IN THE SUPREME COURT OF THE STATE OF UTAH

TERRY MITCHELL, *Plaintiff*, v. RICHARD WARREN ROBERTS, *Defendant*.	Appellate Case No. 20170447-SC

PLAINTIFF TERRY MITCHELL'S BRIEF IN SUPPORT OF AN AFFIRMATIVE ANSWER TO QUESTIONS CERTIFIED BY THE UNITED STATES DISTRICT COURT

From the United States District Court, District of Utah,
Before Magistrate Judge Evelyn J. Furse
No. 2:16-cv-00843-EJF

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QUESTIONS CERTIFIED TO THE UTAH SUPREME COURT BY THE UNITED STATES DISTRICT COURT

Pursuant to Rule 41, Utah R. App. P., the United States District Court for the District of Utah ("federal court") certified the following questions to this Court:

1. Can the Utah Legislature expressly revive time-barred claims through a statute?

2. Specifically, does the language of Utah Code section 78B–2–308(7), expressly reviving claims for child sexual abuse that were barred by the previously applicable statute of limitations as of July 1, 2016, make unnecessary the analysis of whether the change enlarges or eliminates vested rights?

Standard of Review: "'When a federal court certifies a question of law to [the Utah Supreme Court, the Court is] not presented with a decision to affirm or reverse . . . [and thus] traditional standards of review do not apply.' Rather, '[this Court] answer[s] the legal questions presented without resolving the underlying dispute.'" *Ray v. Wal-Mart Stores, Inc.*, 2015 UT 83, ¶ 8, 359 P.3d 614 (citations omitted) (second alteration in original).

CONSTITUTIONAL PROVISIONS AND STATUTES WHOSE INTERPRETATION IS DETERMINATIVE OF, OR OF CENTRAL IMPORTANCE TO, THE RESOLUTION OF THIS MATTER

The following constitutional provisions and statutes are determinative of, or of central importance to, the resolution of this matter:

Utah Code section 78B–2–308 (Set out verbatim in Addendum No. 1)

Utah Const. art. V, § 1:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions

> appertaining to either of the others, except in the cases herein expressly directed or permitted.

United States Const. art. IV, § 4:

> The United States shall guarantee to every state in this union a republican form of government . . . .

Utah Code section 68–3–3:

> A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive.

STATEMENT OF THE CASE

Nature of the Case

Plaintiff Terry Mitchell ("Mitchell") seeks to hold Defendant Richard Roberts ("Roberts") accountable for his admitted child sexual abuse, as provided by Utah Code section 78B-2-308, as amended by House Bill 279 (2016 General Session) ("H.B. 279"). (Addendum No. 2.) (Compl., ECF No. 2.) Roberts seeks dismissal of the case on the ground the previous statute of limitations expired before enactment of H.B. 279. (Def.'s Mot. Dismiss, ECF No. 9.) Mitchell has pursued her claims as contemplated by Utah Code Ann. § 78B-2-308, which revives claims of child sexual abuse that were time-barred as of July 1, 2016.

The Course of Proceedings

Mitchell's Complaint was filed in federal court on July 29, 2016. (Compl.) Roberts filed a motion to dismiss the complaint on the ground that the statute of limitations had run. (Def.'s Mot. Dismiss.) Mitchell opposed that motion on the basis the Utah Legislature, by the amendment of Utah Code section 78B-2-308, expressly revived civil causes of action

for child sexual abuse that were previously time barred by the prior statute of limitations. (Pl.'s Mem. Opp'n, ECF No. 12.) The federal court has certified to this Court questions relating to the ability of the Utah Legislature to expressly revive previously time-barred claims. (Dist. Ct. Order, ECF No. 37, a copy of which is attached as Addendum No. 3.)

Disposition in the United States District Court

Concluding that "Utah law regarding retroactive operation of statutes remains unclear" (Dist. Ct. Order, at 1), the federal court certified two questions to this Court. (*Id*.) This Court granted the certification of those questions. (Ut. S. Ct. Order, June 13, 2017.)

STATEMENT OF FACTS

Mitchell filed her Complaint in 2016 for child sexual abuse, including rape, perpetrated by Roberts in 1981. (Compl.) Roberts asserts that Mitchell's claims were time barred at least one to four years after May 12, 2009. (Def.'s Mot. Dismiss, at 6–8.) Mitchell's claims were time-barred as of July 1, 2016. (Compl. ¶ 36.) However, the amendment to Utah Code section 78B–2–308 ("revival statute") expressly revives civil claims based on sexual abuse of a person under 18 years of age if such claims were time barred as of July 1, 2016, for either three years after the effective date of the revival statute or thirty-five years after the victim's eighteenth birthday, whichever period is longer. (Compl. ¶ 36; Utah Code Ann. § 78B-2-308(7); Addend. No. 1.)

Roberts, who has not challenged the constitutionality of the revival statute (Def.'s Mot. Dismiss; Pl.'s Mem. Opp'n, ECF. No. 12, at 19; Def.'s Reply Supp. Mot. Dismiss, ECF No. 17), has claimed the statute is invalid, even though the Legislature expressly stated its intent that the statute revive claims that were time-barred as of July 1, 2016.

The dispositive fact here is that the Utah Legislature, clearly within its legislative power, and based on compelling evidence and reasoning explained at length in the text and legislative history of the revival statute,[1] determined that claims for child sexual abuse barred by the earlier statute of limitations should be revived in light of recent research and understanding regarding barriers faced by many victims of child sexual abuse "to pull their lives back together and find the strength to face what happened to them." Utah Code Ann. § 78B–2–308(1)(b).

SUMMARY OF ARGUMENTS

Defendant Richard Roberts ("Roberts"), caused untold tragedy by—as he has admitted[2]—engaging in child sexual abuse[3] of Plaintiff Terry Mitchell ("Mitchell"), a 16-year-old witness in a case Roberts prosecuted against Joseph Franklin ("Franklin"), who killed Mitchell's two friends. (Compl., ¶¶ 6, 9–24, 71–72.)

Roberts seeks to avoid accountability, arguing that Mitchell's claims are barred by statutes of limitations, notwithstanding that the Utah Legislature expressly revived claims for child sexual abuse that otherwise would be time barred. In a call for an unconstitutional

[1] Utah Code Ann. § 78B–2–308(1); Pl.'s Mem. Opp'n, at 13–16; 20–22.
[2] Def.'s Mot. Dismiss, at 4.
[3] Roberts and his lawyers seek to downplay his sexual misconduct with Mitchell when she was a young girl and a witness in a case he was prosecuting. He and his counsel characterize his sexual abuse of Mitchell as being "consensual" (Def.'s Mot. Dismiss, at 4) and simply a "bad lapse in judgment." *See, e.g.,* Carrie Johnson, "Federal Judge Retires As 'Bad Lapse in Judgment' With 16-Year-Old Surfaces," NPR, March 18, 2016, found at http://www.npr.org/2016/03/18/470852225/federal-judge-retires-as-bad-lapse-in-judgment-with-16-year-old-surfaces. No matter how Roberts and his legal counsel seek to trivialize Roberts's sexual outrages and depraved professional misconduct, each of the many instances constitutes "sexual abuse" of a "child" within the meaning of H.B. 279.

judicial veto of legislation, Roberts asserts that the courts can simply disregard statutes the legislature intended to be applied retroactively.

Any question in this case about a possible time bar is answered conclusively by the current version of Utah Code section 78B-2-308, which revives previously time-barred claims of child sexual abuse. Roberts seeks an invalidation of that statute, relying entirely on statements by this Court about statutory construction that are relevant only when the Legislature has *not* expressed its intent about the retroactive effect of a statute.

Mitchell urges this Court to give effect to the express intention of the Utah Legislature to revive previously time-barred claims of child sexual abuse. Roberts argues that the courts should disregard the statutory revival of Mitchell's claims intended to be accomplished by the Utah Legislature.[4] Such judicial disregard of the Legislature's intent would reflect an astounding expansion of judicial review, in which the courts substitute their view of the wisdom of legislation for that of the legislative branch.

Roberts would have the courts (1) ignore the fundamental rule that a previously time-barred claim can indeed be revived—even if it means enlarging or eliminating "vested rights"—when the Legislature expresses its intent that such a claim be revived; and (2) disregard the statutory findings and the statement of intent vigorously and unmistakably expressed by the Utah Legislature that claims such as Mitchell's against Roberts, if previously time barred by a statute of limitations, be revived.

