No. 20170447-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

TERRY MITCHELL,
Plaintiff,
v.
RICHARD WARREN ROBERTS,
Defendant.

PLAINTIFF TERRY MITCHELL'S RESPONSIVE 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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Plaintiff Terry Mitchell ("Mitchell"), when she was a vulnerable sixteen-year old, suffered sexual abuse at the hands of Defendant Richard Roberts ("Roberts"). At the time of the abuse, Roberts was a Department of Justice attorney prosecuting Joseph Paul Franklin, the murderer of two of Mitchell's friends. Mitchell was unable to confront Roberts and seek justice until after the statute of limitations had run, in part because of Roberts's manipulations, coercion, and threats. However, the Utah Legislature provided a window of opportunity for some semblance of justice and accountability, allowing for time-barred claims of child sexual abuse to be brought. Utah Code § 78B-2-308 ("H.B. 279").

After the havoc he has wrought on the lives of others, Roberts contends that perpetrators of child sexual abuse, as well as the families of those perpetrators, should be able to "organize their lives and put the past behind them,"[1] without ever facing their victims in court and being held to account. Now that he himself stands to be judged, Roberts urges this Court to invalidate the revival statute. He does so without any constitutional analysis,

[1] Brief of Richard Warren Roberts ("Roberts Brief"), at 11.

by relying on dicta from a few court cases, and ignoring the overwhelming body of law requiring the courts to give effect to Utah's revival statute. Roberts would have the Court exercise a judicial veto, declaring that the right to rely on a statute of limitations defense is so sacrosanct that it is wholly beyond the power of the Legislature, more important even than what this Court has held to be "fundamental" rights.

Roberts's views on the law are entirely wrong. Utah law is settled that the Legislature may retroactively enlarge, impair, or eliminate "vested rights," so long as the Legislature clearly expresses that intention. The Certified Questions result from one anomalous case from this Court—contradicted by cases both before and after it was issued—which held, on an issue that was barely briefed, that a statute could not be applied retroactively if it eliminated a "vested right."

Our system of government, with a separation of powers, requires that the judiciary refrain from contradicting the express will of the Legislature unless it is in irreconcilable conflict with a constitutional limitation. Nothing in the United States or Utah Constitutions limits the ability of the Legislature to allow the victims of child sexual abuse to have a renewed chance to seek justice. Where the Legislature has carefully evaluated the interests of victims

of child sexual abuse and defendants to determine that a revival of time-barred claims is necessary, the statute passes any test of constitutionality articulated by this Court.

ARGUMENT

I. Unredressed Child Sexual Abuse Presents a Compelling Need for the Revival of Time-Barred Claims.

"Until recently the sexual abuse of children was the perfect crime. The perpetrator was fairly guaranteed that he would never be caught or successfully prosecuted. Now women—and men—have begun to use the courts to hold them accountable . . . ." Erin Khorram, *Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes Are Legal*, 16 U.C. Davis J. Juv. L. & Pol'y 391, 425 (2012) (hereinafter "Khorram, *Crossing the Limit Line*") (citation omitted) (quoting Harvard psychiatrist Judith Herman).

Our nation is faced with an urgent public policy crisis of the tragic sexual abuse of children. *See, e.g.*, Richard Wexler, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 79 (1995) ("The lowest numbers one can reasonably come up with still leave . . . every year . . . more than 100,000 sexually abused."). While the "sexual abuse of children is a

tragic and increasingly common issue today . . . . even more tragic and increasingly common is the issue of adults who suffered sexual abuse as children and are coping with it in their adult lives." Heidi L. Neuendorf, *The Judicial Impediment on Legislative Lawmaking in* Stratmeyer v. Stratmeyer, 44 S.D. L. Rev. 115, 123 (1999).

Because many victims of child sexual abuse require decades before they are able to "pull their lives back together and find the strength to face what happened to them," Utah Code Ann. § 78B-2-308(1)(b), many states have enacted legislation providing a "window" of time allowing victims to pursue claims of child sexual abuse that were previously time barred. Those states include California,[2] Delaware,[3] Georgia, GA Code § 9-3-33.1(d)(1) (2015), Hawaii, Haw. Rev. Stat. § 657-1.8(b), and Minnesota, Minn. Stat. Ann. § 541.073.[4] (Guam has also passed such a statute, 2011 Guam Public Law 31-

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[2] *Quarry v. Doe I*, 272 P.3d 977, 986 (Cal. 2012) (recognizing the validity of a statutory "window" to pursue a claim that "otherwise would be time-barred" if the Legislature provides "express language of revival").

[3] *Sheehan v. Oblates of St. Francis De Sales*, 15 A.3d 1247, 1258–60 (Del. 2011) (holding the revival of intentional tort claims otherwise time barred to be valid, "leaving any desirable changes to the General Assembly").

[4] Minnesota's statute was subsequently amended. The version reflecting the revival of time-barred claims can be viewed at https://www.westlaw.com/Document/I66C7973D521548DABFD4A0CAF9C4DE3A/.

7). Utah joined that list of states because the Legislature sought "to move into the good category nationally in how we protect children from this heinous act of the sexual abuse of children."[5]

The Utah Legislature recognized that the short time previously available for victims of child sexual abuse to commence a civil action was a mistake. The previous short statute of limitations failed to provide a reasonable time for victims to pursue justice, causing countless victims to lose any opportunity for recourse to the courts. The single purpose of H.B. 279 is to revive that remedy, to fix the mistake of prior legislation.[6] The principle is well recognized that retroactive legislation "might be needed if the old law . . . has produced undesirable effects. . . . Retroactive lawmaking provides legislators with a potentially valuable tool to attain social and political goals." Jan G. Laitos, *Legislative Retroactivity*, 52 Wash. U. J. Urb. & Contemp. L. 81, 99 (1997) (hereinafter "Laitos, *Legislative Retroactivity")*.

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[5] Statement of Representative Ken Ivory during the House Floor Debate on February 26, 2016, on House Bill 279 (Substitute 2), which 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&20meta_id=622136ht. A transcript of that House Floor Debate is at Pl.'s Mem. Opp'n, "Ex. 1," App. "A", ECF No. 12–4.

[6] Pl. Terry Mitchell's Br. in Supp. of an Affirmative Answer to Questions Certified by the United States District Court ("Mitchell Brief"), at 23–24.

"Our laws are faced with the discord between finality and justice, and the statutes of limitation seek to find that balance. However, striking a perfect balance is impossible." Khorram, *Crossing the Limit Line*, 397. Statutes of limitations are intended to bar those who are "neglectful of their rights" or "who fail to use reasonable and proper diligence in the enforcement thereof," but "[i]t is not the policy of the law to unjustly deprive one of his remedy." *Id.* at 398 (quoting *Evans v. Eckelman*, 265 Cal. Rptr. 605, 610 (Cal. Ct. App. 1990) (*quoting Manguso v. Oceanside Sch. Dist.*, 52 Cal. Rptr. 27, 30 (Cal. Ct. App. 1979))).

In certain cases, such as with H.B. 279, the fundamental policies underlying statutes of limitation do not apply or are counter-balanced by principals of fairness and justice requiring that a plaintiff not be deprived of her remedy. In contrast to the general rule that the law should provide guidance so that the governed may conform their actions to the law, there is no principled objection to the revival of time-barred claims where defendants have never made choices in reliance on the statute of limitations and where many tort victims are unable to bring timely claims due to no fault of their own.

A. Revival of Time-Barred Claims Is Fair and Just Where, as With H.B. 279, Many Tort Victims Are Unable to Assert, or Are Intimidated Against Asserting, Their Rights.

Statutes of limitation encourage victims to promptly bring their claims. However, equitable considerations may justify tolling or extending the statute of limitations where some factor outside many victims' control, such as the pressure and intimidation by many tortfeasors, prohibits the prompt filing of a claim. The Legislature explicitly found that "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[.]" Utah Code Ann. § 78B-2-308(1)(b). The Legislature also recognized the unequal balance of power between adults and children and the role many tortfeasors, like Roberts,[7] play in preventing the victim to pursue justice and

[7] Mitchell described how she was pressured by Roberts to remain silent:

> Defendant Roberts maintained the secrecy of his abuse by using intimidation, deception, artifice, and the coercive, victim-blaming threat to Mitchell that if anyone discovered Defendant Roberts was engaging in sex acts with Mitchell, then a mistrial [in the trial of Joseph Paul Franklin for the murder of Mitchell's two friends] would occur. That threat continued for months after the trial, communicated repeatedly by Defendant Roberts in telephone conversations initiated by Defendant Roberts with Mitchell. Based on Defendant Roberts's assertions that people would see it as Mitchell's fault, and because of her prior horrendous experiences with the news media and with members

accountability, finding "the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to ensure silence." Utah Code Ann. § 78B-2-308(1)(d).

