No. 20170447-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

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

RESPONSE BRIEF OF RICHARD WARREN ROBERTS

On certified question of law from the United States District Court,
District of Utah, Honorable Evelyn J. Furse, Case No. 2:16-cv-00843-EJF

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Introduction

This court has consistently held for more than a century that a claim whose statute of limitation has expired cannot be revived by legislation. Beginning just after statehood in *Ireland v. Mackintosh*, 61 P. 901 (Utah 1900), and continuing through *State v. Apotex Corp.*, 2012 UT 36, ¶ 67, 282 P.3d 66, the court has repeatedly reaffirmed that, once a claim has expired, a defendant has a vested, *constitutional* right to rely on that defense, and that this vested right cannot be taken away by the legislature. [Def. Br. 15-33.] The rule's historical pedigree reveals the original meaning of the Utah Constitution.

The rule of "protection against ancient demands, whether originally well founded or not," also has been a foundation of Utah law since statehood, protecting parties and the judiciary alike from "oppressive charges" involving:

> claims which arose at such a distance of time as to leave no way to trace their origin, nature, or extent, and as will frustrate every honest effort to arrive at the truth in relation to them, and render impossible any satisfactory explanation of them because of the death of witnesses and loss of evidence . . . , after a distance of time when the transaction has faded from memory . . . .

Kuhn v. Mount, 44 P. 1036, 1037-38 (Utah 1896). The contrary view, espoused by plaintiff and *amici*, is that no claim ever truly expires, no potential defendant can rely on repose, and the judicial system must contend with whatever stale claims the legislature decides to revive. The Utah Legislature argues that its power is "plenary"—it can do as it chooses to eliminate vested rights, with no limit.

[Legis. Br. at 3.] There is no support for this sweeping renunciation of the constitutional protection long afforded to vested rights. While the legislature has plenary power to declare that a cause of action, including those involving sexual abuse, has no statute of limitation going forward, the legislature cannot eliminate a vested right to be free of a claim after the limitation period prescribed by a prior legislature has expired.

Ignoring this distinction, plaintiff and *amici* mischaracterize, disparage, or ignore this court's settled precedent and original meaning of the Utah Constitution. They claim—to the extent they address it—that the most recent, leading case (*Apotex)* is a mistake; they argue that the court's nearly 120 years of consistent holdings were ill-considered *dicta,* and that the court never grappled with the constitutional dimension of the vested right at issue here. They assert that the court should disregard its precedent, reverse course, and now follow decisions of the United States Supreme Court and a minority of states, which have construed the federal constitution and the constitutions of other states to provide less protection for vested rights than does the Utah Constitution. All these arguments are misguided and fail to give due respect to settled Utah law.

Ultimately, what plaintiff and *amici* seek is the abandonment of original meaning and the reformulation of Utah constitutional law. They ask this court to abandon the protection of vested rights, at least for sexual abuse claims, so that the current legislature's goal of providing relief to victims can be accomplished

without limitation. But aside from their policy arguments, they do not address how rejection of *stare decisis* is warranted, especially where the precedent reflects the original meaning of the Utah Constitution. They do not explain how *this* vested right can be eliminated without placing in jeopardy *all* vested rights under Utah law. And they do not offer a coherent distinction between the legislature's plenary power to eliminate the vested rights of defendants to be free from expired claims and its plenary power to eliminate other vested rights.

While the legislature has the power to define substantive rights going forward, and has the power to change substantive law retroactively in some cases, the legislature has never had the power to revive an expired claim or eliminate the vested right in a statute-of-limitation defense. Enforcing that rule is not a change in law.

It is the role of the court, as a bulwark against the prevailing passions of any political moment, to vouchsafe constitutional rights, and in particular to prevent the legislature from taking away vested rights protected under the Utah Constitution. For nearly 120 years, the vested right to be free from expired claims has been recognized by this court. Plaintiff and *amici* offer no persuasive, legally supportable reason to abandon that settled rule, let alone to ignore the original meaning of the Utah Constitution. This court should reaffirm that the Utah Legislature may not eliminate the vested right to be free from claims that expired under a statute enacted by a prior legislature.

Argument

1. The Utah Legislature Lacks the Power to Revive Expired Claims

1.1 This Court's Holdings Answer Both Certified Questions: The Legislature *Cannot* Revive Expired Claims, Even Where It Expressly Purports to Do So

This court has never permitted the legislature to revive a time-barred claim—civil or criminal.[1] This court instead has recognized since statehood that the legislature lacks the power to do so under the Utah Constitution. *See infra* at 8-10.

The legislature cannot give itself that power by expressly declaring its intent to revive a time-barred claim. Just five years ago, in *State v. Apotex*, the court considered an amended statute of limitation providing that "civil action[s] . . . may be brought for acts occurring prior to the effective date of this [amended] section if the limitations period set forth in [the amended statute] has not lapsed." Utah Code § 26-20-15(2) (cited in *Apotex*, 2012 UT 36, ¶ 66, 282 P.3d 66). The amended statute thus "revive[d] claims that were already time-barred under the prior version of the statute." *Apotex*, 2012 UT 36, ¶ 14 (internal quotation marks omitted). This court held the legislation to be unlawful in light of the longstanding rule that the "amended [statute] cannot resurrect claims that have already expired." *Id.* ¶ 67.