Just as many courts throughout the nation have recognized the power of legislatures

[4] Def.'s Mot. Dismiss, at 8–16.

to revive civil claims that were previously time barred by earlier statutes of limitations, so too has this Court recognized for over a hundred years that, if the Utah Legislature has expressed its intention that legislation is to be applied retroactively, such a statute must be given retroactive effect by the courts unless there is a constitutional defect. The analysis almost universally applied by the Utah Supreme Court in determining whether a constitutional statute is to be applied retroactively—and, specifically, whether a statute can revive a claim previously time barred by an earlier statute of limitations—has been to determine, as a *primary* matter, whether there is an express legislative intent that the statute is to be applied retroactively. If there has been such an expression of legislative intent, that is the end of the analysis. Only if there has been no such expression of legislative intent, then the courts engage in the secondary, default inquiry of whether "vested" or "substantial" rights or interests have been affected. That analysis is entirely consistent with applicable state and federal constitutional provisions, the state statute governing when statutes will be given retroactive effect, the nearly unanimous case law in Utah, and the core principles of separation of power in a constitutional republic.

ARGUMENT

I. THE UTAH LEGISLATURE CAN EXPRESSLY REVIVE TIME-BARRED CLAIMS THROUGH A STATUTE.

If legislation is constitutional, the courts must give effect to the expressed intention of the Legislature.

> We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; *if a challenged action does not violate the Constitution, it must be sustained:*

> "*Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.* We do not sit as a committee of review, nor are we vested with the power of veto." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-195 (1978).

I.N.S. v. Chadha, 462 U.S. 919, 944 (1983) (emphasis added). *See also Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (In "application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernable . . . we must give effect to that intent."), *overruled in part on other grounds by Boys Market v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Gottling v. P.R. Inc.*, 2002 UT 95, ¶ 23, 61 P.3d 989 ("[R]espect for the legislative prerogative in lawmaking requires that the judiciary not interfere with enactments of the Legislature where . . . the legislative scheme employs reasonable means to effectuate a legitimate objective." (citation omitted)); *State v. Lusk*, 2001 UT 102, ¶ 19, 37 P.3d 1103 ("[O]ur primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." (citation omitted) (alteration in original)).

A. As in the Case of any Statute Intended by the Legislature to Be Applied Retroactively, if the Legislature Expresses Its Intent that a Constitutional Statute Revives Previously Time-Barred Claims, the Courts Must Give Effect to the Legislation.

The primary test as to whether legislation should be applied retroactively—regardless of whether such application would affect "vested" rights—is whether the Legislature expressed its intent that the legislation be applied retroactively. The Utah Legislature has supplied the rule regarding whether a statute is to be applied retroactively:

> A provision of the Utah Code is not retroactive, *unless the provision is expressly declared to be retroactive.*

Utah Code Ann. § 68-3-3 (emphasis added).[5]

Consistent with that rule, Utah's appellate courts have reiterated many times during the course of more than a century that statutes—even if they affect "substantive law" or "vested rights"—are to be applied retroactively if the Legislature has made clear its intent the statutes are to be retroactively applied. *See Lusk*, 2001 UT 102, ¶ 27, 37 P.3d 1103; *Brown & Root Indus. Serv. v. Indus. Comm'n*, 947 P.2d 671, 675 (Utah 1997); *Evans & Sutherland Computer Corp. v. State Tax Comm'n*, 953 P.2d 435, 437–38 (Utah 1997) ("Traditionally, we have begun our analysis by applying the first rule of statutory construction" that "a legislative enactment which alters the *substantive law* . . . will not be read to operate retrospectively *unless the legislature has clearly expressed that intention.*" (emphasis added) (citation omitted)); *Roark v. Crabtree*, 893 P.2d 1058, 1061 (Utah 1995); *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1988) ("[A] Legislative enactment which alters the *substantive law or affects vested rights* will not be read to operate retrospectively *unless the legislature has clearly expressed that intention.*" (emphasis added)); *Union Pac. R. Co. v. Trustees, Inc.*, 329 P.2d 398, 399 (Utah 1958); *McCarrey v. Utah State Teachers' Retirement Bd.*, 177 P.2d 725, 726 (Utah 1947) ("As said in 50 Am.Jur. 494, Statutes, Section 478: '*The question whether a statute operates retrospectively, or prospectively*

[5] The word "unless" introduces the only circumstances in which an event one is mentioning will *not* take place or in which a statement being made is *not* true. *See Collins Dictionary*, found at https://www.collinsdictionary.com/us/dictionary/english/unless. In other words, Utah Code section 68–3–3 means that if a statutory provision is expressly declared by the Legislature to be retroactive, it must be applied retroactively.

only, is one of legislative intent.'" (emphasis added)); *In re Ingraham's Estate*, 148 P.2d 340, 341 (Utah 1944) ("Constitutions, as well as statutes, should operate prospectively only, *unless the words employed show a clear intention that they should have a retroactive effect*.") (emphasis added) (citing *Mercur Gold Mining & Milling Co. v. Spry, Cty. Collector*, 16 Utah 222, 52 P.382, 284 (Utah 1898)); *Ireland v. Mackintosh*, 22 Utah 296, 61 P. 901, 904 (1900) ("[S]tatutes 'will not be permitted to affect past transactions[ ] *unless such intention is clearly and unequivocally expressed*.'" (emphasis added) (citation omitted)); *State of Utah v. Jacoby*, 1999 UT App 52, ¶ 10, 975 P.2d 939 ("A statute is presumed to be prospective and will not be applied retroactively *in the absence of clear legislative intent* . . . or [unless] it is procedural in nature and does not enlarge or eliminate vested rights." (emphasis added)).

That principle, although limited in its application in *criminal* cases, *State v. Clark*, 2011 UT 23, ¶ 11, n.5, 251 P.3d 829, applies to the retroactivity of *civil* statutes, including statutes reviving civil claims that were previously time-barred by an earlier statute of limitations. This Court noted that principle in *Roark*, a case involving a new statute of limitations for child sexual abuse:

> "It is a long-standing rule of statutory construction that a legislative enactment *which alters the substantive law or affects vested rights* will not be read to operate retrospectively *unless the legislature has clearly expressed that intention*."

893 P.2d 1058 (Utah 1995) (emphasis added) (quoting *Madsen*, 769 P.2d 245, 253 (Utah 1988)). In *Roark*, this Court, under a section headed "*Legislative Intent*," analyzed the matter of legislative intent—which is determinative if the legislature has expressed its

intent that the statute is to be retroactive—and found "the legislature did not intend for [the statute] to apply retroactively." 893 P.2d at 1061. This Court held that, *in the absence of legislative intent that a statute is to be applied retroactively*, the statute could not be applied retroactively because it affected the "vested right" of relying on the expiration of a previous statute of limitations. *Id.* at 1062–63.[6]

Consistent with this Court's approach in the section of *Roark* under the heading "*Legislative Intent*," *id.* at 1061–62, many courts throughout the nation have held that, in answer to the first question certified by the federal court to this Court, legislatures indeed "can expressly revive time-barred claims through a statute." *See Bernstein v. Sullivan*, 914 F.2d 1395, 1400 (10th Cir. 1990) (holding that, consistent with Congress's express intention, it was appropriate to apply longer statute of limitations after claims were earlier time barred); *Wesley Theol. Seminary of the United Methodist Church v. United States Gypsum Co.*, 876 F.2d 119, 121 (D.C. Cir. 1989) (recognizing validity of legislation that revives claim previously barred by a statute of repose); *United States v. McLaughlin*, 7 F. Supp. 2d 90 (D. Mass. 1998); *United States v. Hodges*, No. 4:92CV1395, 1993 WL 328044, *1 (E.D. Mo. Apr. 21, 1993) (unpublished) ("[T]he *general rule* [that extensions of a statutory limitations period will not revive a time barred claim] is *inapplicable when the legislature intends that the statutory limitations period apply retroactively*." (emphasis

[6] As described at 12–13, 16–20, *infra*, the opinion in *Apotex* erroneously relied upon the "vested rights" analysis in *Roark* as if it *absolutely* prohibits the retroactive application of statutes impacting the "vested right" of reliance upon a prior statute of limitations, rather than being relevant only to the *secondary* rule of statutory construction, which is to be applied *only in the absence of express legislative intent*. *Apotex*, 2012 UT 36, ¶ 67, 282 P.3d 66.

added)); *Quarry v. Doe I*, 53 Cal. 4th 945, 991 (Cal. 2012) (holding that revival of claims for sexual abuse is allowed where legislature expressed its intention); *Deutsch v. Masonic Homes of Cal., Inc.*, 80 Cal. Rptr. 3d 368, 378–79 (Cal. Ct. App. 2008) (holding statute reviving claims of sexual abuse to be valid, noting "it has been established law for over a century that *a legislature may revive a civil claim that is barred by the statute of limitations*" (emphasis added) (citation omitted)); *Sheehan v. Oblates of St. Francis De Sales*, 15 A.3d 1247, 1258–60 (Del. 2011) (holding revival of intentional tort claims otherwise time barred to be valid, noting that "we must take and apply the law as we find it, leaving any desirable changes to the General Assembly"); *Roe v. Doe*, 581 P.2d 310, 316 (Haw. 1978) ("Although courts often repeat the rule that 'subsequent extensions of a statutory limitation period will not revive a claim previously barred', *the question remains one of legislative intent*." (emphasis added)); *Shirley v. Reif*, 920 P.2d 405 (Kan. 1996) (holding a statute may revive a previously time-barred claim of childhood sexual abuse, noting that "[t]he legislature has the power to revive actions barred by a statute of limitations if it specifically expresses its intent to do so through retroactive application of a new law." (quotation marks and citation omitted)); *Pryber v. Marriott Corporation*, 296 N.W.2d 597, 600 (Mich. App. 1980) ("The right to defeat a claim by the interposition of a statute of limitations is a right which may be removed by the Legislature."); *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820 (Minn. 2011) (holding the revival of a claim previously barred by a statute of repose to be valid); *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 418 (Minn. 2002) ("[T]here can be no doubt that the legislature has the power to amend a statute of limitations to revive a claim that was already barred under the

prior limitations period."); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1080 (N.Y. 1989) ("[T]he Legislature acted within its broad range of discretion" in enacting a statute reviving time-barred claims for DES-caused injuries.).