The Legislature has taken a clear stance that Utah's public policy is to refrain from blaming or penalizing victims of child sexual abuse for their frequent inability to promptly bring a civil action. It is not the children's fault.[8] Rather, the public policy properly determined by the Utah Legislature

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> of the community, Mitchell believed that she would be blamed if there were a mistrial.

Complaint (Dkt. 2), ¶ 24.

[8] Statutes of limitations are "predicated on the reasonable and fair presumption that valid claims which are of value are not usually left to gather dust or remain dormant for long periods of time." In cases of childhood sexual abuse, in which resulting injury may go unrealized for many years, this "reasonable and fair presumption" is neither valid nor just.

Kelly v. Marcantonio, 678 A.2d 873, 885 (R.I. 1996) (Lederberg, J., concurring in part and dissenting in part) (citations omitted).

> [W]e must recognize that children's access to legal recourse is limited at best. First, the child has to recognize what is happening is wrong. Second, the victim needs to be willing to come forward and tell someone about the abuse before any action can proceed, and unfortunately, many children are ashamed and embarrassed about the sexual abuse and, thus, are hindered from coming forward.

Khorram, *Crossing the Limit Line,* 407–08.

is that, as a matter of fairness and justice, all victims of child sex abuse must be allowed a fair opportunity to pursue their claims.

Where, as with H.B. 279, the Legislature has found that tort victims' inability to promptly pursue their claims is not due to "sleeping on their rights" or a failure to use reasonable diligence in pursuing their claims and that principles of fairness and justice weigh in favor of the revival of time-barred claims. Although Roberts expounds for five pages in the Roberts Brief, at 10–15, about the terrific benefits of statutes of limitations, he fails to recognize that the Utah Legislature has made the policy determination that there shall be *no* statute of limitations for civil actions for child sexual abuse. Utah Code Ann. § 78B-2-308(3)(a). Roberts also fails in his policy arguments to acknowledge that such a policy determination is for the Legislature, not the courts, to make.[9]

[9] *Carter v. Lehi City*, 269 P.3d 141, 155 (Utah 2012) ("Judicial decisions . . . are generally focused on interpreting the policy decisions of the legislature—not on making those decisions in the first place—and applying them to the facts of an individual case as found by the court."). *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them.").

B. Revival of Time-Barred Claims Is Fair and Just Where, as With H.B. 279, Defendants Do Not Make Choices in Reliance on the Law.

Mitchell does not contend the Legislature should *arbitrarily* upset reasonable expectations of consistency and finality in the law. But those concerns are not present with H.B. 279. No one insures against child sexual abuse, and employers will not be found liable because the window of revival does not apply to claims of vicarious liability.[10] And, certainly, there was nothing *arbitrary* whatsoever in what the Utah Legislature conscientiously did to protect victims of child sexual abuse.

Decisions relating to child sexual abuse are quite unlike decisions relating to contracts. Roberts, because he sexually abused Mitchell many years ago when she was 16 years old, is put in a less advantageous position by the retroactive effect of H.B. 279, but he has not detrimentally relied on the law in the sense of being "deprived of anything for which he bargained or in the expectation of which he otherwise made substantial commitments." W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Cal. L. Rev. 216, 226 (1960). The policy of this State is not to

[10] *See infra*, at 12–13.

permit decisions relating to the sexual abuse of a child to be made in reasonable reliance on the limited number of years that victims, who are frequently reticent or unable to pursue their legal claims, will have to pursue a civil remedy.

C. The Legislature Has Decided Any Interest in a Defendant's Reliance on the Statute of Limitations Is Outweighed by the Interests of Child Victims.

Roberts attempts to argue, broadly, that statutes of limitation are important to prevent the litigation of stale claims, that it is necessary to have limits to prevent unfair results, and that all potential claims must come to an end. Roberts Brief at 10–14. First, those policy arguments do not help answer the certified questions, which seek clarification regarding the power of the Legislature and the proper analysis for construction of statutes that contain express legislative intent to affect vested rights. More importantly, Roberts's extensive policy arguments about the interests served by statutes of limitations widely miss the mark where the claim underlying the controversy is a claim of child sexual abuse, with respect to which the Utah Legislature has determined there should be *no statute of limitations*. Utah Code Ann. § 78B-2-308(3)(a). The Legislature could not have been more clear in articulating the policy of Utah that fairness and justice dictate that, in the

case of civil actions for child sexual abuse, the right of defendants to rely on the statute of limitations is outweighed by the right of victims of child sexual abuse to pursue their claims.

Similarly, Roberts's arguments that defendants' "insurers, employers, and families" rely on the finality of statutes of limitation has no bearing on statutes like H.B. 279. Insurance policies normally provide exclusions of coverage for intentional torts committed by the insured and, even in the absence of such an exclusion, strong authority provides that such coverage would be against public policy. *See, e.g., Agora Syndicate, Inc. v. Levin*, 977 F. Supp. 713, 716 (E.D. Pa. 1997); *Chiquita Brands Int'l, Inc. v. Nat'l Union Ins. Co.*, 988 N.E.2d 897, 900 (Ohio 2013); *State Farm Fire & Cas. Co. v. Harbert*, 741 N.W.2d 228, 238 (S.D. 2007); *Padilla v. Wall Colmonoy Corp.*, 145 P.3d 110, 115 (N.M. 2006), *as revised* (Oct. 31, 2006); *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1007 (Fla. 1989).

Employers will also not be liable for claims revived by H.B. 279, which may be brought only against "a living person who . . . intentionally perpetrated the sexual abuse [or] . . . would be criminally responsible for the sexual abuse . . . ." Utah Code Ann. § 78B-2-308(6)(a), (7). In addition to the limitation in the text of the statute, Roberts's employer at the time of his

sexual abuse of Mitchell, the United States Department of Justice, does not face any potential liability for that sexual abuse because Roberts's abuse of Mitchell could not be considered to be within the course of his employment. *See Shirley v. United States*, 232 Fed. Appx. 419, 420 (5th Cir. 2007) ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents and employees who act *within the scope of their employment* 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" (emphasis added)); *Clark v. Pangan*, 2000 UT 37, ¶¶ 20–21, 998 P.2d 268 (for intentional torts in Utah to be committed within the scope of employment: "the employee's conduct must (1) 'be of the general kind the employee is employed to perform,' (2) 'occur within the hours of the employee's work and the ordinary spatial boundaries of the employment,' and (3) 'be motivated, at least in part, by the purpose of serving the employer's interest.'" (quoting *Birkner v. Salt Lake Cty.*, 771 P.2d 1053, 1056–57 (Utah 1989))).

Roberts's appeal to the interest of family members of defendants against whom claims of child sexual abuse are made is the least compelling.

Roberts argues that, without a statute of limitations, defendants and their families may not be able to "organize their lives and put the past behind them." Roberts Brief at 11. Roberts's argument is a perverse reversal of the victimization addressed by H.B. 279, where the Legislature recognized that *victims* of child sexual abuse "take[ ] decades to pull their lives back together and find the strength to face what happened to them." Utah Code Ann. § 78B-2-308(1)(b).[11]

II. The Notion of Inviolable "Vested Rights" Is an Outdated Vestige of the Nineteenth Century That Has Been Replaced with Substantive Due Process Analysis.

[11] Mitchell's case is a classic example of why child sexual abuse cases often take so long to pursue:

> On November 20, 2013, hours after the execution of Franklin, Defendant Roberts sent two emails to Mitchell from his judicial chambers and from his United States District Court email address after many years of no communications between them. This event was extremely troubling and traumatizing to Mitchell, causing her to focus on memories she had tried to keep out of her mind because they caused so much pain, feelings of self-blame, shame, humiliation, anger, confusion, and anguish, triggering migraine headaches (some lasting for a few weeks), night terrors, relationship problems, and cognitive difficulties.

Complaint (Dkt. 2), ¶ 31.

In an opinion published in 1814, Justice Story addressed whether a statute should be invalidated under the proscription against retroactive laws in New Hampshire's Bill of Rights, N.H. Bill of Rights, article 23 ("[R]etrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offences."). Justice Story penned the construction of "vested rights" that would influence the Supreme Court for over a century:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . .

Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814). However, "[b]y the middle of the Twentieth Century, the Supreme Court had largely abandoned the strict *Wheeler* rule." Laitos, *Legislative Retroactivity*, 111. "Instead, the Supreme Court simply determined whether the retroactivity was inconsistent with . . . the Due Process, Contracts, and Takings clauses" under a rational basis review. *Id.* at 111-12. Thus, the pertinent question became "not the effect of the retroactive law on a 'vested right,' . . . but whether retroactivity was a useful means of carrying out the goal of the law." *Id.* at 112. *See also* W. David Slawson, *Constitutional*

and Legislative Considerations in Retroactive Lawmaking, 48 Cal. L. Rev. 216, 248–49 (1960) ("In treating vested-rights retroactive legislation in general . . . the Supreme Court has commonly accorded the legislative judgment of social need the same high degree of credence that is characteristic of all substantive due-process adjudications . . . . [T]here seems to be little doubt at the present time that legislation can impair or remove accrued rights of action to the same extent that it can impair or destroy other property rights.").