[1] This explains why neither plaintiff nor *amici* have cited a single case where this court has permitted revival of a time-barred claim.

The court tied this holding to the line of cases stating the rule that "'after a cause of action has become barred by the statute of limitation, 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.* (alteration in original) (quoting *Roark v. Crabtree*, 893 P.2d 1058, 1063 (Utah 1995)). The court in *Roark*, in turn, asked—and answered in the negative—the question posed in *Apotex* and here: "can a claim which was barred under the then-applicable statute of limitations be revived by a subsequent extension of the limitation period?" *Roark*, 893 P.2d at 1062.

In answering "no," this court did not reach the conclusion based upon its own reasoning or an alternative framing of the question as "whether the defense of statute of limitations is a vested right." *Id*.; *see also infra* at 7-10 (discussing the vested rights underpinnings of the rule). The court instead tied the rule to the past century of Utah Supreme Court precedent, beginning with this court's "first examin[ation of] retroactive revival of a time-barred civil action" in *Ireland*. *Id.* (citing *Ireland v. Mackintosh*, 61 P. 901 (Utah 1900)). The *Roark* court repeated *Ireland*'s holding that "subsequent passage of an act increasing the period of limitation could not operate to affect or renew a cause of action already barred." *Id.* The court went on to trace the rule as stated in *In re Swan's Estate*, 79 P.2d 999 (Utah 1938), *Del Monte Corp. v. Moore*, 580 P.2d 224 (Utah 1978), and other cases spanning the century. *Roark,* 893 P.2d at 1062.

These cases are not isolated holdings in which this court happened to reach the same result and repeat the rule time and time again. They are a cumulative line of precedent, with the court building in every case from *Ireland* through *Apotex* on its prior cases and reaffirming "its firm stance that when 'the statute has run on a cause of action, so that it is dead, it cannot be revived by any . . . statutory extension.'" *Roark*, 893 P.2d at 1062 (alteration in original) (quoting *Del Monte*, 580 P.2d at 225). To be sure, in some of those cases the court did not have to reach the constitutional issue because, as a matter of statutory interpretation, the court held that the statute did not apply retroactively. But the avoidance of the constitutional question does not change the constitutional answer articulated consistently from *Ireland* to *Apotex*.

Faced with this unbroken line of authority, plaintiff and *amici* try to discredit it. Plaintiff calls the most recent, on-point decision of this court (*Apotex)* "erroneous[]," while the Legislature as *amicus* calls it "an aberration." [Pl. Br. at 18; Legis. Br. at 8 n.20.] Remarkably, the Attorney General as *amicus* fails to cite or address the most recent controlling case.

Plaintiff likewise attempts to dismiss the decisions preceding *Apotex* as "inconsistent" or "irreconcilable." [Pl. Br. at 17 n.10.] That is not an accurate characterization of this court's decisions. For example, *Del Monte*'s statement that a "dead" claim "cannot be revived by any . . . statutory extension," 580 P.2d at 225—which plaintiff dismisses as "abrupt[]" and lacking "consideration," [Pl. Br.

at 17 n.10]—was central to the outcome in the case.[2] As the court explained in *Roark*, "Since 1900, this court has consistently maintained that the defense of an expired statute of limitations is a vested right" that "could not be impaired or affected by subsequent legislation extending the limitation period." 893 P.2d 1062. The ironclad rule has been applied consistently both in criminal cases, *see State v. Lusk*, 2001 UT 102, 37 P.3d 1103, and in cases where the legislature purported to revive expired claims, *e.g.*, *Apotex*.[3]

1.1.1 This Court Has Always Grounded the Applicable Vested Right in Utah's Due Process Clause

Plaintiff and *amici* suggest that the prior decisions were not based on the Utah Due Process Clause; accordingly there can be no vested right at issue here. That is incorrect. This court has always recognized that the right to be free from expired claims is a vested right protected by the Utah Due Process Clause, even in cases in which the court did not have to reach the constitutional issue.

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[2] The court held that an amended statute of limitation applied retroactively only if it did not revive an expired claim. 580 P.2d at 225. Because the claim at issue had not expired, the new statute of limitation applied. *Id*.

[3] Like *Apotex*, *Hyland v. Dixie State Univ.*, No. 2:15-CV-36 TS, 2017 WL 2123839 (D. Utah May 16, 2017), involved legislation that expressly revived expired claims. [Def. Br. 35-36.] Contrary to the Attorney General's argument, the district court did opine "about the effect of a statute the Legislature expressly declared to" revive claims whose "time limit" had expired. [A.G. Br. at 3 n.1]; *see Hyland*, at *2 (quoting H.B. 399 Government Immunity Amendments, at ¶¶ 145–182). The court, applying Utah law, accepted the position asserted by the Utah Attorney General in that case and held that the statute was unlawful because it "deprives Defendants"—a State of Utah university and its officials—"of a right to a statute of limitations defense," which is "a vested right that cannot be taken away by legislation," *Hyland* at *2 & nn.17, 19 (quoting and discussing *Roark*, 893 P.2d at 1062, and citing *Del Monte*, 580 P.2d at 225).

