expand that period for later discovery of the injury. It revived claims against perpetrators or a person or entity that aided, abetted, or concealed the abuse.[30]

Three states did not revive claims alleging bare negligence, but required evidence of gross negligence to support a time-barred claim. These states include Delaware (2007), Hawaii (2012-2020), and Vermont (2019).[31]

In addition, several states revived only those claims falling within a new or extended, but finite, statute of limitations by applying the extended period retroactively. These states include Connecticut (2002), Kentucky (2021), Montana (2019), Nevada (2021), Oregon (2009), and West Virginia (2020), as well as the District of Columbia (2019). They did not revive claims going back indefinitely.

Finally, Colorado's 2021 law retroactively authorized a cause of action involving conduct that occurred after 1960 and capped damages in otherwise time-barred negligence claims against organizations and public entities at levels significantly lower than those proposed in H.B. 1.[32]

In sum, while you may hear that many states have revived time-barred childhood sexual abuse claims, relatively few states, such as California, New York, New Jersey and Minnesota, have broadly done so. When you look more closely at what other states actually did, the vast majority included significant constraints on what claims are revived that are not found in H.B. 1.

Reviving Time-Barred Claims is Unconstitutional

The Maryland Court of Appeals (now the Maryland Supreme Court) has "consistently held that the Maryland Constitution ordinarily precludes the Legislature (1) from retroactively abolishing an accrued cause of action, thereby depriving the plaintiff of a vested right, and (2) from retroactively creating a cause of action, or reviving a barred cause of action, thereby violating the vested right of the defendant."[33]

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[29] H.B. 2466 (Ariz. 2019) (codified at Ariz. Rev. Stat. § 12-514).

[30] H.B. 4559 (2020) (amending W. Va. Code Ann. § 55-2-15).

[31] Del. Code tit. 10, § 8145(b); Haw. Rev. Stat. § 657-1.8(b); Vt. Stat. Ann. tit. 12, § 522.

[32] S.B. 88 (Colo. 2021) (codified at Colo. Rev. Stat. § 13-20-1201 et seq.) (generally limiting damages to $350,000 against public entities and $500,000 against private entities).

[33] *Dua v. Comcast Cable*, 805 A.2d 1061, 1078 (Md. 2002) (emphasis added); *Langston v. Riffe*, 754 A.2d 389, 401 (Md. 2000) ("Generally, a remedial or procedural statute may not be applied retroactively if it will interfere with vested or substantive rights.").

In 2011, the Court of Appeals ruled that the 2003 law's seven-year statute of limitations may apply retroactively, but it carefully distinguished between adding time to bring claims where the statute of limitations has not expired and reviving time-barred claims.[34] "We would be faced with a different situation entirely had [the plaintiff's] claim been barred under the three-year limitations period," the court observed.[35] So, for example, the General Assembly can increase the period to file a claim for a person who is two years into the current twenty-year statute of limitations because the claim remains viable, but it cannot constitutionally authorize a person to sue once the applicable time period to bring the claim has expired.

The Court has consistently ruled that retroactive legislation cannot impede vested rights, regardless of the legislature's "rational basis" for enacting it.[36] It has invalidated legislation extending a statute of limitations that revived time-barred claims in other contexts.[37]

In addition, the legislation extending the statute of limitations enacted in 2017 provided that "in no event" may an action be filed against someone other than a perpetrator more than 20 years after a victim becomes an adult. This type of language reflects a "statute of repose." Maryland courts have repeatedly recognized that a statute of repose creates a "vested" substantive right to be free from liability after a legislatively determined period, rather than altering the procedure to bring a claim.[38] Unlike a statute of limitations, the period set by a statute of repose does not depend on when an injury occurred and cannot be tolled or extended. This further increases the already high likelihood that the Court of Appeals will find H.B. 1's reviver unconstitutional.

As you may know, the Maryland Attorney General's Office of Counsel to the General Assembly evaluated the constitutionality of reviving time-barred sexual abuse claims in 2003, 2019, and 2021. In 2003 and initially in 2019, Assistant Attorney General Kathryn Rowe concluded that it is "possible" that the Court of would find legislation reviving time-barred claims violates the due process requirements of the Maryland Constitution.[39] The earlier opinions hedged for two reasons – (1) it took a cautious approach in not stating with certainty that the reviver would be

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[34] *Doe v. Roe*, 20 A.3d 787, 800 (Md. 2011).