The *Wheeler* rule was abandoned because it provided "an excessive exercise of judicial power" and "both commentators and courts believed that the term 'vested right' was conclusory, and not helpful in predicting whether a law could be applied [retroactively] to an existing interest." Laitos, *Legislative Retroactivity*, 111 (citing John Scurlock, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 6 (1953)).

For the same reasons, this Court should decline to revive the anachronistic, decrepit doctrine that affecting "vested rights" is beyond the

power of the Legislature.[12] Indeed, this Court has *already held*, almost uniformly, that enlarging, diminishing, or eliminating "vested rights" is well within the Legislature's power. *See, e.g.*, *Waddoups v. Noorda*, 2013 UT 64, ¶ 8, 321 P.3d 1108 ("Laws that 'enlarge, eliminate, or destroy vested or

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[12] Roberts argues that decisions in five other states support the view that "vested rights" protect against legislative revival of time-barred claims, Roberts Brief at 29–30, n.17, but misleadingly fails to note the following:
(1) *Green v. Karol*, 344 N.E.2d 106, 112 (Ind. Ct. App. 1976), addressed a statute that had *no expression of intent that the statute had retroactive effect*. Instead, the court dealt merely with an amended statute of limitations that provided a longer time. *Id.* (The "statute of limitation was amended as follows: 'Action under this section shall be commenced within two . . . years after discovery by the person bringing the action of a violation of this act . . . and not afterwards. . . .'" (quoting Ch. 190, s 3, (1969) Ind. Acts 541 (amended 1975))).
(2) *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W.3d 850, 855 (Ky. 2003), determined the statute at issue did not impair a vested right.
(3) *Angell v. Hallee*, 92 A.3d 1154, 1157 (Me. 2014), addressed the simple lengthening of the time to bring an action, without any expression of legislative intent that the statute was to be applied retroactively or was to revive time-barred claims.
(4) *Overmiller v. D.E. Horn & Co.*, 191 Pa. Super. 562, 572 (1960), merely noted, equivocally, that "had the legislature made any such attempt [to revive claims that had been barred] there is authority to indicate that it would be unconstitutional." That statement was based on *Stewart v. Keyes*, 295 U.S. 403, 417 (1935), a case dealing with whether the lifting of the bar of a statute of limitations in "an attempt *arbitrarily* to take [real or personal] property from one having a perfect title and to subject it to an extinguished claim of another" would be "to deprive him of his property without due process of law" (emphasis added).

contractual rights' are substantive and are barred from retroactive effect *absent express legislative intent*." (emphasis added)); *Roark v. Crabtree*, 893 P.2d 1058, 1061 (Utah 1995) ("'It is a longstanding 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*.'" (quoting *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1988)) (emphasis added)); *Ireland v. Mackintosh*, 61 P. 901, 904 (Utah 1900) (Statutes "will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed; . . . .").

III. The Notion of Inviolable "Vested Rights" Is Entirely Inconsistent With the Longstanding Rule in Utah Law That the Legislature May Enlarge, Diminish, or Eliminate "Vested Rights" Where, as in H.B. 279, the Legislature Clearly Expresses Such Intent.

Contrary to Roberts's arguments, there is not one Utah case, other than the aberrational *State v. Apotex*, 2012 UT 36, 282 P.3d 66, holding that, even where a "vested right" is enlarged, diminished, or eliminated, the courts may disregard an expressed legislative intention that a statute is to be applied retroactively.[13] The inescapable fact is that nearly all relevant Utah

[13] Roberts cites to only two cases in which he maintains the Utah Legislature stated its intent to revive a plaintiff's time-barred claim and the courts

cases for over 115 years have held that a clear expression of legislative intent regarding retroactivity must control.

Ignoring more than 115 years of Utah case law *affirming* the power of the Utah Legislature to enlarge, diminish, or eliminate "substantive" or "vested" rights by retroactive legislation when the Legislature clearly

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disregarded that intent. In *Hyland v. Dixie State Univ.*, the court noted that "Utah law codifies the presumption that '[a] provision of the Utah Code is not retroactive, *unless the provision is expressly declared to be retroactive*.'" 2:15–CV–36 TS, 2017 WL 2123839, at *2 (D. Utah May 16, 2017) (unpublished) (emphasis added). According to Roberts, in *Hyland,* "[t]he Utah Legislature could not have been clearer in stating its intent to revive plaintiff's claim . . . ." Roberts Brief at 36. That flies directly in the face of the court's finding in *Hyland* that "[h]ere, there is *no expression of retroactivity* in the amendment, so retroactivity depends on whether the amended portions are procedural or substantive, and whether they enlarge or eliminate vested rights." *Id.* at *2 (emphasis added).

Apotex is the only other case to which Roberts points, Roberts Brief at 35, for the notion that courts can disregard an expressed legislative intent that a statute is to be applied retroactively. There, this Court described the lower court's conclusion, noting that "the amendments expanded the limitations period and expressly provided for the new limitations period to be retroactive." 2012 UT 36, ¶ 14. However, there was no discussion in *Apotex* about the power of a court to disregard an expressed intention of the Legislature concerning how a statute is to be applied or of any notion of judicial review that would permit such a disregard of a legislative enactment, particularly with no constitutional analysis.

The fact remains that Roberts cannot point to one Utah case, other than *Apotex,* in which a court found there to be a clear expression of legislative intent that a statute was to be applied retroactively and that such intent was to be disregarded by the courts.

expresses its intention that the legislation is to be applied retroactively, Roberts boldly—and erroneously—asserts that this Court has consistently recognized that "the Utah Legislature *lacks* that power."[14] Roberts reaches that erroneous conclusion by cherry-picking phrases from cases that actually *affirm* the power of the Legislature to enact retroactive legislation affecting "vested" rights and by relying on inapposite cases that did not involve any judicial finding of express legislative intent that a statute was to be applied retroactively. A holding, like that sought by Roberts, stating the Utah Legislature is absolutely prohibited from enacting retroactive legislation affecting "vested rights," regardless of the clear expression of the Legislature's intent, would be a wholesale betrayal of the principle of stare decisis and a radical repudiation of modern due process analysis and the principle of separation of power between the judicial and legislative branches.

Roberts maintains there has been no conflict in the law regarding the issues before this Court.[15] The United States District Court ("Federal Court"),

[14] Roberts Brief, at 1.
[15] *Id.* at 1, 3, 5, 9 28, 42.

of course, saw it very differently, leading it to certify two questions of Utah law to this Court.[16]

In this matter the Federal Court was called upon to determine whether the Utah Legislature, which clearly expressed its intention that the statute is to be applied retroactively, has the ability to make governmental policy determinations and enact a statute, Utah Code section 78B–2–308(7), to revive claims of child sexual abuse that were barred, as of July 1, 2016, by a prior statute of limitations.[17] The Federal Court, bound to apply Utah law, found itself in a quandary in light of (1) the aberrational case *State v. Apotex Corp.*, 2012 UT 36, 282 P.3d 66, which, although not addressing the intent of the Legislature, purports to express an absolute prohibition against the revival of time-barred claims simply because a "vested right" is eliminated[18]

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[16] Memorandum Decision and Order to Submit Proposed Question for Certification ("Memorandum Decision") (Dkt. 29); Order of Certification to Utah Supreme Court (Dkt. 37).

[17] Memorandum Decision.

[18] This Court stated in *Apotex*: "The amended UFCA [Utah False Claims Act] cannot resurrect claims that have already expired under the one-year limitations period." 2012 UT 36, ¶ 67, 282 P.3d 66, citing *Roark v. Crabtree* 893 P.2d 1058, 1062 (Utah 1995), which quoted 51 AMJUR 2d *Limitation of Actions* § 44 (1970). The Court apparently found that since "the defense of an expired statute of limitations is a vested right," *id.*, that was the end of the analysis, without even discussing the primary test of legislative intent.

and (2) this Court's several opinions *before Apotex*[19] and *after Apotex*,[20] which all held that the applicable two-part test, to be applied in determining if a statute is to be applied retroactively, is (1) if the Legislature has clearly expressed an intention that substantive law or "vested rights" are to be altered retroactively by a statute, then the statute is to be so applied, and (2) if there has been no expression of legislative intent that a statute is to be applied retroactively, it is to be applied retroactively only if the statute is procedural and does not enlarge or eliminate "vested rights."[21]

A. Several Utah Cases Affirm the Utah Legislature's Authority to Revive Previously Time-Barred Claims When It Expresses Its Intent That a Revival Statute Be Applied Retroactively.