1.1.2 The Utah Supreme Court Tied the Rule Against Revival of Expired Claims to Due Process and the Vested Rights Framework

In *Ireland*, just four years after statehood, this court recognized that Utah follows a vested rights framework for analyzing expired claims and distinguished the rule under the Utah Due Process Clause from the federal rule. *Ireland* therefore not only is precedent that this court has repeatedly reaffirmed, it also is the best evidence of the original meaning of the Utah Constitution.

The *Ireland* court reasoned that once the "prescribed period has expired," the defendant acquires "a defense to the action," and, critically, "[i]t is clear that unless this defense is a *vested, permanent right*, the statute of limitations cannot be one of repose." 61 P. at 902 (emphasis added). "[T]o restore" the claim would be "*quite beyond the power of legislation*." *Id.* at 903 (quoting Thomas M. Cooley, *A Treatise on the Const. Limitations Which Rest upon the Legis. Power of the States of the Am. Union* 454 (6th ed. 1890) (emphasis added) (internal quotation marks omitted)).[4]

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[4] At the end of *Ireland*, the court also found that the legislature had not intended to revive the expired claim. 61 P. at 904. But the legislature's lack of power to revive the claim was an independent basis for the decision, as shown both by the court's concluding remark that the defendant "acquired a vested right . . . to plead that statute as a defense," *id.*, and its citations, in support of that proposition, to sources prescribing a bar on revival. *See, e.g.*, J.G. Sutherland, *Statutes and Statutory Constr. Including a Discussion of Legis. Powers, Const. Regs. Relative to the Forms of Legis. and the Legis. Proc.* § 480, at 626-27 (1891) ("Vested rights cannot be destroyed, divested, or impaired by direct legislation. . . . There is a vested right in . . . the statute of limitations when the bar has attached."); 1 H.G. Wood, *Treatise on the Limitations of Actions at Law and in Equity* § 11, at 38 (2d ed. 1883) ("Statutes of limitation . . . may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the

The court expressly grounded this vested right in Utah's recently ratified Due Process Clause, which differed from the federal constitution. Citing *Campbell v. Holt*, the court noted that, under the federal constitution, "the bar of the statute [of limitation] as a defense . . . may be removed" by the legislature without "'depriv[ing] the party of his property without due process of law.'" 61 P. at 902 (quoting *Campbell*, 115 U.S. 620, 623 (1885)). The court then analyzed the dissenting opinion in *Campbell*, which stated:

> [W]hen the statute of limitations gives a man a defense to an action, and that defense has absolutely arisen, it is a vested right in the place where it has accrued, and is an absolute bar to the action there, and is protected by the fourteenth amendment to the constitution from legislative aggression.

Id.

After noting that the "much greater number" of state courts had adopted the view expressed in that dissenting opinion with respect to their own state constitutions, the court in *Ireland* likewise held that, under the Utah Due Process Clause, the right to raise the statute of limitation defense is "a vested, permanent right." *Id*.

Because *Ireland* was decided only four years after Utah's Constitution was ratified, it is the best contemporaneous evidence of the meaning of the Utah Due

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statute in extinguishing the rights of action."); Joel P. Bishop, *Comments on the Law of Statutory Crimes* § 265, at 176 (1873) ("In civil cases . . . the legislature cannot then take away the vested right by removing the statutory bar.").

Process Clause.[5] Indeed "vested rights" had an inherently constitutional dimension when *Ireland* was decided. *See, e.g.*, *Black's Law Dictionary* (1st ed. 1891) (describing "vested rights" as a term "[i]n constitutional law"). The dissent in *Campbell v. Holt*—adopted by this court in *Ireland*—explained that "[t]he term 'property'" in the Fourteenth Amendment's Due Process Clause "embraces all valuable interests which a man may possess outside of himself; that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right." 115 U.S. 620, 630 (1885) (Bradley, J. dissenting). The principle that "property" subject to constitutional protection included vested rights was not new; it had a long tradition in American constitutional law. *See* Edward S. Corwin, *The Basic Doctrine of Am. Const. Law*, 12 Mich. L. Rev. 247, 255-57 (1914).

1.1.3 Subsequent Cases Confirmed the Constitutional Character of Utah's Rule

This court has repeatedly reaffirmed that the Utah Constitution—unlike its federal counterpart—protects "'every species of vested right'" including the right

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[5] Other central and western states that predated Utah interpreted their constitutions similarly. For example, the Supreme Court of Nebraska, in reaffirming its rule in 1991, noted that the "maxim has been followed by this court for fivescore and 16 years"—that is, almost since Nebraska became a state in 1867. *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 773 (Neb. 1991). It observed, "Although we have never fully articulated the rationale behind this rule, it is grounded in the due process guarantee" of the state constitution as a "vested right which cannot be impaired by a subsequent legislative act." *Id.* at 773-74. These states' constitutional rules formed the background against which this court interpreted Utah's new constitution in 1900. *See also infra* at 19-20 (discussing decisions from Arkansas and Illinois).

to be free from expired claims. *McGrew v. Indus. Comm'n*, 85 P.2d 608, 610 (Utah 1938) (quoting *Campbell*, 115 U.S. at 630 (Bradley, J., dissenting)); *see also Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 39, 44 P.3d 663 (same). The United States Supreme Court likewise recognized Utah's provision as more protective. In *Chase Secs. Corp. v. Donaldson*, it explained that "some state courts have not followed [the federal rule regarding expired claims] in construing provisions of their constitutions similar to the due process clause," and listed Utah among them, citing this court's decision in *In re Swan's Estate*. 325 U.S. 304, 312 & n.9 (1945).