II. THE LANGUAGE OF UTAH CODE SECTION 78B–2–308(7), EXPRESSLY REVIVING CLAIMS FOR CHILD SEXUAL ABUSE THAT WERE BARRED BY THE PREVIOUSLY APPLICABLE STATUTE OF LIMITATIONS AS OF JULY 1, 2016, MAKES UNNECESSARY THE ANALYSIS OF WHETHER THE CHANGE ENLARGES OR ELIMINATES VESTED RIGHTS.

The federal court described the confusion, resulting from inconsistent statements of the Utah Supreme Court, that led it to certify the questions of Utah law to this Court:

> Historically, Utah courts have considered "[t]wo rules of statutory construction . . . relevant to" retroactive operation. *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997). "One is the 'long-standing rule of statutory construction that a legislative enactment which alters the substantive law . . . will not be read to operate retrospectively unless the legislature has clearly expressed that intention.'" *Id.* (quoting *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1998 [sic 1988])). "The second relevant rule of statutory construction, which is often referred to as an exception to the first, permits retroactive application 'where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights' without enlarging or eliminating vested rights.'" *Id*. at 437–38 (quoting *Roark v. Crabtree*, 893 P.2d [at] 1062 . . . .). "Traditionally, [the Utah Supreme Court has] begun [its] analysis by applying the first rule of statutory construction: Only when [it] conclude[s] that retroactive application is not permitted under that rule do[es] [it] consider whether the second rule of construction permits retroactive operation." *Id*. at 438.
>
> Whether the [*State v.*] *Apotex* [*Corp*., 2012 UT 36, 282 P.3d 66] decision abrogated the two-part test or merely skipped the first part of the test . . . remains unclear. Because Utah Code section 78B–2–308(7) expressly authorizes retroactive application, the first part of the traditional test would apply, and the [federal] Court would not consider whether the retroactive application affects vested rights. Therefore, whether the Utah Supreme Court intended to abandon the first part of the test becomes central to the determination of this case.

> Further, the Utah Supreme Court reiterated the two-part test one year after *Apotex* in *Waddoups v. Noorda*, 2013 UT 64, 321 P.3d 1108, making the effect of *Apotex* on the two-part test even more in doubt.

(Mem. Dec. and Order, dated April 21, 2017, ECF No. 29, at 2–3, a copy of which is attached as Addendum No. 4.)

In *Apotex*, 2012 UT 36, ¶ 67, 282 P.3d 66, this Court could not have intended—by skipping over the primary legislative-intent test to the secondary procedural/substantive test discussed in the second section of *Roark*—to abrogate the long-time traditional test for determining the retroactive application of statutes. That abrogation would result in a vast, unprecedented expansion of judicial review over statutes passed by the Legislature and an unfounded reversal of Utah law for over a century. Because Utah Code section 78B–2–308(7) meets the primary test relating to legislative intent based upon the expressed intention of the Utah Legislature that the statute would revive previously time-barred claims, any resort to the secondary, default test relating to whether "vested" rights are affected is unnecessary and irrelevant. Since the Legislature expressed its intent regarding retroactivity of the revival statute, nothing else is required under the test announced by this Court for over a century, under Utah Code section 68–3–3, and under the provisions of the United States Constitution, Article IV, section 4, and the Utah Constitution, Article V, section 1, guaranteeing separation of power between the three branches of government.

A. A Statute Must Be Applied Retroactively if (1) There Is a Clear Expression of Legislative Intent that the Statute Is to Be Applied Retroactively, Regardless of Whether the Statute Affects Vested Rights, *or* (2) the Statute Does Not Affect Vested or Substantive Rights.

Traditionally, to determine the retroactivity of a statute enacted by the Utah Legislature, this Court has initially inquired whether the Legislature expressed its intention that the statute be applied retroactively. If it has, then the legislative intent is conclusive: the statute is to be applied retroactively. *See, e.g., Waddoups v. Noorda*, 2013 UT 64, ¶¶ 6–7, 321 P.3d 1108 ("*[A]bsent clear legislative intent to the contrary*, we generally presume that a statute applies only prospectively." (emphasis added) (inside quotation marks and citation omitted)); *Evans & Sutherland*, 953 P.2d at 437–38; *Roark*, 893 P.2d at 1061 ("[A] *legislative enactment which alters the substantive law or affects vested rights* will not be read to operate retrospectively *unless the legislature has clearly expressed that intention.*" (emphasis added) (inside quotation marks and citation omitted); *Stephens v. Henderson*, 741 P.2d 952, 953–54 (Utah 1987) (considering as determinative the inquiry of whether the Legislature expressly directed that a statute was to have retroactive effect); *McCarrey*, 177 P.2d at 726 ("As said in 50 Am.Jur. 494, Statutes, Section 478: 'The question whether a statute operates retrospectively, or prospectively only, is one of legislative intent.'"). When there is a legislative expression of intent that a statute is to be applied retroactively, no further analysis is required.

If, *and only if*, the Legislature has *not* expressed its intention that a statute is to be applied retroactively, the courts apply the secondary inquiry of whether the statute affects "vested" rights. If the statute does not affect vested rights, it is to be applied retroactively, even in the absence of any statement of legislative intent regarding retroactive application. If the statute does affect vested rights, then, under the secondary test—which, again, is to be applied only if there has been no declaration of the Legislature's intention that the statute

is to be applied retroactively—it is not to be applied retroactively. *See, e.g., Evans & Sutherland*, 953 P.2d at 437–38 ("Traditionally, we have begun our analysis by applying the first rule of statutory construction: Only when we conclude that retroactive application is not permitted under that rule do we consider whether the second rule of construction permits retroactive operation." (citing *Roark*, 893 P.2d at 1061–62)).[7]

In *Waddoups*, 2013 UT 64, ¶ 6, 321 P.3d 1108, this Court noted that an express legislative declaration that a statute is to be applied retroactively is an exception to the statute barring retroactive application of new laws, and that, *if no declaration of legislative intent is found*, the courts are to proceed to an analysis of whether the statute is "substantive" (meaning that it "enlarge[s], eliminate[s], or destroy[s] vested or contractual rights") or "procedural" (meaning that the law "merely pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective"). *Id.* ¶ 8 (emphasis added) (inside quotations and citations omitted).

The governing rule is the same under federal and state law regarding the obligation to honor expressed legislative intent. The United States Supreme Court has described the two-part test to be applied to determine whether a statute should be applied retroactively:

> When a case implicates a federal statute enacted after the events in suit, *the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules.* When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party

[7] In *Evans & Sutherland*, this Court stated that "where . . . a statute does *not* contain an express retroactivity provision, the better approach is to first determine whether a statute is substantive or procedural and then apply the applicable rule of statutory construction." 953 P.2d at 438 (emphasis added).

> possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern *absent clear congressional intent favoring such a result***.**

Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994) (emphasis added).

As if responding precisely to the second question certified by the federal court in this case, the Tenth Circuit Court of Appeals stated:

> If the legislature has made its intent clear, a court need not even consider whether the statute should be classified as substantive or procedural. [Citing *Landgraf*, 511 U.S. at 280.] Only if the legislature's intent is not clear should a court consider whether the statute is substantive or procedural. *See id.* at 275-80.

Boyd Rosene & Assoc., Inc. v. Kansas Municipal Gas Agency, 174 F.3d 1115, 1120 (10th Cir. 1999) (emphasis added). *See also Fernandez v. Immigration & Naturalization Service*, 113 F.3d 1151, 1153 (10th Cir. 1997) (referring to "judicial default rules," to be applied only when the legislative branch has not expressed an intent as to retroactivity).