The Hawaii Supreme Court perfectly captured the dynamic in Utah's case law relating to retroactive application of statutes, particularly the revival by statutes of previously time-barred claims: "Although courts often repeat the rule that 'subsequent extensions of a statutory limitation period

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[19] *Madsen v. Borthick*, 769 P.2d 245 (Utah 1998); *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435 (Utah 1997); *Roark v. Crabtree*, 893 P.2d 1058 (Utah 1995).

[20] *Waddoups v. Noorda*, 2013 UT 64, 321 P.3d 1108.

[21] *See* the statement describing the source of the Federal Court's confusion in Mitchell Brief, at 12–13; Memorandum Decision, at 2–3.

will not revive a claim previously barred', the question remains one of legislative intent." *Roe v. Doe*, 581 P.2d 310, 316 (Haw. 1978).

One hundred seventeen years ago, this Court, in *Ireland v. Mackintosh*, described as a "vested right" a defense under a previous statute of limitations in a case involving the attempted collection under a promissory note. 61 P. 901, 904 (Utah 1900). Yet this Court, faced with a question about a possible statutory revival of the previously time-barred claim, stated: "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 . . . .*'" *Id.* (emphasis added) (citing *Potter v. Ajax Min. Co.*, 57 P. 270, 273 (1899) (holding that an attorney's lien statute was not to be retroactively applied *because such intention was not expressed by the legislature in the act*)).

The determining factor in *Ireland* as to whether a time-barred claim had been revived was that "[t]he amendatory act of March 20, 1897, neither by its expressed terms nor by intendment shows that the legislature intended to revive causes of action which had before the passage of that act become barred." 61 P. at 904. In *Ireland*, this Court applied the very two-part test

constituting the historical Utah rules,[22] as described by the Federal Court in this case: First, did the Legislature express its intention that the statute be applied retroactively to revive time-barred claims? If *not*, is the right "vested"?

If the Legislature has *not* expressed its intention the right is to be altered by retroactive application of a statute, *and* if the right is "vested," then, and only then, retroactive application of the statute is prohibited. Conversely, even if a "vested right" would be affected, if the Legislature expressed its intent a statute is to be applied retroactively and a previously time-barred claim revived, then the courts are to apply the statute retroactively.

> We are clearly of the opinion–First, that it was not the intention of the legislature to revive causes of action on claims which had previously become stale, and against which the statute had fully run; and, second, that, when appellant's right of action on the note in question became barred under the previous statute, the respondent acquired a vested right, in this state, to plead that statute as a defense and bar to the action.

Id. (Emphasis added.)

[22] Memorandum Decision, at 2.

This Court did not say that a "vested right" was somehow untouchable and not subject to alteration by the Legislature, even where the Legislature expressed its intention that a statute would affect that right. The holding of *Ireland* is that since it was a "vested right," it was not affected by retroactive application of a statute *because the Legislature did not intend to revive a time-barred claim by retroactive application of the new statute. Id.*[23]

In *Roark v. Crabtree*, 893 P.2d 1058 (Utah 1995), this Court considered whether a new statute allowing the filing of a civil action for child sexual abuse within four years after discovery of the abuse could be applied retroactively to revive previously time-barred claims. The two-part test applied in *Roark*—which is the same test applied nearly uniformly in Utah cases addressing whether to apply *any* statute retroactively—was, first, to inquire as to the potentially dispositive issue of "legislative intent" regarding retroactive application of the new statute, then, second, *only after*

[23] Two cases cited by Roberts for the notion that a statute increasing the period of limitation cannot revive a previously time-barred claim are *In re Swan's Estate*, 79 P.2d 999, 1002 (Utah 1938), and *Greenhalgh v. Payson City*, 530 P.2d 799, 802 (Utah 1975). Both of those cases rely on *Ireland*, which, again, recognized that the expression of legislative intent is dispositive as to the question of whether a statute revives time-barred claims. Also, neither of those cases dealt with an expression by the Utah Legislature of its intention that previously time-barred claims should be revived.

finding there was no legislative intent to apply the new statute retroactively, to analyze whether the new statute was "procedural" or whether it "enlarges, eliminates, or destroys vested or contractual rights." *Id.* 1061–62.

Even the structure of the *Roark* opinion makes clear the primary test of legislative intent and the secondary test to be applied if there is no expression of legislative intent. The first section of the discussion under the heading "RETROACTIVE APPLICATION OF SECTION 78–12–25.1" is entitled "*Legislative Intent*". *Id.* at 1061. There this Court stated the primary rule as follows:

> "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*." *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1988) (citing *Schultz v. Conger* 755 P.2d 165, 166 (Utah 1988); *Stephens v. Henderson*, 741 P.2d 952, 953–54 (Utah 1987); *Pilcher v. State*, 663 P.2d 450, 455 (Utah 1983); *State v. Higgs*, 656 P.2d 998, 1000 (Utah 1982); *Union Pac. R.R. v. Trustees, Inc.*, 8 Utah 2d 101, 104, 329 P.2d 398, 399 (1958); *McCarrey v. Utah State Teachers' Retirement Bd.*, 111 Utah 251, 253, 177 P.2d 725, 226 (1947); *In re Ingraham's Estate*, 106 Utah 337, 339, 148 P.2d 340, 341–42 (1944); *Farrel v. Pingree*, 5 Utah 443, 448, 16 P. 843, 845 (1888)). This rule of construction is codified in Utah Code Ann. § 68–3–3.

Id. (emphasis added). This Court then determined that the Legislature did not intend the statute would be applied retroactively. *Id.* at 1061–62.

After finding there was no legislative intent that the statute should be applied retroactively, the Court then proceeded to determine whether the statute "changes only procedural law" (under which circumstances the statute would be applied retroactively, regardless of legislative intent) or whether the "statute enlarges, eliminates, or destroys vested or contractual rights." *Id.* at 1062. The Court then held that reliance on the running of a statute of limitations is a "vested right"—the very label given to the category of rights that *can* be affected by a legislative enactment when, under the primary test of "legislative intent," "the legislature has clearly expressed [the] intention" that a statute "be read to operate retrospectively." *Id*. at 1061. *Roark* makes clear that the question as to whether a statute affects "vested rights" is relevant only if there is *no legislative intent* that a statute is to be applied retroactively.

This Court applied the same test in *State v. Lusk*, 2001 UT 102, 37 P.3d 1103, without noting the possible ex post facto implications in criminal cases. In *Lusk*, this Court considered whether a longer statute of limitations revived a previously time-barred criminal charge of aggravated sexual abuse of a child. *Id.* ¶ 25. Immediately following the statements in *Lusk* relied upon by

Roberts,[24] the following crucial paragraph, wholly ignored by Roberts, was emphasized by this Court:

> "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*. *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1988); *accord Evans & Sutherland Computer Corp. v. State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997); *Roark v. Crabtree*, 893 P.2d 1058, 1061 (Utah 1995). Nevertheless, *where such specific legislative is absent*, a statute may be applied retroactively if it is procedural in nature and does not enlarge or eliminate vested rights. *Evans & Sutherland*, 953 P.2d at 437–38; *see also Brown & Root Indus. Serv. v. Indus. Comm'n*, 947 P.2d 671, 675 (Utah 1997); *State ex rel. Kirby v. Jacoby*, 1999 UT App 52, ¶ 10, 975 P.2d 939.

Id. ¶ 27 (emphasis added).

The only meaning that can be attributed to that paragraph is that, absent express legislative intent that a statute is to be applied retroactively, it will still be applied retroactively if "it is procedural in nature and does not enlarge or eliminate vested rights." Further, if there *is* a statement of legislative intent that the statute is to be applied retroactively, it shall be given that application even if it "alters the substantive law or affects vested rights." *Id. See also Lucero v. State,* 2016 UT App 50, ¶ 10, 369 P.3d 469.

[24] Roberts Brief, at 21.

B. When the Utah Legislature Clearly Expresses Its Intent That a Statute Be Applied Retroactively, Utah Law Uniformly Calls for the Retroactive Application, Even Where Substantive or Vested Rights May Be Enlarged, Diminished, or Eliminated.

One hundred eighteen years ago, this Court stated in *Potter v. Ajax Min. Co.*, 57 P. at 273 (1899), that, in determining whether a statute is to be applied retroactively, the intent of the Legislature is the determinative factor, under both the common law and the statutory law:

> At common law the rule was that a statute is never to be construed to operate retrospectively, *unless such intention is clearly expressed in the act*. Section 2490, Rev. St., expressly provides that no part of the Revised Statutes is retroactive, *unless expressly so declared*.