Utah has an unbroken adherence to constitutional protection for vested rights, including the right to be free from expired claims, and the source of that protection has always been found in the state constitution. As the court explained in *Roark*, the question is whether the "right to plead a defense of statute of limitations is a vested right which cannot be impaired without denying [defendant] *due process of law*." 893 P.2d at 1061 (emphasis added). In Utah, the answer has always been "yes." *See id*. at 1061-62 (citing cases).

Plaintiff dismisses this court's vested-rights jurisprudence, calling it "irreconcilable" with the legal principles governing retroactivity of statutes. [Pl. Br. at 17 n.10.] But there is no conflict. Regardless of whether a statute of limitation is considered "procedural" for retroactivity purposes before it expires, the legislature has no power to revive expired claims because doing so "eliminates a vested right" protected by the Utah Constitution. *Lusk*, 2001 UT 102,

¶ 30 (stating that allowing resurrection of dead claims "solely upon the whim and vagary of the legislature . . . would be untenable"); *see also infra* at 15-17 (discussing retroactivity analysis). Nor does retroactive application of a substantive change raise constitutional concerns unless it eliminates vested rights.

Plaintiff and *amici* also argue that the right claimed here must fall within the rubric of "substantive due process" and implicate a fundamental right or interest. [Pl. Br. at 27; A.G. Br. at 9-10; Legis. Br. at 10-11.] But the substance at issue here was provided by a prior legislature in the statute of limitation that expired. This court need not craft a fundamental, substantive right that citizens have independent of government. The right here vested under the operative statute at the time the limitation period expired.

Likewise, while this court disfavors "substantive due process innovations undisciplined by any but abstract formulae," *In re J.P.*, 648 P.2d 1364, 1376 (Utah 1982), the vested right to repose after a statute of limitation has expired is neither innovative nor abstract. It is a settled, straightforward rule of Utah law as old as the Utah Due Process Clause, a fact that demonstrates that the rule falls within the scope of the clause's original meaning. *See supra* at 8; *see also Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12, 140 P.3d 1235 ("[I]n interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the

time of drafting.").[6] And since statehood this interpretation of Utah's due process protections has been reaffirmed repeatedly by the court, even when addressing modern cases presenting the issue of child sex abuse. *See supra* at 7 (discussing *Roark* and *Lusk*). The rule against revival of expired claims is, at once, rooted in a contemporaneous interpretation of the state constitution and validated by the court in cases up to *Roark*, *Lusk*, and most recently *Apotex*.

1.2 The Open Courts Clause Also Protects the Right to Rely on a Vested Statute of Limitation Defense

The Open Courts Clause and the Due Process Clause are "complementary" and "related both in their historical origins and to some extent in their constitutional function. . . . Both act to restrict the powers of the . . . Legislature." *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985); *see generally Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 78, --- P.3d --- (Lee, J., concurring) (explaining that "nineteenth-century open courts cases . . . recognize constitutional limits on the *retroactive* application of legislation in a manner abrogating or limiting *vested claims or remedies*").

Under the Open Courts Clause, "no person shall be barred from prosecuting or defending . . . any civil cause to which he is a party." Utah Const. art. I, § 11. The clause protects the right of litigants "'to present claims and defenses, and have them properly adjudicated on the merits.'" *Daines v. Vincent*,

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[6] For the same reasons, the argument of the Attorney General as *amicus* that an originalist analysis leads to the conclusion that Utah intended to mirror the scope of the federal Due Process Clause is incorrect. [A.G. Br. at 4-5.]

2008 UT 51, ¶ 46, 190 P.3d 1269 (quoting *Miller*, 2002 UT 6, ¶ 42). The right to present defenses—including affirmative defenses—is no less protected than is the right to present claims.[7] Once a claim has expired, the legislature cannot lawfully eliminate the perfected affirmative defense any more than it can rescind a cause of action on the eve of trial—both are vested rights protected by the Utah Constitution.

The Legislature and Attorney General assert that protection for defenses is not grounded in the text of the Open Courts Clause. [Legis. Br. at 11; A.G. Br. at 12-13.] That ignores the plain language of the clause, which protects "person[s] . . . prosecuting or *defending*" claims in Utah courts. Utah Const. art. I, § 11 (emphasis added). Furthermore, as noted supra at 10, beginning in the late 1800s, vested rights were considered property under Utah law. And because the resurrection of an expired claim would cause "injury" to the defendant's "property," the first part of the clause also provides protection. Utah Const. art. I, § 11 ("every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law").

The Attorney General takes the extreme position that the clause "says nothing about guaranteeing the availability of any and all former defenses."

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[7] The Attorney General's sharp delineation between causes of action and defenses is unsound. [A.G. Br. at 13.] The open courts analysis cannot hinge on whether a defendant invokes an expired statute of limitation as an affirmative defense or instead seeks a declaratory judgment, *see* Utah Code § 78B-6-401, before the relevant statute of limitation is amended to revive expired claims.