The legal analysis to determine whether a statute is to be applied retroactively, and the order of the analysis, is straightforward. That analysis is reflected clearly in *Roark*, where this Court first examined, under descriptive headings in the opinion, the primary inquiry regarding "*Legislative Intent*," 893 P.2d at 1061–62, and then, after finding there had been no legislative intent that the subject statute was to be applied retroactively, a consideration of "*The Nature of Section 78–12–25.1*"—that is, whether the statute "enlarges, eliminates, or destroys vested or contractual rights." *Id.* at 1062–63.[8]

[8] In *Soriano v. Graul*, the Utah Court of Appeals noted that *Roark* examined "the legislative history in conjunction with the statute's plain language to determine if the legislature intended for the statute to apply retroactively." 2008 UT App 188, ¶ 8, 186 P.3d 960.

Roberts seeks to turn the proper statutory analysis on its head,[9] seeking to have the courts consider as the primary, determinative issue whether a statute affects "vested" rights. He relies on cases in which this Court has offered out-of-context dicta[10] or, in one instance,

[9] Def.'s Mot. Dismiss, at 9–14.

[10] In *Del Monte Corp. v. Moore*, 580 P.2d 224 (Utah 1978), this Court made a remark, in dicta, entirely inconsistent with the determinative question of legislative intent regarding whether statutes that would revive previously time-barred claims are to be applied retroactively. In *Del Monte*, this Court abruptly noted "that if the statute has run on a cause of action, so that it is dead, it cannot be revived by any such statutory extension." *Id*. at 225. However, *Del Monte* did not involve any expression of legislative intent that a statute was to be applied retroactively to previously time-barred claims. *Del Monte*, 580 P.2d at 225. Further, no consideration was given in *Del Monte* to the principle found in numerous cases, before and after *Del Monte*, that, even if "vested rights" are affected by the revival of previously time-barred claims, a statute is to be applied retroactively if the Legislature makes it clear that is its intention. *See, e.g., Waddoups*, 2013 UT 64, ¶ 6, 321 P.3d 1108 ("The statute barring retroactive application of new laws contains a single exception, '[a] provision of the Utah Code is not retroactive, *unless the provision is expressly declared to be retroactive*.'" (emphasis added) (quoting Utah Code § 68–3–3)); *Roark*, 893 P.2d at 1061–62 (legislative intent governs the question of retroactive application of a statute reviving previously time-barred claims).

Also, in *Lusk*, 2001 UT 102, 37 P.3d 1103, a criminal case, this Court—having already discussed the vital primary rule relating to the primacy of legislative intent, *id.* ¶ 27—stated, solely in the context of its discussion of the secondary test to be applied only "where such specific legislative intent [that a statute be applied retroactively] is absent," *id.*, "that once the statute of limitations has run in a particular case, a defendant has a vested right to rely on the limitations defense, which right cannot be rescinded by subsequent legislation extending a limitations period." *Id.* ¶ 30. That statement can be accurate *solely* in the context of the *secondary* test to be applied only if there has been a finding that there is no legislative declaration that a statute is to be applied retroactively. Otherwise, it would be wholly irreconcilable with the legal principles stated in the earlier discussion in *Lusk* about the obligation of the courts to give effect to legislative intent: "It is a long-standing rule of statutory construction that *a legislative enactment which alters the substantive law or affects vested rights will not be read to operate retrospectively unless the legislature has clearly expressed that intention*. . . . Nevertheless, where such specific legislative intent is absent, a statute may be applied retroactively if it is procedural in nature and does not enlarge or eliminate vested rights." *Id.* ¶ 27 (emphasis added) (quotation marks and citations omitted).

overlooked the first, primary test relating to legislative intent and focused exclusively on the secondary "vested rights" test. *Apotex*, 2012 UT 36, 282 P.3d 66. In *Apotex*, which was decided after *Roark* and *Evans & Sutherland* and before *Waddoups*, this Court ignored the controlling factor of legislative intent—as described in *Roark*, 893 P.2d at 1061–62, *Evans & Sutherland*, 953 P.2d at 437–38, and *Waddoups*, 2013 UT 64, ¶ 8, 321 P.3d 1103—and, instead, focused solely, and erroneously, on the secondary alternative "vested rights" test that relates merely to the "default" rule of "statutory construction," stating as follows:

> The amended UFCA cannot resurrect claims that have already expired under the one-year limitations period. "[T]his court has consistently maintained that the defense of an expired statute of limitations is a vested right." *Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995). "'Accordingly, after a cause

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Roberts has relied upon *In re Swan's Estate*, 79 P.2d 999, 1002 (Utah 1938), and *Greenhalgh v. Payson City*, 530 P.2d 799, 802 (Utah 1975), for the proposition that a statute increasing the period of limitation cannot renew a cause of action already barred. However, in neither of those cases was there a finding that the Legislature expressed its intention that claims previously time-barred by a previous statute of limitations should be revived by the newer statutes. Roberts failed to note that *Swan's Estate* and *Greenhalgh* both rely upon *Ireland*, 61 P. 901 (Utah 1900), which made abundantly clear that *an expression of legislative intent that a statute is to revive time-barred claims is conclusive*. The rule was unambiguously stated in *Ireland*:

> "Limitations derive their authority from statutes." . . . It is a rule of construction that statutes "are to be so construed as to have a prospective effect, merely, and will not be permitted to affect past transactions, *unless such intention is clearly and unequivocally expressed* . . . ."

61 P. at 904 (emphasis added) (citations omitted). This Court then found that the new statute of limitations was not "intended [by the legislature] to revive causes of action which had before the passage of that act become barred." *Id.*

No Utah cases hold that, even where a "vested right" is affected, the courts may ignore or overrule an expressed legislative intention that a statute is to be applied retroactively. Conversely, many cases over the course of more than a century have held that an affirmative expressed legislative intent regarding retroactivity must prevail. *See* 7–12, 13–18, *supra*, 19–21, *infra*.

> of action has become barred by the statute of limitations the defendant *has a vested right to rely on that statute as a defense . . . which cannot be taken away by legislation . . . or by affirmative act, such as lengthening of the limitation period.'" Id.* at 1063 (alterations in original) (quoting 51 AMJUR 2D *Limitation of Actions* §444 (1970)).

Apotex, 2012 UT 36, ¶ 67, 282 P.3d 66.

Apotex and the two sentences in *Roark* upon which this Court relied in *Apotex, id.* ¶ 67, would seem, in a vacuum, to limit the relevant inquiry solely to whether "vested rights" would be impacted by the revival of a cause of action previously time barred. However, if that inquiry were sufficient to overcome the expressed legislative intent that a statute is to be retroactive, then any inquiry about legislative intent—under Utah Code section 68–3–3 or under the traditional two-part test almost universally applied by this Court—would be superfluous.

The courts cannot disregard the intent of the Legislature in reliance upon a rule that is not based on any constitutional rationale, but, instead, on an "AMJUR 2D" citation and an out-of-context sentence in a discussion (following a principal inquiry concerning legislative intent) about the secondary, procedural/substantive rule of statutory construction in *Roark.* Any such court-created rule, which this Court could not have intended in *Apotex,* would be directly counter to the fundamental limit on judicial review acknowledged by this Court: "Given the importance of not intruding into the legislative prerogative, we do not strike down legislation unless it clearly violates a constitutional provision." *State v. Herrera*, 1999 UT 64, ¶ 18, 993 P.2d 854. *See also Condemarin v. University Hosp*., 775 P.2d 348, 387 (Hall, C.J., dissenting) ("So long as the statute is constitutional, we have no intrinsic ability to review its inherent wisdom or, if it seems

unwise, the power to change it." (citation omitted)).

The intent of the Legislature cannot be countermanded by this Court, especially when relying upon the statement of the *secondary* test in *Roark*, while overlooking the entire preceding section of *Roark* dedicated to the decisive *primary* factor of "legislative intent." *See Roark*, 892 P.2d at 1061–62. A finding that a "vested right" is enlarged or eliminated is *not* the initially decisive factor, as mistakenly indicated in *Apotex.* As this Court has held repeatedly, even if a "vested right" is enlarged or eliminated, the intent of the Legislature must be given effect. *See, e.g., Waddoups*, 2013 UT 64, ¶ 8; *Evans & Sutherland*, 953 P.2d at 437–38; *Roark*, 893 P.2d at 1061; *Madsen*, 769 P.2d at 253.