57 P. at 273 (emphasis added).

Although this Court has, at times, expressed that vested rights cannot be affected by retroactive application of legislation, the primacy of legislative intent in determining whether a statute affecting "substantive" or "vested" rights has been consistently recognized by Utah courts considering the effect of legislative intent ever since *Potter*. *See* Mitchell Brief, at 7–10, 13–21. The same rule has been applied by the United States Supreme Court and the Tenth Circuit Court of Appeals. *Id.* at 15–16.

IV. The Constitution Is the Only Authority Upon Which This Court May Limit the Power of the Legislature, and Where the Legislature Has Unambiguously Expressed Its Intent, as in H.B. 279, the Role of the Courts Is to Apply Statutes as Written.

The legislative power of the State is vested in the Senate and the House of Representatives, and no person charged with the exercise of judicial power "shall exercise any functions appertaining" to the legislative power. Utah Const. art. 6, § 1; Utah Const. art. V, § 1 (separating powers and noting exception for "cases herein expressly directed or permitted," none of which apply to the Certified Question). Accordingly, absent constitutional infirmity, "[u]nambiguous language in the statute may not be interpreted to contradict its plain meaning." *Bonham v. Morgan*, 788 P.2d 497, 500 (Utah 1989) (citing *Johnson v. State Retirement Board,* 770 P.2d 93 (Utah 1988)); *State ex rel. M.E.P.*, 2005 UT App 227, ¶ 11, 114 P.3d 596, 599 ("Indeed, Defendant's argument essentially asks this court to take on the role of the legislature and insert the term 'overly' into the statute. We cannot do this.").

> [A] legislative act will not be stricken unless the interests of justice require the same because the law is clearly in conflict with that set forth in the constitution.

State v. Bell, 785 P.2d 390, 397 (Utah 1989) (citing *Zamora v. Draper*, 635 P.2d 78, 80 (Utah 1981)). *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519,

538 (2012) ("'Proper respect for a coordinate branch of the government' requires that we strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'" (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883))).

Here, Roberts, seeks to cast the proposition that "expired civil claims cannot be revived by legislation" as a "settled, black letter rule." Roberts Brief at 5. Not only does Utah law stand for exactly the opposite position, but there can be no judicially-created per se, super-judicial-review "black letter rule," providing as sacrosanct and untouchable the "vesting" of a defense of a statute of limitations, bestowing upon the judiciary the power to disregard legislatively expressed policy and statutory law. Hence, where the Utah Legislature clearly expresses its intention, the answer to the certified questions before this Court is yes, the Legislature can indeed revive time-barred claims when it clearly expresses its intent to do so.

V. No Constitutional Provision Prevents the Legislature From Reviving Time-Barred Civil Claims Where the Legislature Expresses Its Intention and the Revival Is Rationally Related to Addressing the Clear Evil of Unredressed Child Sexual Abuse.

"Nothing in the United States or Utah Constitution prohibits retroactive legislation except as to ex post facto laws." *Salt Lake City v. Tax*

Comm'n of State of Utah ex rel. Mountain States Tel. & Tel. Corp., 813 P.2d 1174, 1177 (Utah 1991). "The protection against ex post facto laws applies only to criminal punishment, not civil remedies." *In re Discipline of Ennenga*, 2001 UT 111, ¶ 18, 37 P.3d 1150.[25] Because Utah has no constitutional prohibition against retroactive legislation, the Legislature may even impose retroactive taxes that burden completed transactions. *Garrett Freight Lines v. State Tax Comm'n*, 135 P.2d 523, 526–27 (Utah 1943).

Even where some state constitutions, unlike Utah's Constitution, expressly forbid retroactive legislation, courts may still apply a balancing test to determine whether a retroactive statute is constitutional. *See e.g.*, *Robinson v. Crown Cork & Seal Co.,* 335 S.W.3d 126, 145 (Tex. 2010) ("[I]n determining whether a statute violates the prohibition against retroactive laws in article I, section 16 of the Texas Constitution ["No . . . retroactive law . . . shall be made"], courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest

[25] Roberts resorts to several inapposite criminal cases, involving ex post facto issues, in support of his notion that the Legislature cannot revive previously time barred claims. Roberts Brief at 14, 20–23, 25, 35, 42 (citing *State v. Lusk*, 2001 UT 102, 37 P.3d 1103), 26–27 (citing *State v. Norton*, 675 P.2d 577 (Utah 1983)), 41 (citing *State v. Thurman*, 846 P.2d 1256 (Utah 1983).

served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.").

Without engaging in *any* due process or open courts analysis, Roberts argues that a "vested" right of an expired statute of limitations cannot be taken away by legislation, as if that right is in its own category of being uniquely, absolutely, per se "protected" by the Open Courts Clause and by the Due Process Clause. However, the Legislature has the power to enlarge, diminish, or eliminate many rights implicated by either or both clauses. The analysis is uniformly not *whether*, as an absolute matter, the Legislature can do so, but whether the subject legislation satisfies the applicable constitutional test—a test never even addressed by Roberts.[26] Roberts has utterly failed to address or suggest *any* constitutional analysis.

To undergo any constitutional analysis would concede that, responsive to the first Certified Question, yes, the legislature can, at least in some circumstances (including those at issue here), revive time-barred

[26] In fact, until Roberts's initial Brief in this matter, he never raised any constitutional issue in this matter. *See* Mitchell Brief at 26 and n.18; Plaintiff's Memorandum in Opposition to the Framing by Defendant of the Proposed Question to Be Certified to the Utah Supreme Court (Dkt. 36), at 3–6.

claims. Not only is revival generally within the power of the legislature, H.B. 279, specifically, survives scrutiny under both the Due Process Clause and the Open Courts Clause.[27]

A. The Due Process Clause Allows the Legislature to Diminish or Destroy Vested Rights Where, as in H.B. 279, a Rational Basis Supports a Legitimate Legislative Objective.

Roberts argues, as if it were a per se rule that escapes scrutiny under well-established constitutional analysis, that "[u]nder Utah law, the right to be free, forever, from claims that have expired is a constitutional due process right that cannot be taken away by legislation." Roberts Brief at 31. While Utah case law—which basically parrots "vested rights" language, the genesis of which is from pre-modern-due-process-analysis Nineteenth Century cases—provides that a defendant acquires a "vested right" upon the expiration of the time in which to file a claim, *Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995), that is merely the *starting point* of a due process

[27] Roberts does not argue that any other constitutional provision supports his claim. It bears noting that Utah's Constitution does not contain a prohibition against retroactive legislation. *Compare* Utah Const. art. I § 17 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.") *with, e.g.,* Tex. Const. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.").

analysis. It is certainly not the end or the entirety of the analysis, as Roberts maintains (and as this Court in *Apotex*[28] seems to imply). If the determination that a substantial or vested right were at issue were the end of the analysis, that would mean the right of a man who has engaged in child sexual abuse to plead a statute of limitations defense would be even more essential and primary than what this Court has found to entail *fundamental rights*,[29] which the legislature may impair if there is a compelling state interest and the means are narrowly tailored to achieving that interest. *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 72, 250 P.3d 465, 484 ("A statute that infringes upon [a] 'fundamental' right is subject to heightened scrutiny and is unconstitutional unless it (1) furthers a compelling state interest and (2) 'the means adopted are narrowly tailored to achieve the basic statutory purpose.'" (quoting Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 206 (Utah 1984)).

If the right to plead the defense of the running of a statute of limitations is found to be implicated by the Due Process Clause, then a legislative

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[28] *State v. Apotex Corp.*, 2012 UT 36, ¶ 67, 282 P.3d 66.

[29] For example, this Court has recognized as "fundamental" rights the "right of privacy" and "the right to travel," *In re Boyer*, 636 P.2d 1085, 1087 (Utah 1981); and parental rights, *In re J.P.*, 648 P.2d 1364 (Utah 1982).

infringement of that right would be subject to either the rational basis test or heightened scrutiny, depending on whether the right is characterized as "fundamental." *Judd v. Drezga*, 2004 UT 91, ¶ 30, 103 P.3d 135, 143. Roberts does not characterize the right "to be free from expired claims" as fundamental.[30] And the right to rely on a statute of limitations defense against claims of child sexual abuse *cannot* be a fundamental right. *See* In re Adoption of J.S., 2014 UT 51, ¶ 39, 358 P.3d 1009, 1020 (noting that recognizing a "fundamental right" requires first showing such a right is "'deeply rooted in this Nation's history and tradition,' and in the 'history and culture of Western civilization.'" (quoting *In re* J.P., 684 P.2d 1364, 1375 (Utah 1982)). It is therefore within the power of the Legislature to revive time-barred claims so long as the statute "is rationally related to a legitimate state interest." Gardner v. Bd. of Cty. Comm'rs, 2008 UT 6, ¶ 33, 178 P.3d 893.

[30] Roberts characterizes the right to be free from time-barred claims as being protected by the Open Courts Clause. Roberts Brief at 31–33. "[A]rticle I, section 11 rights are not properly characterized as 'fundamental,' . . . ." *Judd v. Drezga*, 2004 UT 91, ¶ 30, 103 P.3d 135, 143.