[A.G. Br. at 12.] He implies that the legislature can eliminate "any and all" defenses at any time, including the defense of res judicata, and thus the legislature could effectively direct verdicts for chosen categories of plaintiffs. This cannot be correct, and no authority supports this contention. The Open Courts Clause "secures substantive rights." *Tindley v. Salt Lake City Sch. Dist*., 2005 UT 30, ¶ 13, 116 P.3d 295. The right to defend oneself under the law at the time the right vests is such a "substantive" right, and there are few rights more foundational than the right to present a dispositive affirmative defense that a claim has expired under the law.[8] *Berry*, 717 P.2d at 676 ("If the legislative prerogative were always paramount, and the Legislature could abolish any or all remedies . . . , section 11 would be a useless appendage to the Constitution.").

2. Plaintiff and *Amici* Misapply Retroactivity Doctrine

Plaintiff and *amici* confuse the question of retroactive application of a statute to prior conduct with the related but distinct question of whether a legislative enactment may be applied to revive claims for which the statute of limitation has expired. The correct interpretation of a statute is that it applies retroactively. That settled issue is not presented by the certified questions.

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[8] The Attorney General argues, incorrectly, that defendant's reading of the Open Courts Clause precludes the legislature from ever limiting legal defenses, even prospectively. [A.G. Br. at 13-14.] But while the Open Courts Clause is concerned with protecting vested rights of both plaintiffs and defendants, *Berry*, 717 P.2d at 676; *Miller*, 2002 UT 6, ¶ 40, a statute-of-limitation defense does not vest until the claim has expired under the operative law. Until then, the legislature can extend the limitation period. Few other affirmative defenses "vest" in an analogous way.

The issue here is whether the legislature can resurrect *expired* claims and thereby eliminate a vested right. The answer, as this court has always held, is "no." It is irrelevant whether the legislature intended the statute to apply retroactively to past conduct. No matter how clearly or forcefully the legislature speaks, expired claims may not be revived. This has been held in cases where the legislature's intent was opaque. *See, e.g., Roark v. Crabtree*, 893 P.2d 1058, 1061-63 (Utah 1995).[9] And it has been likewise held where the legislature made its intent to resurrect expired claims manifest. *State v. Apotex*, 2012 UT 36, ¶¶ 63-67, 282 P.3d 66. Once the statute of limitation has expired, the right becomes vested and cannot be eliminated, whether through legislative intent or through any exception for "procedural" statutes. *State v. Lusk*, 2001 UT 102, ¶ 30, 37 P.3d 1103 (citing *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 851 (Utah 1996); *Roark*, 893 P.2d at 1063; and *State ex rel. Kirby v. Jacoby*, 1999 UT App 52, ¶ 10, 975 P.2d 939).

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[9] Plaintiff and *amici* cite *Roark* to argue that the legislature can revive an expired claim if it intends to do so. [Pl. Br. at 9-10; Legis. Br. at 6-7; A.G. Br. at 8-9.] This misreads *Roark*. The plaintiff in *Roark* argued that "(1) the purpose and scope of" the statute at issue indicated the legislature wanted it to apply "retroactively," and "(2) it is procedural in nature and does not alter any vested rights." 893 P.2d at 1061. The court "address[ed] each of Roark's contentions in turn." *Id*. First, it found that the legislature did not intend the amended statute of limitation to be retroactive. *Id.* at 1062. Second, it held that the amended statute affected vested rights and thus was "not merely procedural." *Id*. at 1063. But unlike some other vested rights, the court explained that Utah law "refuse[s] to allow the revival of time-barred claims through retroactive application of extended statutes of limitations" *at all*, because the "vested right to rely on" a statute of limitation "cannot be taken away by legislation." *Id*. at 1063 (internal quotation marks and citation omitted). Thus, though *Roark* tracks the two arguments advanced by the plaintiff, it also holds, following *Ireland*, that the legislature cannot revive expired claims.

Statutory interpretation is not at issue here. As defendant explained in his opening brief, "The legislature remains free to amend and extend statutes of limitation, *even retroactively*, but those amended statutes apply only as to claims that have *not yet expired*." [Def. Br. at 25 (first emphasis added).] So long as a limitation period remains open, an individual's right to rely on that statute of limitation has not vested, and the legislature may extend the limitation period. The court has recognized this distinction on numerous occasions. *See, e.g.*, *Del Monte Corp. v. Moore*, 580 P.2d 224, 225 (Utah 1978) ("[I]f the statute has run on a cause of action, so that it is dead, it cannot be revived by any such statutory extension. But if the cause of action is still alive, the new enactment can extend the time in which it may be brought."); *State v. Green*, 2005 UT 9, ¶ 20, 108 P.3d 710 (restating the "controlling" law that "'a statute of limitations will extend the limitations period applicable to a crime already committed only if the amendment becomes effective before the previously applicable statute of limitations has run.'") (quoting *Lusk*, 2001 UT 102, ¶ 26); *Roark*, 893 P.2d at 1062-63; *State ex rel. Kirby v. Jacoby*, 1999 UT App 52, ¶ 13, 975 P.2d 939.[10]

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[10] *Apotex* neither abrogates nor calls into question the traditional retroactivity analysis applied in cases such as *Waddoups v. Noorda*, 2013 UT 64, ¶ 6, 321 P.3d 1108, which did not concern expired claims or statutes of limitations. [Pl. Br. at 15]; *see also* Order of Certification, ECF No. 37, at 1 (June 1, 2017) (certifying the questions in this case because the magistrate judge "found that Utah law regarding retroactive operation of statutes remains unclear in light of possibly conflicting statements" in *Apotex* and *Waddoups*). *Apotex* restates the longstanding rule that even though the legislature may retroactively alter some "substantive" rights, *Waddoups*, 2013 UT 64,¶ 8, it lacks the power to revive expired claims regardless of whether it purports to do so. *Apotex*, 2012 UT 36, ¶ 67.