Roberts fails to recognize that the issue of whether a "vested" right is involved is relevant solely with respect to a secondary rule of "statutory construction," which is applied *only* when the Legislature has *not* expressed its intent that the statute be applied retroactively. As one court has noted, as if writing in response to *Apotex*, "although courts often repeat the rule that 'subsequent extensions of a statutory limitation period will not revive a claim previously barred', the question remains one of legislative intent." *Roe v. Doe*, 581 P.2d 310, 316 (Haw. 1978) (citation omitted).[11]

[11] Roberts has erroneously maintained that "Utah is among six states . . . that prohibit the retroactive expansion of the statute of limitations, to revive an otherwise time-lapsed claim, as an impermissible deprivation of a vested property right." (Def.'s Mot. Dismiss, at 12.) However, for that proposition, Roberts curiously cites to *Roark*, which, diametrically contrary to Roberts's contention, affirms that if "the legislature has clearly expressed that intention," a "legislative enactment which alters the substantive law or affects vested rights" will indeed "be read to operate retrospectively." 893 P.2d at 1061. The conclusion in *Roark*, declining to apply a statute retroactively, resulted from findings by the Court that there was "no express declaration of retroactivity" in the statute, *id.*, and the legislative history, including a statement by the bill's co-sponsor that "[t]his [bill] is not retroactive,"

Consistent with the courts' circumscribed role in interpreting, and not making, statutory law, the courts must give retroactive effect to constitutional statutes reviving claims previously time barred if the Legislature has made clear that result was intended by it. Since the *only* purpose and expressed intent of House Bill 279 was to provide a window of time in which previously time-barred claims of child sexual abuse would be revived, that effect must be honored by this Court.

1. The Utah Legislature Unambiguously Expressed Its Intent in the Text of the Statute that Claims for Sexual Abuse, Time-Barred as of July 1, 2016, Are to Be Revived.

H.B. 279 amended Utah Code section 78B-2-308 to read, in part, as follows:

> (1) The Legislature finds that:
> (a) child sexual abuse is a crime that hurts the most vulnerable in our society and destroys lives;
> (b) research over the last 30 years has shown that it takes decades for children and adults to pull their lives back together and find the strength to face what happened to them;
> (c) often the abuse is compounded by the fact that the perpetrator is a member of the victim's family and when such abuse comes out, the victim is further stymied by the family's wish to avoid public embarrassment;
> (d) even when the abuse is not committed by a family member, the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to ensure silence;

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reflected a legislative intention that the bill was to be applied only prospectively. *Id*. at 1062.

Exactly the same analysis was provided in *Rhodes v. Cannon*, 164 S.W. 752, 753–54 (Ark. 1914), the case primarily relied upon, and misrepresented, by *Johnson v. Lilly* 823 S.W.2d 883 (Ark. 1992), cited previously by Roberts. (Def.'s Mot. Dismiss, at 12–13.) The court in *Johnson* entirely ignored the fact that *Rhodes* relied on cases holding that expressed legislative intent is controlling. For instance, *Rhodes* states: "It is a sound rule of construction that a statute should have a prospective operation only, *unless its terms show clearly a legislative intention that it should operate retrospectively*." 164 S.W. at 754 (quoting *Fayetteville B. & L. Ass'n v. Bowlin*, 63 Ark. 573, 39 S.W. 1046 (1897)) (emphasis added).

(e) in 1992, when the Legislature enacted the statute of limitations requiring victims to sue within four years of majority, society did not understand the long-lasting effects of abuse on the victim and that it take decades for the healing necessary for a victim to seek redress;
(f) the Legislature, as the policy-maker for the state, may take into consideration advances in medical science and understanding in revisiting policies and laws shown to be harmful to the citizens of this state rather than beneficial; and
(g) the Legislature has the authority to change old laws in the face of new information, and set new policies within the limits of due process, fairness, and justice.

* * *

(6) A civil action may be brought only against a living person who:
(a) intentionally perpetrated the sexual abuse;
(b) would be criminally responsible for the sexual abuse in accordance with Section 76-2-202; or
(c) negligently permitted the sexual abuse to occur.
(7) A civil action against a person listed in Subsection (6)(a) or (b) for sexual abuse that was time barred as of July 1, 2016, may be brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection (7), whichever is longer.

There can be no clearer statement of legislative intent than in House Bill 279 that a statute is intended to revive claims that were previously time barred. Reinforcing that clear expression of intent is the title of § 78B-2-308: "Window for revival of time barred claims." The title of a statute "is persuasive and can 'aid in ascertaining [the statute's] correct interpretation and application.'" *State v. Gallegos*, 2007 UT 81, ¶ 16, 171 P.3d 426 (alteration in original) (citations omitted)).

In short, the unquestionable legislative intent, which must be given effect by the courts, is that if a person's claim that he or she was a victim of "sexual abuse"—defined as "acts or attempted acts of sexual intercourse, sodomy or molestation by an adult directed toward a child," where "child" is defined as "a person under 18 years of age," Utah Code Ann. § 78B-2-308(2)(g) and (a), respectively—has been time barred, it is revived until

"within 35 years of the victim's 18th birthday or within three years of the effective date" of the statute (May 10, 2016), "whichever is longer." Utah Code Ann. § 78B-2-308(7).

2. Consistent with the Text of the Current Statute of Limitations, the Legislative History of the Recent Amendment Makes Clear the Utah Legislature Intended that Previously Time-Barred Claims of Child Sexual Abuse Are to Be Revived.

The legislative history of H.B. 279, amending Utah Code section 78B-2-308, leaves no doubt about the intent of the Utah Legislature in enacting the bill to revive previously time-barred claims involving sexual abuse of people under 18 years of age. During the House Floor Debate on H.B. 279 (Substitute 2), on February 26, 2016,[12] one of the sponsors of the bill, Representative Ken Ivory, stated, in part, as follows:

> What HB 277 did in eliminating the statute of limitations forward, created a limitation that as of March 23, 2015, anyone that was 22 or younger has no statute of limitations for sexual abuse of children. Anyone that was 22 years old and one day was still barred by time from bringing their claims.
>
> * * *
>
> I received a call from a woman in St. George who had a horrifying experience of her being abused, sexually abused, as a child and she asked the same question: "Does it help me?" And I said, "No, I'm sorry. . . and . . . and . . . but it will." And I immediately called leg. counsel and opened the file for HB 279.
>
> What we've seen throughout the nation, *we've seen states opening what they call "windows," reviving the statute of limitations for these claims for a specific reason. What we've learned scientifically that we didn't know is that it takes decades for victims of sexual abuse of children to be able to process the shame, the embarrassment, the intimidation, the threats that were imposed upon them as children to be able to process and come forward and disclose the claim.*

[12] The House Floor Debate on February 26, 2016, on House Bill 279 (Substitute 2) can be viewed and heard by clicking on "HB279S2" on the left column on the page found at http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19980&meta_id=622136. A transcript of that House Floor Debate is at Pl.'s Mem. Opp'n, "Ex.1," App. "A", ECF No. 12–4.

* * *

> Well, now, scientifically we know that, on average—you have the handouts—on average, it takes them until age 41 for a child victim of sexual abuse to come forward and present . . . .
>
> *So what HB 279 does, is, where we've already eliminated the statute of limitations going forward, we now deal with those who have been abused, that were older than 22 on March 23, and we put the statute of limitations of 18 plus 35 years that takes them out past the average age for reporting and allows them to revive their civil statute of limitations claims only against the perpetrator and only against the active aiders and abettors. . . .*
>
> *. . . . I think we want to err on the side of protecting children where a defendant may have a right procedurally for a claim that has lapsed. We have the opportunity to get our public policy right, and that's the basis behind H.B. 279,* Mr. Speaker Pro Tem. . . .
>
> This [legislative intent language] is not new language. . . . In this instance, *our Supreme Court has said, if we are going to revive a civil statute of limitations, we need to, as a Legislature, to give a clear expression of intention for doing that, and so in this instance, that's why it's necessary in this bill, that we give a clear intention of reviving a statute of limitations.* (Emphasis added.)

During the Senate Floor Debate on House Bill 279 (Substitute 2), Senator J. Stuart Adams made the same passionate argument.[13]

As with the text of House Bill 279, the legislative history virtually screams out the intent of the Legislature that previously time-barred claims of child sexual abuse be revived so victims over 22 years-old can pursue justice and the perpetrators be held to account.

B. Legislative Intent that a Constitutional Statute Revives Previously Time-Barred Claims Must Control.

[13] The Senate Floor Debate was on March 10, 2016. It can be viewed by visiting http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=20232&meta_id=630469 and clicking on "2H.B. 279" on the left column. A transcript of that Senate Floor Debate is found at Pl.'s Mem. Opp'n, "Ex.2," App. "A", ECF No. 12–5.

It is not for the courts to formulate legislation, weigh its effects, or evaluate the public policy considerations behind it. That is uniquely the province of the legislative branch, as long as the legislation meets constitutional requirements.

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.[14]

The Utah Constitution expressly and emphatically requires a strict separation of power between the three branches of government:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.[15]

The United States Supreme Court emphasized the crucial role in our constitutional republic of a separation of powers among the branches of government:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation . . . is basic and vital; namely to preclude a commingling of these essentially different powers of government in the same hands. . . . [E]ach department should be kept completely independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.[16]

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[14] *I.N.S. v. Chadha*, 462 U.S. at 951.
[15] Utah Const. art. V, § 1.
[16] *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933).