No Utah case has analyzed a statute that expressly revives time-barred claims under the Due Process Clause,[31] but other state courts have applied a version of the rational basis test:

> The due process clauses of Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution protect individuals from being deprived of property without due process of law. We have adopted a two-part test to determine whether retroactive statutes comport with due process.
>
> We first determine whether application of the statutes in question to the party challenging the statute actually has a retroactive effect. This inquiry turns on whether the challenging party has a "vested" right. "'The concept of vested rights is conclusory—a right is vested when it has been so far perfected that it cannot be taken away by statute.'"
>
> However, merely "identifying a substantive, or vested, property right is not dispositive for due process purposes." After a vested property right has been identified, we employ the balancing test set forth in *Martin v. Richards,* 192 Wis.2d 156, 531 N.W.2d 70 (1995), which "examines whether the retroactive statute has a rational basis."

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[31] Although *Roark* addressed an argument that the "right to plead a defense of statute of limitations is a vested right which cannot be impaired without denying him due process of law," the Court found no legislative intent that the statute be applied retroactively and, further, did not ground any of its analysis in the Due Process Clause. 893 P.2d at 1061–62. In *Apotex*, this Court interpreted a statute as having no retroactive effect as a matter of statutory interpretation and court-made black letter law, citing to *Roark* and American Jurisprudence, 2d. It engaged in no constitutional analysis. 2012 UT 36, ¶ 67, 282 P.3d 66.

Soc'y Ins. v. Labor & Indus. Review Comm'n, 786 N.W.2d 385, 395–97 (Wis. 2010) (footnotes and citations omitted) (alteration in original). *See also In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 832 (Minn. 2011) ("When the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, the statute does not violate due process."). *See also Gallewski v. H. Hentz & Co.*, 93 N.E.2d 620, 624 (N.Y. 1950) ("[T]he Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated.").

Roberts misleadingly argues that "[s]even states hold their state constitution's due process clause—sometimes in conjunction with a vested rights analysis—prohibits retroactive revival of time barred claims."[32]

[32] Roberts, misleadingly, fails to note the following:
(1) *Doe v. Crooks*, 613 S.E.2d 536 (S.C. 2005) addressed a change in a statute of limitations with no indication that the legislature intended to revive time-barred claims.
(2) *State of Minn. ex rel. Hove v. Doese*, 501 N.W.2d 366, 368 (S.D. 1993) addressed an amended statute that had no "plain intention of retroactivity."
(3) *Colony Hill Condo. I Assoc. v. Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984) addressed a statute that had no legislative intent for revival or retroactive application and was a statute of *repose*, not a statute of limitations,

Roberts Brief at 30. None of the cases cited by Roberts, however, analyze anything analogous to H.B. 279, which contains legislative findings that show the gravity of the problem the legislature sought to address and the necessity of revival of time-barred claims. Instead, each of the cases cited by Roberts support a proposition with which Mitchell agrees: The Legislature may not *arbitrarily* eliminate rights protected by constitutional due process.

Roark's dicta quoted American Jurisprudence, 2d, to say—in absolute terms—that the defense that a claim is time barred "cannot be taken away by legislation." *Roark v. Crabtree*, 893 P.2d 1058, 1063 (Utah 1995). Long before that, this Court maintained a more nuanced view and, consistent with

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and stated "[a] statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action."
(4) *Kelly v. Marcantonio*, 678 A.2d 873, 881–82 (R.I. 1996) addressed an amended statute that unlike H.B. 279, did not have a clear expression of legislative intent that the statute would have retroactive effect and did not have compelling legislative findings to show why that retroactive effect is necessary.
(5) *Doe v. Diocese of Dallas*, 917 N.E.2d 475, 480 (Ill. 2009) and (6) *Givens v. Anchor Packing, Inc.* 466 N.W.2d 771 (Neb. 1991) did not address statutes with legislative findings like that in H.B. 279.
(7) *Wiley v. Roof*, 641 So. 2d 66, 67 (Fla. 1994), addressed a statute that, unlike H.B. 279, had no legislative findings and, indicating the legislature cannot *arbitrarily* resurrect claims, stated "the legislature cannot subsequently declare that 'we change our mind on this type of claim' and then resurrect it."

Justice Bradley's dissent in *Cambell v. Holt*, 115 U.S. 620, 631–34 (1885), recognized that "due process concepts" mandated that the legislature may not *arbitrarily* eliminate a vested right to a claim or defense. *See Buttrey v. Guaranteed Sec. Co.*, 78 Utah 39, 300 P. 1040, 1045 (1931) (In discussing an accrued cause of action that was argued to be destroyed by the repeal of statute, the Court stated, "It is a vested right, in the nature of a property right, and ought to be regarded as property in the sense that tangible things are property and equally protected by the Constitution against *arbitrary* interference by the Legislature." (emphasis added) (citing *Hailing v. Industrial Commission*, 71 Utah 112, 263 P. 78, 81 (1931) ("A vested right of action is property in the same sense in which tangible things are property, and is equally protected against *arbitrary* interference." (emphasis added) (quoting 2 Cooley's Constitutional Limitations (8th Ed.) p. 756))).

The analyses in *Ireland*, 61 P. at 904, and *Roark v. Crabtree*, 893 P.2d at 1062–63, also demonstrate the underlying applicable principle is that vested rights cannot be *arbitrarily* taken away by an act of legislation. In *Ireland*, this Court held it would not construe a statute to "affect past transactions, unless such intention is clearly and unequivocally expressed." 61 P. 901 at 904. Specifically, in the absence of legislative intent to revive time-barred claims,

a statute would not be construed to deprive a defendant of the vested right to plead that the action was untimely. *Id.* The rule in *Ireland* does not restrict the power of the Legislature, but recognizes that construing a statute to deprive a vested right would be impermissible *in the absence of a statement of legislative intent*. Similarly, in *Roark*, as noted *supra*, at 25–27, this Court first looked to whether the Legislature expressed an intention to revive time-barred claims, then held that *in the absence of a clear expression of legislative intent* the statute could not be construed to diminish the defendant's "vested" defense that the claim was time barred. 893 P.2d at 1062, 1063.

The revival of time-barred claims is not in a special category all its own, where it is absolutely forbidden regardless of the Legislature's policies and expressed intention and immune from the application of well-established constitutional analyses. The Due Process Clause does not, as Roberts asserts, provide a per se, absolute bar restricting the revival of time-barred claims. Rather, it merely requires that the Legislature act according to due process in reviving previously time-barred claims—*i.e.* where the revival is rationally related to a legitimate state interest.

1. H.B. 279 Passes Scrutiny Under the Due Process Clause Because It Is Rationally Related to the Legitimate State Interest of Allowing Victims of Child Sexual Abuse to Seek Justice.

H.B. 279 has the purpose of allowing victims of child sexual abuse to seek redress in the courts and to provide society the concomitant social and economic benefits. Numerous courts have found the revival of time-barred claims to pass constitutional muster, some without nearly as compelling governmental interests or the detailed expression of legislative intent as that presented in H.B. 279. *See* Mitchell Brief, at 27–29 (collecting fourteen decisions finding revival of time-barred claims constitutional).

Other courts have addressed statutes substantially similar to H.B. 279 and found no constitutional violation. In Connecticut, a statute reviving expired claims for child sexual abuse was found to have a legitimate purpose and accomplished that purpose in a reasonable way, as follows:

> [P]laintiff emphasizes the "legitimate legislative purpose" of [the revival statute] . . . . namely, "to afford a plaintiff sufficient time to recall and come to terms with traumatic childhood events before he or she must take action," with a defendant being "now unexpectedly exposed to liability . . . an express purpose of the statute." Indeed, Senator Anthony Avallone, reflected on "'substantial testimony before the [Judiciary] Committee that minor victims of sexual assault often do not understand or recognize the damage which they have sustained until a substantial number of years after they attain majority. In fact, it

> is not just two or three years, but can be substantially longer than that. . . . So the [Judiciary] Committee in recognition of that extends the statute of limitations on which one can bring an action.'"
>
> * * *
>
> Given the unique psychological and social factors that often result in delayed reporting of childhood sexual abuse, which frustrated the ability of victims to bring an action under earlier revisions of the statute of limitations, we cannot say that the legislature acted unreasonably or irrationally in determining that the revival of child sexual abuse victims' previously time barred claims serves a legitimate public interest and accomplishes that purpose in a reasonable way.

Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462, 514, 517 (Conn. 2015).