3. The Plurality of States Hold that Expired Claims Cannot Be Revived, and Plaintiff and *Amici* Offer No Good Reason to Join the Minority of Jurisdictions

It is telling that plaintiff and *amici* devote most of their argument to attacking Utah authority and exalting the decisions of a minority of other jurisdictions. This court adopted the majority position among the states just after the Utah Constitution was ratified. *Ireland v. Mackintosh*, 61 P. 901, 902 (Utah 1900) (recognizing that, while "a few of the state courts" follow the federal rule, "a much greater number" do not). Most states to address the issue prohibit legislatures from reopening expired claims. Plaintiff and *amici* advance no compelling reason for this court to reverse course and adopt the minority view as a matter of *stare decisis*, let alone to abandon the Utah rule that stems from the original meaning of the Utah Constitution.

3.1 The Majority Rule Is that the Legislature Lacks the Power to Revive Expired Claims

Today, at least twenty-four states, including Utah, hold that an expired claim cannot be revived. [Def. Br. at 29 n.17; A.G. Br. at 5 n.2 (accepting the 24-state figure).] These courts have relied on several mutually reinforcing rationales for reaching this conclusion, including constitutional limits on retroactive legislation, vested-rights doctrine, and due process. [Def. Br. at 29 n.17.]

Uniting these states' jurisprudence is the holding that the legislature lacks the *power* to revive expired claims—as this court has repeatedly recognized. Like

Utah, numerous courts emphasize vested rights and their states' long history of providing more protection in this arena than do the federal due process clauses.

For example, in *Johnson v. Lilly*, 823 S.W.2d 883, 884-85 (Ark. 1992), the Arkansas Supreme Court acknowledged the federal rule but decided to adhere to a line of Arkansas cases, beginning in the nineteenth century, forbidding the reopening of expired claims. The court stated: "[W]e have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred." *Id.* at 885. The early cases on which it relied held that "'the defendant has a *vested right* to rely on that statute as a defense,'" and that the legislature lacked the "'*power* to divest that right and revive the cause of action.'" *Id.* (emphases added) (quoting *Wasson v. Ark. ex rel. Jackson*, 60 S.W.2d 1020, 1020-21 (1933)). The court underscored that it had rejected *Campbell v. Holt*'s framework in its 1914 case *Rhodes v. Cannon*—not long after this court did so in *Ireland*—and instead adopted the approach that "'when the claim is barred by it is forever barred.'" *Id.* (quoting *Rhodes*, 164 S.W. 752, 754 (Ark. 1914)).

Similarly, the Supreme Court of Illinois, like this court, grounded its state's law in vested rights and due process:

> "[O]nce a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action. That right cannot be taken away by the legislature without offending the due process protections of our state's constitution."

> Accordingly, we held, "[i]f the claims were time-barred under the old law, they remained time-barred even after the repose period was abolished by the legislature."

Doe A. v. Diocese of Dallas, 917 N.E.2d 475, 484 (Ill. 2009) (second alteration in original) (quoting *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997)). As this court did in *Roark* and as the Arkansas Supreme Court did in *Johnson v. Lilly*, the Illinois Supreme Court emphasized the history of the law in the state: "These principles date back more than a century. They have been consistently followed by this court. They remain valid today." *Id.* (citations omitted). Thus, this court is not alone in continuing to adhere to this rule as articulated in early cases decided following ratification of the state constitution.

Many other states—the majority—agree with Utah for substantially similar reasons. [Def. Br. at 30-40 & n.22 (citing additional cases).][11] *Amici* highlight United States Supreme Court case law. In fact, it is the Attorney General's lead

[11] Lacking a single on-point Utah authority supporting their position, plaintiff and *amici* rely on federal and out-of-state cases. Plaintiff argues that Utah should switch sides and join the minority of jurisdictions that follow the federal rule of *Campbell*. [Pl. Br. at 10 (citing federal cases from the Tenth Circuit, D.C. Circuit, District of Massachusetts, and Eastern District of Missouri); *id.* at 11 (citing cases from states that adopted the federal rule)]. To the extent plaintiff tries to mitigate the weight of authority that adheres to Utah's rule by suggesting that other states have not considered bills exactly like the one at issue here or pointing to differences in the wording of other states' constitutions, these arguments are unavailing—the bar on legislative revival of expired claims applies to bills addressing a range of issues, as *Apotex* and *Roark* demonstrate, and the rules of other states are grounded in the particularities of their own state constitutions, interpretations of their state due process guarantees, and state constructions of vested rights. *See infra* at 21-22.

argument. [A.G. Br. at 4-6; *see also* Legis. Br. at 10-11.] But as the United States Supreme Court recognized,

> [S]ome state courts have not followed [federal precedent] in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument.