The Utah Legislature was acting entirely within its designated sphere to fill a gap in access to justice for victims more than 22 years old but who had not yet filed a civil action against the perpetrators and to enact legislation that revives claims previously time barred by relatively short statutes of limitations. Clearly, the Legislature believed those previous statutes of limitations were unfair and ill-suited to claims that are often extremely difficult, if not impossible, for victims of child sexual abuse to assert within the time allowed.

The intent expressed by the Legislature, in the statute and in the legislative history, cannot be judicially defeated merely on the basis of a court-created prohibition against the revival of time-barred claims. Such a prohibition would fly in the face of long-standing legal tests allowing for the retroactive application of statutes affecting "vested rights" when the Legislature has made clear its intent that the statute is to have such an effect.[17]

The Supreme Court of Delaware powerfully stated the principle in a case involving the statutory revival of previously time-barred claims of child sexual abuse: "[W]e do not sit as an überlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it . . . ." *Sheehan*, 15 A.3d at 1259.

1. Utah Code Section 78B-2-308, as Amended, Is Constitutionally Sound.

a. Roberts Has Not Challenged the Constitutionality of Utah Code Section 78B-2-308, as Amended by H.B. 279.[18]

[17] *See* 15–22, *supra.*

[18] Nor has Roberts filed a notice of constitutional question or served a notice and paper stating a question regarding the constitutionality of § 78B-2-308 on the Utah Attorney General, as required by Rule 5.1(a)(1) and (2), Fed. R. Civ. P. Nothing filed by or on behalf of Roberts gives the federal court any reason to certify to the Utah Attorney General that a

b. H.B. 279 Comports with Due Process.

i. The Applicable Analysis Under Federal and State Substantive Due Process Is the Rational Basis Test.

Roberts, who, according to Mitchell (Compl., ¶ 24), threatened Mitchell to keep quiet about the abuse, now seeks to escape legal accountability by hiding behind now-irrelevant statutes of limitations, arguing that § 78B-2-308, as amended by H.B. 279, cannot revive the claims of Mitchell against him, regardless of the clear intent of the Utah Legislature. That is not the makings of a "fundamental right." Hence, any due process analysis of the current § 78B-2-308 must be according to a rational basis test. *See State of Utah v. Angilau*, 2011 UT 3, ¶ 10, 245 P.3d 745; *State v. Candedo*, 2010 UT 32, ¶¶ 16, 19, 24, 232 P.3d 1008; *Judd v. Drezga*, 2004 UT 91, ¶ 30, 103 P.3d 135.

ii. The Amendment to Utah Code Section 78B-2-308 by H.B. 279 is Rationally Related to the State of Utah's Legitimate Interest in Providing Greater Justice for Victims of Child Sexual Abuse and Holding Perpetrators Accountable Through the Revival of Claims of Child Sexual Abuse that Otherwise May Be Time-Barred.

Utah's legitimate interest in reviving claims of child sexual abuse is found compellingly expressed in the statement of legislative findings at Utah Code Section 78B-2-308(1) and in the statements of the sponsors of House Bill 279. The recognition of that legitimate interest has not been limited to legislatures and courts.[19]

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statute's constitutionality has been questioned, as provided by Rule 5.1(b), Fed. R. Civ. P. or 28 U.S.C. § 2403.

[19] For instance, *The New York Times* made the compelling case for the revival of previously time-barred claims of child sexual abuse:

The revival statute is not only rationally related to, but was necessary to promote, Utah's interest in providing greater access to justice for victims of child sexual abuse whose claims were otherwise time-barred by obsolete statutes of limitations. Therefore, the revival statute is wholly constitutional. *See Bernstein*, 914 F.2d 1395, 1400 (10th Cir. 1990) (holding that application of longer statute of limitations after claims were earlier time barred is constitutional); *Wesley Theol. Seminary*, 876 F.2d 119, 121 (D.C. Cir. 1989) ("[B]urden [from retroactive legislation that revives claim previously barred by a statute of repose] "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose**.**" (citation omitted)); *McLaughlin*, 7 F. Supp. 2d at 91 (D. Mass. 1998) (holding revival by Congress of previously time-barred claims complies with due process); *Quarry*, 53 Cal. 4th at 991 (allowing revival of claims for sexual abuse where legislature expressed its intention); *Doe v. Roman Catholic Archbishop of Los Angeles*, 247 Cal. App. 4th 953, 969 (Cal. App. 2016) ("[O]ur Legislature has the power to revive expired claims"); *Deutsch*, 80 Cal. Rptr. 3d at 378–79 ("[I]t has been established law for over a century that a legislature may revive a civil claim that is barred

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> Hawaii significantly strengthened its protections against child sexual abuse last month when Gov. Neil Abercrombie signed a measure extending the statute of limitations for civil lawsuits filed by child victims. At least as important, *it opens a one-time two-year window to allow victims to file suits against their abusers even if the time limit had expired under the old law*.
>
> Like similar laws in California and Delaware, the Hawaii measure recognizes some wrenching realities. It can take many years, even decades, before child abuse victims are emotionally ready to come forward and tell their stories in court.

"More Time For Justice" (Editorial), *The New York Times*, May 6, 2012 (emphasis added).

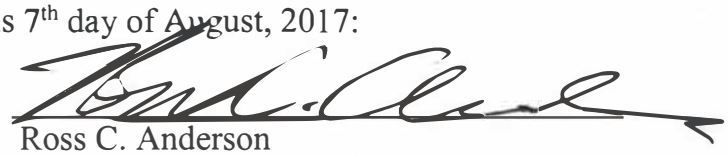
by the statute of limitations." (citation omitted)); *Sheehan*, 15 A.3d at 1258–60 (holding revival of intentional tort claims otherwise time-barred meets due process requirements); *Glock, Inc. v. Harper*, 796 S.E.2d 304, 306 (Ga. App. 2017) ("[A] newly-amended statute of limitations may be retroactively applied to allow an action that was barred under the previous statute . . . 'when the language imperatively requires it, or when an examination of the act as a whole leads to the conclusion that such was the legislative purpose.'" (citation omitted)); *Roe*, 581 P.2d at 316 (holding revival of time-barred claim to be constitutional); *Shirley*, 920 P.2d at 412 (Kan. 1996) (holding statute may, consistent with due process, revive previously time-barred claim of childhood sexual abuse); *Succession of Younger*, ("[A] statute cannot apply retroactively to revive a prescribed cause of action, *absent clear language of the legislature as to the retroactive application* of the statute." (emphasis added)); *Pryber*, 296 N.W.2d at 600 ("Federal constitutional law on this issue" is that "[a]n act of state legislation which has the effect of lifting the bar of a statute of limitations so as to restore a remedy which has been lost through lapse of time is not per se violative of the Fourteenth Amendment to the United States Constitution. . . . The same conclusion obtains as a matter of state constitutional law. . . ."); *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820 (Minn. 2011) (holding revival of claim previously barred by statute of repose, which created a "protectable property right," met due process requirement because it was rationally related to a legitimate state interest); *Hymowitz*, 539 N.E.2d at 1079–80 (holding revival of previously time-barred claims meets federal and state constitutional muster).

The constitutional revival statute must be given its intended effect by the courts because the Utah Legislature clearly expressed its intention that it be applied to revive previously time-barred civil claims of child sexual abuse.

CONCLUSION

Because the Utah Legislature vividly expressed its intention that the constitutional revival statute should be applied to revive civil claims for child sexual abuse that were time barred as of July 1, 2016, the questions certified by the federal court should be answered in the affirmative.

Respectfully submitted this 7th day of August, 2017:



Ross C. Anderson
Attorney for Plaintiff Terry Mitchell

Addendum No. 1

Effective 5/10/2016

78B-2-308 Legislative findings -- Civil actions for sexual abuse of a child -- Window for revival of time barred claims.

(1) The Legislature finds that:

(a) child sexual abuse is a crime that hurts the most vulnerable in our society and destroys lives;

(b) research over the last 30 years has shown that it takes decades for children and adults to pull their lives back together and find the strength to face what happened to them;

(c) often the abuse is compounded by the fact that the perpetrator is a member of the victim's family and when such abuse comes out, the victim is further stymied by the family's wish to avoid public embarrassment;

(d) even when the abuse is not committed by a family member, the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to insure silence;

(e) in 1992, when the Legislature enacted the statute of limitations requiring victims to sue within four years of majority, society did not understand the long-lasting effects of abuse on the victim and that it takes decades for the healing necessary for a victim to seek redress;

(f) the Legislature, as the policy-maker for the state, may take into consideration advances in medical science and understanding in revisiting policies and laws shown to be harmful to the citizens of this state rather than beneficial; and

(g) the Legislature has the authority to change old laws in the face of new information, and set new policies within the limits of due process, fairness, and justice.