[35] *Id.*

[36] *See, e.g., id.; see also Muskin v. State Dep't of Assessments & Taxation*, 30 A.3d 962, 986 (Md. 2011) (""It has been firmly settled by this Court's opinions that the Constitution of Maryland prohibits legislation which retroactively abrogates vested rights. No matter how 'rational' under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking of a person's property and giving it to someone else.").

[37] *Smith v. Westinghouse Electric Corp.*, 291 A.2d 452, 455 (Md. 1972) (ruling that retroactively extending statute of limitations for work-related deaths from two to three years was unconstitutional when applied to revive expired cause of action); *see also Johnson v. Mayor & City Council of Baltimore*, 61 A.3d 33, 44 (Md. 2013) (in finding amendment to Workers' Compensation Act applied prospectively only, observing that "we concluded that *Roe* and others *whose claims were not already barred* by the statute of limitations could file their claims pursuant to the lengthier limitations period") (emphasis added).

[38] *See, e.g., Duffy v. CBS Corp.*, 182 A.3d 166, 177 (Md. 2018); *SVF Riva Annapolis v. Gilroy*, 187 A.3d 686, 689 (Md. 2018); *Anderson v. United States*, 46 A.3d 426, 437-38 (Md. 2012); *Carven v. Hickman*, 763 A.2d 1207, 1211 (Md. 2000).

[39] *See* Kathryn M. Rowe, Assistant Attorney General to The Hon. Luke Clippinger, regarding H.B. 687, Mar. 12, 2019 (citing 2003 letter).

unconstitutional because, while recognizing the clear language in past rulings indicated the high court would not allow a reviver, the court had not squarely ruled on the issue; and (2) it recognized that courts in some states (a minority) had permitted revivers.

After the statute of repose language was added to the statute in 2017, the opinion letters became more definitive. The March 16, 2019 opinion letter concludes that reviving time-barred claims would "most likely be found unconstitutional as interfering with vested rights."[40] The June 23, 2021 opinion letter to Senate Judicial Proceedings Chair William Smith similarly concluded: "I find it unlikely that a court would find a change in the law creating a new two year during which a person would be once again liable to be sued did not violate the vested right created by the passage of the statute of repose."[41]

You may have seen Attorney General Anthony Brown's latest letter on the issue to Chairman Smith. That letter used a double negative to describe the legality of the legislation, finding it "not clearly unconstitutional." The new attorney general opined that "it is not a given" that the Maryland Supreme Court will invalidate the reviver and vowed to defend the constitutionally questionable provision.[42] That opinion wrote off the Court's unambiguous language as dicta and instead relied on case law from other states taking the minority approach, which the Maryland Supreme Court has already specifically and repeatedly indicated (in both *Dua v. Comcast* and *Muskin v. SDAT*) that it will not follow.

Regardless of whether the period for filing a claim is considered a statute of limitations or a statute of repose, Maryland's constitutional law is consistent with most other states. As several state supreme courts have observed, "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.[43] States reach this result through applying due process safeguards, a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, or another state

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[40] Letter from Kathryn M. Rowe, Assistant Attorney General to The Hon. Kathleen M. Dumais regarding H.B. 687, Mar. 16, 2019.

[41] Letter from Kathryn M. Rowe, Assistant Attorney General to The Hon. William C. Smith, Jr. regarding S.B. 134 and H.B. 263 of 2021, June 23, 2021.

[42] Letter from Attorney General Anthony G. Brown to The Hon. William C. Smith, Jr. regarding S.B. 686, Feb. 22, 2023.

[43] *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 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 running of the statute of limitations creates a vested right); *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" similar to Missouri); *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.").

constitutional provision. These cases generally recognize that a legislature cannot take away vested rights. It is a principle that is equally important to plaintiffs and defendants. The legislature cannot retroactively shorten a statute of limitations and take away an accrued claim (such as by reducing a three-year period to one year, when a plaintiff is two years from accrual of the claim). Nor can it extend a statute of limitations after the claim has expired. Courts have applied these constitutional principles to not allow revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others.