Chase Secs. Corp. v. Donaldson, 325 U.S. 304, 312-13 (1945). Plaintiff's and *amici*'s reliance on federal precedent is particularly misplaced because the United States Supreme Court recognized Utah as a state that interpreted its constitution to bar the revival of expired claims. *Id*. at 312 n.9 (citing *In re Swan's Estate*, 79 P.2d 999 (Utah 1938)). Because this court held that the Utah Due Process Clause protects vested rights in expired claims notwithstanding the federal rule, the citations by plaintiff and *amici* to cases applying the federal standard are inapposite.

Cases cited by plaintiff and *amici* construing other states' constitutions are not persuasive on their merits. Some are unpublished and thus not binding in their own jurisdictions. [Pl. Br. at 10 (citing *United States v. Hodges*, No. 4:92CV1395, 1993 WL 328044, at *1 (E.D. Mo. Apr. 21, 1993) (unpublished)).] Others rely on reasoning that is inapplicable under Utah law. For example, the Delaware Supreme Court adopted *Chase* because "we should ordinarily submit our judgment to that of the highest court of the land, if the point at issue has been decided by that Court." *Sheehan v. Oblates of St. Francis De Sales*, 15 A.3d 1247,

1259 (Del. 2011) (internal quotation marks omitted). This court has no similar doctrine. *See State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935. And some courts were faced with contrary or ambiguous state precedent, unlike the uniform precedent in Utah. *See, e.g.*, *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 499 (Conn. 2015) (concluding that "the constitutional history . . . provides support for the plaintiff" because before the Connecticut Constitution was framed, "the legislature had acted to revive time barred actions").

These cases discussed by plaintiff and *amici* are not instructive.

3.2 Plaintiff and *Amici* Offer No Good Reason to Depart from Utah Precedent and the Plurality Rule

It is important to focus on what plaintiff and *amici* seek: the rejection of settled Utah precedent. Yet they do not address the controlling standard for overturning precedent, and they give no persuasive, thoughtful reason why the court should open a Pandora's Box to the wholesale renunciation of vested rights in Utah that would be triggered by a ruling in their favor.

Before this court will overturn its prior decisions, it analyzes (1) "the persuasiveness of the authority" and (2) "how firmly the precedent has become established," including factors like "the age of the precedent, how well it has worked in practice, its consistency with other legal principles, and the extent to which people's reliance on the precedent would create injustice or hardship if overturned." *Eldridge v. Johndrow*, 2015 UT 21, ¶22, 345 P.3d 553; *see also Waite v.*

Utah Labor Comm'n, 2017 UT 86, ¶ 56, --- P.3d --- (Lee, J., concurring); *Waite*, 2017 UT 86, ¶ 93 (Pearce, J., concurring); [Def. Br. at 40-42].

All of these elements—ignored by Plaintiff and *amici*—weigh strongly *against* the rejection of Utah's long-settled precedent here. First, this court's consistent holdings are persuasive: the constitutional, vested right to be free from expired claims is grounded in the original meaning and basic fairness, the need for certainty and closure, and the interests of the judicial system in limiting claims that cannot be litigated fairly long after evidence has been discarded and memories have faded.

Second, Utah's precedent is firmly established; it has been consistently elucidated for nearly 120 years, without equivocation or exception. It has worked well in practice, balancing the legitimate interests of all persons affected. The rule is consistent with all other applicable legal principles, including the related rule that a statute applies retroactively to unexpired claims only where the legislature expressly intends it to do so or where the statute is procedural. But the application of these legal principles does not answer the constitutional question when vested rights are eliminated.

Finally, the injustice that would be created by overturning settled Utah law here is manifest: *all* persons, and their insurers, previously protected by vested rights from the assertion of expired claims, who have put these matters behind them, discarded whatever evidence they might have used to defend themselves,

and forgotten about relevant facts with the passage of time, would be subject to the possible assertion of those claims.

Plaintiff and *amici* say nothing about the extraordinary consequences of their view: there can be no repose, for anyone. Any and all claims, no matter how long expired, are fair game for litigation against anyone, if the legislature decides to revive them. And under plaintiff's rule, the legislature may choose to revive claims whenever and however it wishes. If the vested right here—long protected by Utah—can be summarily revoked, then there can be no reliance interest that other claims will not be revived, let alone other vested rights eliminated.

3.3 The Legislature Lacks Plenary Power to Eliminate Vested Rights

Throughout the history of Utah's ban on the revival of expired claims, this court has, rightly, viewed itself as protecting both defendants and the integrity of the judicial system from the "whim and vagary of the legislature" without the rule. *Lusk*, 2001 UT 102, ¶ 20. And the court, in upholding the rule, has characterized it as protecting the fairness of the system from both the "impunity" of "oppressive charges," *Kuhn v. Mount*, 44 P. 1036, 1038 (Utah 1896), and the "untenable" results that would ensue if the legislature could resurrect "dead" claims. *Lusk*, 2001 UT 102, ¶ 30.

Plaintiff and *amici* assert that only the legislature can decide what claims may be revived. They assert that the separation of powers would be violated if this court intrudes on that legislative prerogative. [Pl. Br. at 25; Legis. Br. at 3-4;

A.G. Br. at 5-6.] Just the opposite is true: the separation of powers *requires* the supervision of the court, to protect against the current legislature's encroaching on constitutionally protected, vested rights that stem from a prior legislature's statute.[12] The court should not abdicate its long-recognized role of defending individuals' vested rights—protected under the Due Process Clause—and the integrity of the judicial system against the legislature's "whim" and a potential onslaught of stale, oppressive claims. *Lusk*, 2001 UT 102, ¶ 30.