(2) As used in this section:

(a) "Child" means a person under 18 years of age.

(b) "Discovery" means when a person knows or reasonably should know that the injury or illness was caused by the intentional or negligent sexual abuse.

(c) "Injury or illness" means either a physical injury or illness or a psychological injury or illness. A psychological injury or illness need not be accompanied by physical injury or illness.

(d) "Molestation" means that a person, with the intent to arouse or gratify the sexual desire of any person:

(i) touches the anus, buttocks, or genitalia of any child, or the breast of a female child;

(ii) takes indecent liberties with a child; or

(iii) causes a child to take indecent liberties with the perpetrator or another person.

(e) "Negligently" means a failure to act to prevent the child sexual abuse from further occurring or to report the child sexual abuse to law enforcement when the adult who could act knows or reasonably should know of the child sexual abuse and is the victim's parent, stepparent, adoptive parent, foster parent, legal guardian, ancestor, descendant, brother, sister, uncle, aunt, first cousin, nephew, niece, grandparent, stepgrandparent, or any person cohabiting in the child's home.

(f) "Perpetrator" means an individual who has committed an act of sexual abuse.

(g) "Sexual abuse" means acts or attempted acts of sexual intercourse, sodomy, or molestation by an adult directed towards a child.

(h) " Victim" means an individual who was intentionally or negligently sexually abused. It does not include individuals whose claims are derived through another individual who was sexually abused.

(3)

(a) A victim may file a civil action against a perpetrator for intentional or negligent sexual abuse suffered as a child at any time.

(b) A victim may file a civil action against a non-perpetrator for intentional or negligent sexual abuse suffered as a child:
(i) within four years after the person attains the age of 18 years; or
(ii) if a victim discovers sexual abuse only after attaining the age of 18 years, that person may bring a civil action for such sexual abuse within four years after discovery of the sexual abuse, whichever period expires later.

(4) The victim need not establish which act in a series of continuing sexual abuse incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse.

(5) The knowledge of a custodial parent or guardian may not be imputed to a person under the age of 18 years.

(6) A civil action may be brought only against a living person who:
(a) intentionally perpetrated the sexual abuse;
(b) would be criminally responsible for the sexual abuse in accordance with Section 76-2-202; or
(c) negligently permitted the sexual abuse to occur.

(7) A civil action against a person listed in Subsection (6)(a) or (b) for sexual abuse that was time barred as of July 1, 2016, may be brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection (7), whichever is longer.

(8) A civil action may not be brought as provided in Subsection (7) for:
(a) any claim that has been litigated to finality on the merits in a court of competent jurisdiction prior to July 1, 2016, however termination of a prior civil action on the basis of the expiration of the statute of limitations does not constitute a claim that has been litigated to finality on the merits; and
(b) any claim where a written settlement agreement was entered into between a victim and a defendant or perpetrator, unless the settlement agreement was the result of fraud, duress, or unconscionability. There is a rebuttable presumption that a settlement agreement signed by the victim when the victim was not represented by an attorney admitted to practice law in this state at the time of the settlement was the result of fraud, duress, or unconscionability.

Amended by Chapter 379, 2016 General Session

Addendum No. 2

STATUTE OF LIMITATIONS REFORM AMENDMENTS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ken Ivory

Senate Sponsor: J. Stuart Adams

Cosponsors: Susan Duckworth

Rebecca Chavez-Houck Angela Romero

LONG TITLE

General Description:

This bill provides a window for the revival of civil claims against perpetrators of sexual abuse of a child.

Highlighted Provisions:

This bill:

- allows child sexual abuse victims to bring a civil action against an alleged perpetrator even though the statute of limitations has run;
- provides a window of 35 years after attaining 18 years of age to commence an action; and
- specifies limitations.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-2-308, as last amended by Laws of Utah 2015, Chapter 82

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-2-308** is amended to read:

78B-2-308. Legislative findings -- Civil actions for sexual abuse of a child -- Window for revival of time barred claims.

(1) The Legislature finds that:

(a) child sexual abuse is a crime that hurts the most vulnerable in our society and destroys lives;

(b) research over the last 30 years has shown that it takes decades for children and adults to pull their lives back together and find the strength to face what happened to them;

(c) often the abuse is compounded by the fact that the perpetrator is a member of the victim's family and when such abuse comes out, the victim is further stymied by the family's wish to avoid public embarrassment;

(d) even when the abuse is not committed by a family member, the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to insure silence;

(e) in 1992, when the Legislature enacted the statute of limitations requiring victims to sue within four years of majority, society did not understand the long-lasting effects of abuse on the victim and that it takes decades for the healing necessary for a victim to seek redress;

(f) the Legislature, as the policy-maker for the state, may take into consideration advances in medical science and understanding in revisiting policies and laws shown to be harmful to the citizens of this state rather than beneficial; and

(g) the Legislature has the authority to change old laws in the face of new information, and set new policies within the limits of due process, fairness, and justice.

[~~(1)~~] (2) As used in this section:

(a) "Child" means a person under 18 years of age.

(b) "Discovery" means when a person knows or reasonably should know that the injury or illness was caused by the intentional or negligent sexual abuse.

(c) "Injury or illness" means either a physical injury or illness or a psychological injury or illness. A psychological injury or illness need not be accompanied by physical injury or

illness.

(d) "Molestation" means [~~touching~~] that a person, with the intent to arouse or gratify the sexual desire of any person:

(i) touches the anus, buttocks, or genitalia of any child, or the breast of a female child [~~younger than 14 years of age, or otherwise taking~~];

(ii) takes indecent liberties with a child[~~,~~]; or [~~causing~~]

(iii) causes a child to take indecent liberties with the perpetrator or another[~~, with the intent to arouse or gratify the sexual desire of any~~] person.

(e) "Negligently" means a failure to act to prevent the child sexual abuse from further occurring or to report the child sexual abuse to law enforcement when the adult who could act knows or reasonably should know of the child sexual abuse and is the victim's parent, stepparent, adoptive parent, foster parent, legal guardian, ancestor, descendant, brother, sister, uncle, aunt, first cousin, nephew, niece, grandparent, stepgrandparent, or any person cohabiting in the child's home.

[~~(g)~~] (f) "Perpetrator" means an individual who has committed an act of sexual abuse.

[~~(h)~~] (g) "Sexual abuse" means acts or attempted acts of sexual intercourse, sodomy, or molestation by an adult directed towards a child.

[~~(f)~~] (h) "[~~Person~~] Victim" means an individual who was intentionally or negligently sexually abused. It does not include individuals whose claims are derived through another individual who was sexually abused.

[~~(2)~~] (3) (a) A [~~person~~] victim may file a civil action against a perpetrator for intentional or negligent sexual abuse suffered as a child at any time.

(b) A [~~person~~] victim may file a civil action against a non-perpetrator for intentional or negligent sexual abuse suffered as a child:

(i) within four years after the person attains the age of 18 years; or

(ii) if a [~~person~~] victim discovers sexual abuse only after attaining the age of 18 years, that person may bring a civil action for such sexual abuse within four years after discovery of the sexual abuse, whichever period expires later.

[~~(3)~~] (4) The victim need not establish which act in a series of continuing sexual abuse incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse.

[~~(4)~~] (5) The knowledge of a custodial parent or guardian may not be imputed to a person under the age of 18 years.

[~~(5)~~] (6) A civil action may be brought only against a living person who:

(a) intentionally perpetrated the sexual abuse;

(b) would be criminally responsible for the sexual abuse in accordance with Section 76-2-202; or

(c) negligently permitted the sexual abuse to occur.

(7) A civil action against a person listed in Subsection (6)(a) or (b) for sexual abuse that was time barred as of July 1, 2016, may be brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection (7), whichever is longer.

(8) A civil action may not be brought as provided in Subsection (7) for:

(a) any claim that has been litigated to finality on the merits in a court of competent jurisdiction prior to July 1, 2016, however termination of a prior civil action on the basis of the expiration of the statute of limitations does not constitute a claim that has been litigated to finality on the merits; and

(b) any claim where a written settlement agreement was entered into between a victim and a defendant or perpetrator, unless the settlement agreement was the result of fraud, duress, or unconscionability. There is a rebuttable presumption that a settlement agreement signed by the victim when the victim was not represented by an attorney admitted to practice law in this state at the time of the settlement was the result of fraud, duress, or unconscionability.