A similar statute in Massachusetts was subject to constitutional scrutiny, and the "compelling legislative purpose" was found to outweigh defendants' rights, including the effect on their ability to present evidence:

> That being said, in reviewing Previte's challenge to the retroactive operation of the act, it nonetheless is necessary to return to the essential requirement that a retroactive statute's burden must be "reasonable in scope and extent." "Only those statutes which, on a balancing of opposing considerations, are deemed to be unreasonable, are held to be unconstitutional." Among the factors we weigh in assessing reasonableness are the duration of the burden imposed by the retroactive statute and "whether the scope of the statute is narrowly drawn to treat the problem perceived by the legislature."
>
> Here, there is no question that the limitations period has been very substantially expanded; although the enlargement is not of

> "infinite duration," thirty-five years is unquestionably a great deal longer than three. The extensive expansion of the statute of limitations undoubtedly affects a defendant's (and similarly a plaintiff's) ability to present evidence. On the other hand, the extent of the expansion appears to be tied directly to the compelling legislative purpose underlying the act, and in particular, the apparent recognition that in many cases, victims of child abuse are not able to appreciate the extent or the cause of harm they experience as a result of sexual abuse perpetrated on them for many years after the abuse has ended.

Sliney v. Previte, 41 N.E.3d 732, 741–42 (Mass. 2015) (footnotes and citations omitted).

Here, the Utah Legislature has demonstrated a profound and legitimate—in fact, *compelling*—governmental interest in the revival of time-barred claims for child sexual abuse, as stated in the text of the statute:

> 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 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; . . . .

Utah Code § 78B-2-308(1). That legitimate, compelling interest is further expounded upon in the legislative history.[33]

The Utah Legislature described how it unwittingly had made a grievous mistake in previously limiting the time to bring claims of child sexual abuse to a narrow length of time, within which victims were unable to face the consequences of their abuse and file claims against their abusers. The courts are without the authority to deprive the Legislature of the power to fix its prior mistakes or misunderstandings and revive time-barred claims, particularly where the Legislature has demonstrated a legitimate, and even compelling, state interest rationally advanced by the legislative means it has chosen.

B. The Open Courts Clause Does Not Prevent the Legislature From Reviving Time-Barred Claims Because (1) A "Vested" Defense in the Running of the Statute of Limitations Is Not Protected by the Open Courts Clause and (2) Even If It Were, the Legislature May Abrogate that Defense Where There Is a Clear Social or Economic Evil to Be Eliminated and Abrogation of the Defense Is Rationally Related to that Objective.

The Open Courts Clause protects *remedies* that existed at *common law* and access to the courts for all parties to present their claims and defenses.

[33] Mitchell Brief, at 23–24 and nn.12–13.

Nowhere does the Open Court Clause provide a constitutional protection for defenses to claims. For good reason, this Court has never held that a right to plead a defense, let alone a legislatively created right to plead a statute of limitations defense, is protected by the Open Courts Clause.

Even if the Open Courts Clause were to be expanded beyond its express terms to preserve a defense that a claim is time barred, that would not mean, as Roberts has misleadingly argued, the right to plead that defense would be beyond the reach of the Legislature. Again, Roberts is far off the mark in arguing as if the preservation of a statute of limitations defense is a special breed of "right" that is absolute and not susceptible to the same constitutional analysis applied by this Court in every other instance. "Nowhere in this state's jurisprudence is it suggested that article I, section 11 flatly prohibits the legislature from altering or even abolishing certain rights which existed at common law." *Cruz v. Wright*, 765 P.2d 869, 871 (Utah 1988).

The Open Courts Clause does not protect the right to plead a statute of limitations defense.[34] Even if it did, that right could be altered, and even

[34] If a statute of limitations defense were somehow etched in legal stone, as Roberts maintains, and the elimination of the statute of limitations by Utah

eliminated, by the Legislature where, as with H.B. 279, revival of the time-barred claims was a rational means of addressing a clear evil (whether it be characterized as social or economic).

1. The Open Courts Clause Does Not Limit the Power of the Legislature to Eliminate the Defense that a Claim Is Time Barred Because Such a Right Is Not a Remedy and Did Not Exist at Common Law.

The Open Courts Claus protects only *remedies* that existed at *common law*. Roberts argues that "defenses" are also protected by the Open Courts Clause. For that proposition, Roberts cites *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 38, 44 P.3d 663, and *Daines v. Vincent*, 2008 UT 51, ¶ 46, 190 P.3d 1269. Both of those cases, however, offer no support that "defenses" are within the ambit of the Open Courts Clause, other than that people shall have access to the courts to present whatever defenses they have.[35] *Miller* simply quoted Black's Law Dictionary for a definition of the right to a day in court, and that

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Code Ann. § 78B-2-308(3)(a) were held by the courts to be violative of the Open Courts Clause, such a result would be not only wholly unjustified by the text of the Open Courts Clause, existing case law, and any previous constitutional analysis by this Court, but it would also be a gross violation of the separation of power and system of checks and balances between the judicial and legislative branches.

[35] Utah Const. art. I, § 11 "[N]o person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."

definition happened to include the word "defend." *Miller*, 2002 UT 6, ¶ 38, 44 P.3d 663 ("This constitutional right to a day in court is the 'right and opportunity, in a judicial tribunal, to litigate a claim, seek relief, or defend one's rights.' *Black's Law Dictionary* 402 (7th ed. 1999)."). *Daines* goes one step further, and cites an opinion of the Fifth Circuit Court of Appeals that quoted Black's Law Dictionary for a definition of the "merits" of a case, which included the word "defense." 2008 UT 51, ¶ 46, 190 P.3d 1269 ("The 'merits' of a case are 'the elements or grounds of a claim or defense.'" (citing *Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality*, 265 F. App'x 203, 207, 2008 WL 344750 (5th Cir. 2008) (quoting *Black's Law Dictionary* 1010 (8th ed. 2004)))). Roberts cites no other authority stating that a "defense" is in any way protected by the Open Courts Clause other than having access to the courts. *See* Roberts Brief at 31–33.

Vast expansions of constitutional protections should not be allowed based on the definitions of Black's Law Dictionary.

> The interpretation of the protections afforded by the Utah Constitution appropriately commences with a review of the constitutional text. While we first look to the text's plain meaning we recognize that constitutional "language . . . is to be read *not as barren words found in a dictionary* but as symbols of historic experience illumined by the presuppositions of those who employed them."

Am. Bush v. City of S. Salt Lake, 2006 UT 40, ¶ 10, 140 P.3d 1235, 1239 (emphasis added) (citations omitted).

The plain language of the Open Courts Clause does not protect "defenses," but rather "remed[ies]" for "injury." Utah Const. art. 1, section 11. Roberts has cited no authority, and made no argument, that historical evidence of the framers' intent supports an expansive reading of the provision so as to include defenses—except relating to *access to the courts* to present defenses.

The glaring fallacy in Roberts's analysis is made conspicuous by the fact that the Open Courts Clause protects *common law* rights, while any right to plead a statute of limitations defense is legislatively created.

> The common law [has] fixed no time as to the bringing of actions. Limitations derive their authority from statutes." *U. S. v. Thompson*, 98 U. S. 490, 25 L. Ed. 194. And in the absence of statutes "there can be no bar arising from lapse of time." *Hauenstein v. Lynham*, 100 U. S. 487, 488, 25 L. Ed. 628; 1 Wood, Lim. §§ 1, 2.

Ireland, 61 P. at 904.

This Court has consistently interpreted the Open Courts Clause to apply to *remedies* that existed at *common law*, not defenses created by statute. *See, e.g., Judd v. Drezga*, 2004 UT 91, ¶ 10, 103 P.3d 135, 139 (Under the Open

Courts Clause, "citizens of Utah have a right to a *remedy for an injury*." (emphasis added)); *Ross v. Schackel*, 920 P.2d 1159, 1162 (Utah 1996) ("In deciding whether this subsection abrogated such a *remedy*, we must examine the *common law* . . . ." (emphasis added)); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 191 (Utah 1989) ("The legislature may create, define, and modernize the law. However, it does not have unbridled power to deny to contemporary plaintiffs their existing *common law rights and remedies*." (emphasis added) (footnotes omitted) (citing *Berry* at 717 P.2d at 676 and n.3).

2. A Statute Survives Scrutiny Under the Open Courts Clause Even If It Abrogates a Remedy that Existed at Common Law When, as with H.B. 279, the Abrogation is a Reasonable Means for Addressing a Clear Social or Economic Evil.

Roberts grossly mischaracterizes the cases interpreting the Open Courts Clause by failing to recognize that, since *Berry v. Beech Aircraft Corp.*, the Utah Legislature may abrogate a constitutionally protected remedy so long as either (i) the legislature provides a reasonable alternative remedy *or* (ii) there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective. 717 P.2d 670, 680 (Utah 1985).

Child sexual abuse is a clear evil. "Sexual abuse is one of the most damaging violations a person can commit against another person. Sexual abuse of a child is even more heinous because of the child's vulnerable position." Khorram, *Crossing the Limit Line,* 391; *see also Stogner v. California*, 539 U.S. 607, 651 (2003) ("When a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime.").