A minority of states 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 Facto" clause that prohibits retroactive *criminal* laws,[44] including retroactive revival of time-barred criminal prosecutions,[45] but does not provide a similar prohibition against retroactive laws affecting *civil* claims.[46] For that reason, under *federal* constitutional law, there is no vested right in a statute of limitations defense that prohibits reviving an otherwise time-barred claim.[47] Delaware, for example, follows the federal approach.[48] The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution.[49] Many states, including Maryland, do so.

In 2020, the Utah Supreme Court became the latest state high court to find reviver legislation (a three-year window that revived claims only against perpetrators) unconstitutional. 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." It continued to follow the "majority approach."[50]

By our count, 15 of the 24 states that have revived time-barred childhood sexual abuse claims did so between 2019 and 2021. Litigation stemming from these recent enactments is now reaching state appellate courts. ATRA is aware of constitutional challenges to revivers in five states: Colorado, Louisiana, North Carolina, New York, and

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

[45] *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").

[46] 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 this 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.").

[47] *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Campbell v. Holt*, 115 U.S. 620, 628 (1885).

[48] *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 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, and following *Chase* and *Campbell*).

[49] *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

[50] *Mitchell v. Roberts*, 469 P.3d 901, 903, 913 (Utah 2020).

Rhode Island. In the Colorado case, for example, organizations representing school districts asked how they could defend against a claim dating back to the 1980s when the then 30-year-old employee accused of abuse would now be 80, and the school district had difficulty even locating records to confirm he was an employee 40 years ago, let alone figure out what interaction he may have had with the plaintiff. The school districts also indicated that they are unlikely to have records from that period. Their retention period reflected the statute of limitations in place at the time and limited storage space.[51] Maryland schools and other organizations will have similar due process issues when responding to decades-old claims. ATRA anticipates that courts will ultimately invalidate some, if not all, of the reviver provisions in states that have disregarded their constitutional principles.[52]

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In conclusion, it is important that Maryland's civil justice system maintain the predictability and certainty of having a finite statute of limitations for any type of civil claim. Legislation that retroactively removes any limitations period sets a troubling precedent, allowing decades-old claims where witnesses, records, and other evidence upon which judges and juries can evaluate liability are no longer available. The General Assembly significantly extended the civil statute of limitations for childhood sexual abuse in 2017. If, however, the Committee feels that more time is needed, there are alternatives that would provide survivors with more time to sue without violating core principles of the civil justice system.

Thank you again for the opportunity to testify today and considering ATRA's concerns as you address this difficult and important issue.

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[51] Brief of Amici Curiae Colorado School Districts Self Insurance Pool, Colorado Association of School Boards, Special District Association of Colorado, Colorado Rural Schools Alliance, and Colorado Association of School Executives in Support of Petitioner Aurora Public Schools, *Aurora Public Schools v. Saupe*, No. 2022 SC 824 (Colo. filed Jan. 17, 2023). The Colorado school districts predicted that the legislation would lead to 1,000 revived claims with an average payment of $600,000—a total cost of $600 million. *See id.*

[52] *Lousteau v. Congregation of Holy Cross Southern Province, Inc.*, No. 22-30407 (5th Cir.) (considering appeal of ruling finding Louisiana's reviver unconstitutional); *Doe v. Society of the Roman Catholic Church of the Diocese of Lafayette*, No. 2022-CC-00829, 347 So.3d 148 (Mem) (La. Oct. 4, 2022) (remanding to Court of Appeals with instruction to consider whether reviving a time-barred claim would "unconstitutionally impair relator's vested right in the defense of liberative prescription"); *PB-36 Doe v. Niagara Falls City Sch. Dist.*, CA 21-01223 (N.Y. App. Div., 4th Dep't) (briefing complete); *McKinney v. Goins*, No. 109PA22 (N.C.) (considering appeal of ruling finding reviver unconstitutional); *Houllahan v. Gelineau*, SU-2021-0032-A, SU-2021-0033-A, SU-2021-0041-A (R.I.) (oral argument heard Feb. 1, 2023, in case in which trial court did not reach constitutional issue).