Addendum No. 3

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

TERRY MITCHELL, Plaintiff, v. RICHARD WARREN ROBERTS, Defendant.	**ORDER OF CERTIFICATION TO UTAH SUPREME COURT** Case No. 2:16-cv-00843-EJF Magistrate Judge Evelyn J. Furse

Defendant Richard W. Roberts filed a Motion to Dismiss this case based on a statute of limitations defense. (Def. Richard W. Roberts' Mot. to Dismiss the Compl., ECF No. 9.) This Court found that Utah law regarding retroactive operation of statutes remains unclear in light of possibly conflicting statements in State v. Apotex Corp., 2012 UT 36, ¶63-67, 282 P.3d 66, and Waddoups v. Noorda, 2013 UT 64, ¶ 8, 321 P.3d 1108, as further explained in the attached Memorandum Decision and Order to Submit Proposed Question for Certification, April 21, 2017. To clarify the existing law, the Court hereby CERTIFIES, under Rule 41 of the Utah Rules of Appellate Procedure, the following questions to the Utah Supreme Court:

1. Can the Utah Legislature expressly revive time-barred claims through a statute?

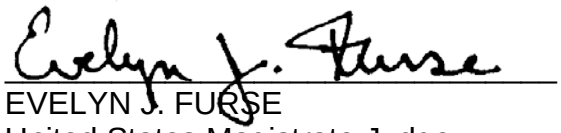
2. Specifically, does the language of Utah Code section 78B–2–308(7), expressly reviving claims for child sexual abuse that were barred by the previously applicable statute of limitations as of July 1, 2016, make

unnecessary the analysis of whether the change enlarges or eliminates vested rights?

The Court ORDERS the Clerk of the United States District Court to transmit a copy of this certification to the parties and shall submit to the Utah Supreme Court a certified copy of this certification. Should the Utah Supreme Court determine that it requires any portion of the record, this Court orders the Clerk of the United States District Court to transmit the requested documents.

DATED this 1st day of June, 2017.

BY THE COURT:



EVELYN J. FURSE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

TERRY MITCHELL, Plaintiff, v. RICHARD WARREN ROBERTS, Defendant.	**MEMORANDUM DECISION AND ORDER TO SUBMIT PROPOSED QUESTION FOR CERTIFICATION** Case No. 2:16-cv-00843-EJF Magistrate Judge Evelyn J. Furse

Defendant Richard Warren Roberts moves the Court[1] to dismiss Plaintiff Terry Mitchell's Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which this Court can grant relief. (Def. Richard W. Roberts' Mot. to Dismiss the Compl. ("Mot."), ECF No. 9.) Mr. Roberts argues the statute of limitations bars Ms. Mitchell's claims. (Mot. 2, ECF No. 9.) Ms. Mitchell maintains Utah Code section 78B-2-308 as amended on May 10, 2016 revives her time-barred claims. (Pl.'s Mem. in Opp'n to Mot. to Dismiss ("Opp'n") 2, ECF No. 12.) Having reviewed the parties' briefing on Mr. Roberts's Motion to Dismiss, the Court concludes Utah law remains unclear as to whether the legislature may expressly revive time-barred claims. Accordingly, this Court finds certification of the state law questions presented by this case to the Utah Supreme Court pursuant to Rule 41 of the Utah Rules of Appellate Procedure appropriate.

[1] The parties have consented to proceed before the undersigned Magistrate Judge in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73. (ECF No. 22.)

Mr. Roberts cites *State v. Apotex Corp.*, 2012 UT 36, 282 P.3d 66, for the proposition that the legislature cannot expressly revive time-barred claims. (Mot. 10, ECF No. 9.) However, in *Apotex*, the Utah Supreme Court did not address whether the statute in question contained an express declaration of retroactivity, despite the State's raising the issue. 2012 UT 36, ¶¶ 63–67.

Historically, Utah courts have considered "[t]wo rules of statutory construction . . . relevant to" retroactive operation. *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997). "One is the 'long-standing rule of statutory construction that a legislative enactment which alters the substantive law . . . will not be read to operate retrospectively unless the legislature has clearly expressed that intention.'" *Id.* (quoting *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1998)). "The second relevant rule of statutory construction, which is often referred to as an exception to the first, permits retroactive application 'where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights' without enlarging or eliminating vested rights.'" *Id.* at 437–38 (quoting *Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995)). "Traditionally, [the Utah Supreme Court has] begun [its] analysis by applying the first rule of statutory construction: Only when [it] conclude[s] that retroactive application is not permitted under that rule do[es] [it] consider whether the second rule of construction permits retroactive operation." *Id.* at 438.

Whether the *Apotex* decision abrogated the two-part test or merely skipped the first part of the test because the statute in question did not necessarily include a clear statement of retroactivity remains unclear. Because Utah Code section 78B-2-308(7) expressly authorizes retroactive application, the first part of the traditional test would apply, and the Court would not consider whether the retroactive application affects vested rights. Therefore, whether the Utah

Supreme Court intended to abandon the first part of the test becomes central to the determination of this case.

Further, the Utah Supreme Court reiterated the two-part test one year after *Apotex* in *Waddoups v. Noorda*, 2013 UT 64, 321 P.3d 1108, making the effect of *Apotex* on the two-part test even more in doubt. In *Waddoups*, the court states that "[l]aws that 'enlarge, eliminate, or destroy vested or contractual rights' are substantive and are barred from retroactive application absent express legislative intent." 2013 UT 64, ¶ 8, (quoting *Brown & Root Indus. Serv. v. Indus. Comm'n*, 947 P.2d 671, 675 (Utah 1997)). However, the Utah Supreme Court did not apply the first part of the traditional test because the statute at issue did not expressly address retroactivity. *Id.* ¶¶ 9–10. Thus, the statement of the first part of the test remains dicta. Further, the court never mentions *Apotex*. Accordingly, this Court finds the applicable state of the law uncertain.

Under Utah Rule of Appellate Procedure 41(a), "[t]he Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States . . . if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain." The Court ORDERS the parties to file a proposed "question [or questions] of law to be answered" by the Utah Supreme Court. Utah R. App. P. 41(c)(1)(A). The parties shall submit either a stipulated question(s) or individual proposed questions within fourteen (14) days from the date of this Order. Within fourteen (14) days from the date of that filing, counsel should file any opposition to the framing of the proposed question or questions filed by opposing counsel if the parties cannot reach a stipulation.

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DATED this 21st day of April, 2017.

BY THE COURT:

EVELYN J. FURSE
United States Magistrate Judge

Addendum No. 4

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

TERRY MITCHELL, Plaintiff, v. RICHARD WARREN ROBERTS, Defendant.	**MEMORANDUM DECISION AND ORDER TO SUBMIT PROPOSED QUESTION FOR CERTIFICATION** Case No. 2:16-cv-00843-EJF Magistrate Judge Evelyn J. Furse

Defendant Richard Warren Roberts moves the Court[1] to dismiss Plaintiff Terry Mitchell's Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which this Court can grant relief. (Def. Richard W. Roberts' Mot. to Dismiss the Compl. ("Mot."), ECF No. 9.) Mr. Roberts argues the statute of limitations bars Ms. Mitchell's claims. (Mot. 2, ECF No. 9.) Ms. Mitchell maintains Utah Code section 78B-2-308 as amended on May 10, 2016 revives her time-barred claims. (Pl.'s Mem. in Opp'n to Mot. to Dismiss ("Opp'n") 2, ECF No. 12.) Having reviewed the parties' briefing on Mr. Roberts's Motion to Dismiss, the Court concludes Utah law remains unclear as to whether the legislature may expressly revive time-barred claims. Accordingly, this Court finds certification of the state law questions presented by this case to the Utah Supreme Court pursuant to Rule 41 of the Utah Rules of Appellate Procedure appropriate.

[1] The parties have consented to proceed before the undersigned Magistrate Judge in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73. (ECF No. 22.)

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Supreme Court intended to abandon the first part of the test becomes central to the determination of this case.

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Under Utah Rule of Appellate Procedure 41(a), "[t]he Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States . . . if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain." The Court ORDERS the parties to file a proposed "question [or questions] of law to be answered" by the Utah Supreme Court. Utah R. App. P. 41(c)(1)(A). The parties shall submit either a stipulated question(s) or individual proposed questions within fourteen (14) days from the date of this Order. Within fourteen (14) days from the date of that filing, counsel should file any opposition to the framing of the proposed question or questions filed by opposing counsel if the parties cannot reach a stipulation.

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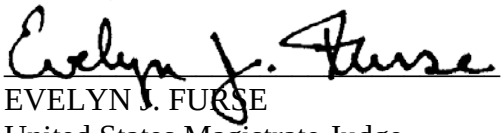
DATED this 21st day of April, 2017.

BY THE COURT:



EVELYN J. FURSE
United States Magistrate Judge

CERTIFICATE OF SERVICE

I, Ross C. Anderson, certify that on August 7, 2017, an original of **PLAINTIFF TERRY MITCHELL'S BRIEF IN SUPPORT OF AN AFFIRMATIVE ANSWER TO QUESTIONS CERTIFIED BY THE UNITED STATES DISTRICT COURT** and ten bound copies were filed with the Clerk of the Utah Supreme Court. Each of the following was served with two copies by U.S. mail and a copy by email:

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