In the Supreme Court of the State of Utah

TERRY MITCHELL, *Plaintiff-Appellant*, v. RICHARD WARREN ROBERTS, *Defendant-Appellee*.	**No. 20170447-SC**

Supplemental Brief of *Amicus Curiae*
the Office of the Utah Attorney General

On certified questions from United States District Court, District of Utah
Honorable Evelyn J. Furse, Magistrate Judge
No. 2:16-cv-00843

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Introduction

The Court asked for supplemental briefs addressing (1) whether the Utah Legislature has the authority under the state constitution to "revive a claim that was barred by the previously applicable statute of limitations," and (2) if so, what limitations, if any, does the constitution impose on that power?

Because the constitution vests the legislature with the State's whole "Legislative power," the legislature can act on any topic not prohibited by the state or federal constitutions. No federal or state constitutional principle—express or implied—clearly limits the legislature's power to revive a time-barred claim for child sexual abuse. That makes section 78B-2-308(7) a valid exercise of legislative power.

The state constitution's Due Process Clause does not change that result. Only ten years before Utah's 1895 constitutional convention, the United States Supreme Court held that the Fourteenth Amendment did not bar a state law that revived a time-barred claim to collect a debt. Some state courts reached the opposite conclusion under their own constitutions. Yet the framers adopted a Due Process Clause virtually identical to the Fourteenth Amendment. Defendant fails to point to anything showing that Utah's due process provision, as originally understood, would provide more protection to him than its federal counterpart.

Finally, the Open Courts Clause, under any plausible interpretation, does not bar section 308(7). At most, that clause allows Defendant his day in court to assert any currently available defense. But the provision does not prohibit the legislature from retroactively reviving a time-barred claim. It's substantive protections apply only to *causes of action*.

Constitutional Interpretation

In interpreting the Utah Constitution, the Court seeks "to ascertain and give power to the meaning of the text as it was understood by the people who validly enacted it as constitutional law." *Richards v. Cox*, 2019 UT 57, ¶ 13, --- P.3 --- (citing *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 95, 416 P.3d 663). That inquiry tries to determine the original public meaning of the constitutional language by "ask[ing] what principles a fluent speaker of the framers' English would have understood a particular constitutional provision to embody." *Richards*, 2019 UT 57, ¶ 13. The inquiry "start[s] with the meaning of the text as understood when it was adopted." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 18, --- P.3d ---.

The analysis uses "all available tools–*Black's Law Dictionary*, corpus linguistics, and [this Court's] examination of the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Richards*, 2019 UT 57, ¶ 13 (internal quotation marks omitted). The analysis looks to the constitutional "text, historical evidence of the state of the law

when it was drafted, and Utah's particular traditions at the time of drafting." *Maese*, 2019 UT 58, ¶ 18 (internal quotation marks omitted). "There is no magical formula for this analysis—different sources will be more or less persuasive depending on the constitutional question and the content of those sources." *Id.* ¶ 19.

A comprehensive review of these sources steers the Court away from unwisely "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact." *Id.* ¶ 20 (internal quotation marks omitted). That type of analysis will look at "[t]he Utah Constitution's language, the debate at the Constitutional Convention, the first state code, historical evidence, and evidence from other jurisdictions" to ascertain what "the public would have understood" the constitutional language to mean "at the time of statehood." *Id.* ¶ 86.

The Presumption of Constitutionality

Defendant bears a heavy burden to invalidate section 308(7). Utah's statutes are presumed constitutional and, wherever possible, must be construed as complying with the state and federal constitutions. *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶ 12, --- P.3d ---; *see also Richards*, 2019 UT 57, ¶ 12 (the Court will "apply a presumption of validity [to a challenged statute] so long as there is a reasonable basis upon which both provisions of the statute and the mandate of the constitution may be

reconciled" (internal quotation marks omitted)). Any reasonable doubts about a statute's validity are resolved in favor of constitutionality, and a statute may not be declared invalid unless it clearly violates a constitutional provision. *Vega*, 2019 UT 35, ¶ 12. That means "[i]f a party seeking to challenge the constitutionality of a law enacted by the representatives of the people fails to provide a sufficient basis for the establishment of a clear constitutional standard, then the presumption of constitutionality kicks in." *Maese*, 2019 UT 58, ¶ 96 (Lee, A.C.J., concurring).