The Utah Legislature, as *amicus*, asserts that its power is "plenary." [Legis. Br. at 3; *see also* Pl. Br. at 6-7.] But this observation fails to distinguish this case from any relevant precedent. As this court has recognized since before *Ireland*, the Legislature has "plenary power" "excepting such as is expressly or impliedly withheld by the state or federal constitution." *Kimball v. Grantsville City*, 57 P. 1, 4 (Utah 1899); *see generally Waite*, 2017 UT 86, ¶ 18 (explaining that, under the Utah Constitution, the legislature lacks "'unbridled power'" to "'create, define, and modernize the law'") (quoting *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 189 (Utah 1989)). The power to reopen an expired claim has always been recognized as one that has been "withheld." Calling the legislature's power "plenary" does not give the legislature the power to

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[12] Under this court's precedent, operative statutes of limitation are, at all times, determined by the legislature. If a past Utah legislature saw fit that a claim should expire on a specific date, and the claim expires on that date, then the right to repose granted by the legislature vests. A future legislature cannot withdraw the right to repose that was previously granted by the (past) legislature after it has vested without violating the constitutional rights of the defendant.

eliminate vested rights, and does not call this court's nearly 120 years of precedent into doubt.

Finally, plaintiff argues that policy reasons favor abandoning long-settled Utah constitutional law. [Pl. Br. at 27 & n.19.] Plaintiff asserts that, because claims of professed victims of sexual abuse appear compelling, the legislature had sound policy reasons for seeking to revive expired child sex abuse claims. While that policy may support the prospective elimination of a statute of limitation for such claims, it does not allow the elimination of the vested right to an expired statute of limitation defense based upon the law at the time. That policy argument ignores the fact that statutes of limitation foreclose claims both valid and invalid,[13] including facially compelling claims of sympathetic professed victims.[14] It also ignores this court's repeated and consistent holding that a defendant, after expiration of a statute of limitation, has a vested, constitutional right that cannot be taken away.

Indeed, the court has so held—twice—in cases presenting the issue of whether the legislature could lawfully revive the limitation period for child sex abuse claims after they had expired. *Lusk*, 2001 UT 102, ¶ 30; *Roark*, 893 P.2d at

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[13] Def. Mot. to Dismiss, ECF No. 9, at 2-4.

[14] Plaintiff's allegations that she was subjected to threats or coercion, [Pl. Br. at 27], were unanimously rejected by both the Tenth Circuit Judicial Council Special Committee and the full Judicial Council, after an extensive investigation, as lacking any corroboration. Judicial Council of the Tenth Circuit Order at 17 (found at http://www.ca10.uscourts.gov/sites/default/files/misconduct/c.c.d._no._17-02_november_30_2017_0.pdf).

1063. In neither case did the court find the nature of the claims a sufficient reason to depart from the universal rule that an expired claim cannot be revived.[15] *See also Lucero v. State*, 2016 UT App 50, ¶ 10, 369 P.3d 469 (reiterating the rule in *Lusk* in a case involving child sex crimes, but finding that the defendant's statute-of-limitation defense had not vested).

The court was correct not to create an exception for these cases. Once a court holds that the legislature may revive expired claims of one kind, the legislature will be free to revive expired claims of all kinds, and perhaps eliminate affirmative defenses of all kinds. A vested right would mean little, as the legislature would have no constraints on its power to revive any cause of action for any occurrence, "at its pleasure at any time, however remote." *Ireland*, 61 P. at 904. No cause of action would be beyond revival, meaning that potential evidence would have to be preserved forever, and there would be no repose—ever—for defendants or their insurers, employers, and families. This "untenable," *Lusk*, 2001 UT 102, ¶ 30, state of affairs has never been the law in Utah, and for good reason. [Def. Br. at 10-15 (describing how Utah law recognizes that statutes of limitation protect the integrity of the judicial system and provide finality and repose).]

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[15] Plaintiff in this case was old enough to give and receive consent under Utah law when the disputed events occurred. Utah Code § 76-5-401 (as codified in 1981). Furthermore, these disputed events occurred in 1981, and plaintiff, who had the benefit of tolling under applicable law, had decades to bring her claims under the statutes of limitation that existed prior to the adoption of section 78B-2-308(7). Def. Mot. to Dismiss, ECF No. 9, at 6-8.

Plaintiff and *amici* ask the court to ignore these powerful reasons to uphold Utah's settled law. But the highest tradition of the court is to protect vested rights under its precedent, particularly when they are threatened by the passions of the political process.

Conclusion

For these reasons, defendant respectfully submits that the court should answer the certified questions as follows:

1. The Legislature has no power to revive time-barred claims through a statute.

2. The Legislature cannot revive expired claims, regardless of its express intention to do so in section 78B-2-308(7).

DATED this 14th day of December, 2017.

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Certificate of Compliance

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because this brief contains 7,859 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13-point Book Antiqua.

3. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 14th day of December, 2017.

/s/ Troy L. Booher

Certificate of Service

This is to certify that on the 14th day of December, 2017, I caused two true and correct copies of the Response Brief of Richard Warren Roberts to be served via first-class mail, postage prepaid, with a copy by email, on:

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