So, too, it is a "social evil" that victims are unable, due to no fault of their own, to seek justice in a court of law merely because the statute of limitations has run. As is made abundantly clear in the text and legislative history of H.B. 279, the revival of time-barred claims is rationally related to addressing that evil.

> The public policy objective argued by the plaintiff finds support from numerous commentators. In one significant example, Professor Marci Hamilton observes that "*[l]egislation that eliminates the civil [statute of limitations] or includes a discovery rule is supported by various studies on the long-term effects of child molestation and the likely delay in disclosure*. Researchers in various studies have found—specifically in men who were sexually abused as children—that long-term adaptation will often include sexual problems, dysfunctions or compulsions, confusion and struggles over gender and sexual identity, homophobia and confusion about sexual orientation, problems with intimacy, shame, guilt and self-blame, low self-esteem, negative self-images, increased anger, and conflicts with authority figures. There is also an increased rate of substance abuse, a tendency to deny and delegitimize the traumatic experience, symptoms of

> [p]ost [t]raumatic [s]tress [d]isorder, and increased probability of fear and depression for all victims. Often, it is not until years after the sexual abuse that victims experience these negative outcomes. As clinician Mic Hunter has observed: 'Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later....'" (Footnotes omitted.) M. Hamilton, "The Time Has Come for a Restatement of Child Sex Abuse," 79 Brook. L. Rev. 397, 404–405 (2014). *Another salutary effect of revival statutes like § 52–577d is that "lawsuits filed under window legislation have led to the public identification of previously unknown child predators*, which reduces the odds that children will be abused in the future." Id., at 405.

Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462, 514–15 (Conn. 2015) (emphasis added) (footnote omitted). *See also* Heidi L. Neuendorf, *The Judicial Impediment on Legislative Lawmaking in* Stratmeyer v. Stratmeyer, 44 S.D. L. Rev. 115, 123 (1999) (While the "sexual abuse of children is a tragic and increasingly common issue today . . . . even more tragic and increasingly common is the issue of adults who suffered sexual abuse as children and are coping with it in their adult lives.").

VI. Contrary to Roberts's Characterization, the Weight of Authority Across the Country Favors Revival of Time-Barred Claims Without Limitation by Any Per Se Rule.

Roberts grossly mischaracterizes the state of the nation's law by arguing that "[t]he substantial majority of states to have considered the issue

(a total of 24 including Utah) hold that expired claims cannot subsequently be revived." Roberts Brief at 39. Roberts has conflated (1) a court merely holding that its state constitution offers *some protection* (as opposed to the zero protection under the federal constitution) with (2) a court holding that a legislature cannot, even with express legislative intent, revive time-barred claims. The Certified Questions do not contemplate whether Utah offers *some* protection for a defense that the statute of limitations has run. Utah law holds that is a substantive right. The Certified Questions contemplate how the courts should address *express statutory language* that time-barred claims are to be revived. The weight of authority across the country favors the power of the Utah Legislature to do just that.

First, under federal law, the legislature can, without any doubt, revive time-barred claims. *Campbell v. Holt*, 115 U.S. 620, 628–29 (1885); *Chase Secs. Corp. v. Donaldson,* 325 U.S. 304, 316 (1945) ("[C]ertainly it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.").

The federal approach, which pre-dated the adoption of Utah's Due Process constitutional provision,[36] finding no constitutional protection against merely reviving a time-barred claim, is followed by the courts of nineteen states (Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Dakota, Washington, West Virginia, and Wyoming). *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 509 (Conn. 2015) (surveying states and ultimately holding Connecticut would follow federal approach).

An additional six states have not addressed the matter, and therefore provide no support for Roberts's position that a state should even deviate from the federal approach, let alone depart so far from it as to create an absolute bar against revival of time-barred claims. *See id.* (surveying states and only identifying 44 states to have addressed the issue).

Eight states, quite unlike Utah, have constitutional provisions that bar retroactive applications of statutes. Roberts Brief at 29 n.17. Even with an express constitutional provision against retroactive application, Texas does

[36] *See* Br. of Amicus Curiae, at 4–6.

not follow a per se rule, but instead applies a balancing test. *Robinson v. Crown Cork & Seal Co.,* 335 S.W.3d 126, 145 (Tex. 2010).

One state, Vermont, has a statutory prohibition against retroactive legislation. 1 Vt. Stat. Ann. § 214(b).[37]

Directly contrary to Roberts's proposed per se rule, Roberts concedes "two states hold that expiration of a statute of limitation creates a constitutionally-protected vested right that must be balanced with the legislature's purpose for imposing retroactivity." Roberts Brief at 29 n.17 (citing *Segura v. Frank*, 630 So. 2d 714, 728–31 (La. 1994) and *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 395–97 (Wis. 2010)).

Additionally, New York applies its own test to determine the validity of the revival of time-barred claims. *Gallewski v. H. Hentz & Co.*, 93 N.E.2d 620, 624 (N.Y. 1950) ("[T]he Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated.").

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[37] Utah has the *opposite*, a codified rule that statutes are not to have a retroactive effect *unless that intent is expressly declared by the Legislature*. Utah Code. § 68-3-3.

Hence, thirty-seven states offer *no* support for Roberts's position. What of the other thirteen? Roberts argues that decisions in five states support the view that "vested rights" protect against legislative revival of time-barred claims, Roberts Brief at 29–30, n. 17, but one of them determined the statute did not impair a vested right and three of them did not address a statute that expressed the intent to revive claims, instead dealing with, for example, the mere lengthening of time to file a claim. *See supra* 17 n.12.

Roberts then argues seven states do not allow revival of time-barred claims based on a state due process clause. Roberts Brief at 29–30, n.17. Of those seven, four of them addressed statutes with *no expression of legislative intent that there be a retroactive effect*. *See supra* 38 n.32.

The last state, Utah, with the dubious exception of *Apotex,* has established that the Legislature may enact retroactive legislation that affects vested or substantive rights, so long as the Legislature clearly expresses that intent. *See supra*, at 18–29. And, addressing whether an amendment to the statute of limitations could revive time-barred claims for child sexual abuse, this Court *first* looked to whether the Legislature had made any expression of intent that it be retroactive, then, only after determining there was no such intent, concluded it could not *otherwise* be given a retroactive effect because

it affected substantive, not merely procedural rights. *Roark*, 893 P.2d at 1062, 1063.

Roberts is left then with four cases supporting his notion that "the majority of states to have considered the issue . . . hold that expired claims cannot subsequently be revived," and *none of them address a statute like H.B. 279*, where the Legislature has engaged in extraordinary efforts to demonstrate the compelling need to revive time-barred claims. That is hardly authority upon which this Court can rely to usurp legislative power by exercising a judicial veto of a statute where the Legislature has researched and carefully balanced the interests at stake and unmistakably declared its intention that a statute is to revive time-barred claims of child sexual abuse.

CONCLUSION

A statute of limitations defense against claims of child sexual abuse is not in a category all its own, absolutely protected under a court-made "black letter" rule against revival of the claims. Contrary to the principles of stare decisis, established constitutional analysis, and the fundamental separation of legislative and judicial powers, Roberts contends he is protected against revival of the claims against him, regardless of the interests at stake and

regardless of legislative policy and expressed intent regarding revival of the previously time-barred claims.

Although there are snippets in certain Utah cases, particularly *Apotex*, that appear, without any modern constitutional analysis, to adopt the Nineteenth Century notion of absolute protection for such "vested rights," the courts would be engaging in a radical expansion of judicial review to disregard a revival statute like H.B. 279, the sole purpose of which is to revive time-barred claims of child sexual abuse. The respect for the legislative prerogative has been repeatedly pronounced by Utah courts for well over a century in the well-established rule that, even where "substantive law" or "vested rights" are affected, a statute is to be given retroactive application if the Legislature, as in this case, has expressed its intent that the statute is to be applied in that manner.

The courts could disregard H.B. 279 and frustrate the clear expressions of legislative intent with respect to that statute only if there is a clear violation of the Utah or United States Constitutions. Since the Utah Legislature was acting well within its constitutional authority in enacting H.B. 279, the revival statute must be upheld. Both questions certified to this Court by the Federal Court should be answered in the affirmative.

Respectfully submitted this 11th day of December, 2017:

/s/ Ross C. Anderson
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Certificate of Compliance With Rule 24(g) and Rule 21

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g) because this brief contains 13,696 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21 because no part of this filing contains non-public information.

DATED this 11th day of December, 2017.

/s/ Ross C. Anderson
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CERTIFICATE OF SERVICE

I, Ross C. Anderson, certify that on December 11, 2017, an original of **PLAINTIFF TERRY MITCHELL'S RESPONSIVE 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 by email and each law office was served with two copies by U.S. mail:

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