Here, Defendant has "not overcome the presumption." *Richards*, 2019 UT 57, ¶ 12.

Argument

I. The Legislative Power Includes the Power to Revive a Time-Barred Claim.

All political power derives from the people. Utah Const. art. I, § 2 ("All political power is inherent in the people; and all free governments are founded on their authority . . . ."). And the people can allocate that power between or "'delegate it to representative instruments which they create.'" *Carter v. Lehi City*, 2012 UT 2, ¶¶ 21, 30, 269 P.3d 141 (quoting *City of Eastlake v. Forest City Enters.,* 426 U.S. 668, 672 (1976)).

The people of Utah, acting through the Utah Constitution, created "The Legislature of the State of Utah" and vested it with the "Legislative power of

the State." Utah Const. art. VI, § 1 (1896).[1] That power allows the legislature to take any action not prohibited by the state or federal constitutions. Because neither founding charter prohibits the legislature from reviving time-barred civil claims for child sexual abuse, section 308(7) is a valid exercise of legislative power.

A. Legislative power means the authority to enact any law not prohibited by the state or federal constitutions.

The original public meaning of legislative power defies any "clear, bright line[]" formulation. *Carter*, 2012 UT 2, ¶ 35 (recognizing "the difficulty of delineating the legislative power with clear, bright lines"); *see also id.* ¶ 32 (noting that "[i]t may not be possible to mark the precise boundaries of [legislative] power with bright lines"). The Court has nonetheless described the "essential hallmarks" of that power. *Id.* ¶ 32. And, at least as it pertains to enacting legislation,[2] the legislative power encompasses making generally applicable rules based on broad policy considerations. *Id.* ¶¶ 36-38 & n.25 (citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 109–10

[1] Article VI, section 1 was later amended to also vest "the people" with the "Legislative power" to initiate or refer legislation. Utah Const. art. VI, § 1(1).

[2] Legislative power includes more than enacting legislation, *Proulx v. Salt Lake City Recorder*, 2013 UT 2, ¶ 17 n.2, 297 P.3d 573, but those additional powers are not at issue in this case.

(The Lawbook Exchange, Ltd., 5th prtg., 1998) (Boston: Little, Brown, & Co., 5th ed. 1883) (defining legislative power as the power to make general rules for the government of society, which are "predetermination[s] of what the law shall be for the regulation of all future cases falling under [their] provisions")). Section 78B-2-308(7) is an exercise of legislative power under that definition—it's a generally applicable law based on broad policy considerations.

Beyond outlining the contours of legislative acts, the Court and commentators have consistently recognized that this legislative power is plenary—the legislature may legislate "upon any subject as to which there is no constitutional restraint, or as to which the paramount law does not speak." *State ex rel. Nichols v. Cherry*, 60 P. 1103, 1103 (Utah 1900); *see also* Cooley, *Const. Limitations* at 105-06 (Little, Brown, and Co., 5th ed. 1883)[3] ("In creating a legislative department and conferring upon it the legislative power, the people . . . conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restriction as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States.").

[3] Available at https://books.google.com/books?id=2uQ9AAAAIAAJ&pg=PA439&source=gbs_toc_r&cad=3#v=onepage&q&f=false..

This expansive understanding of legislative power predated statehood. *See, e.g.,* Cooley, *Const. Limitations* at 105-06; *People ex rel. Woodyatt v. Thompson*, 40 N.E. 307, 312 (Ill. 1895) (stating "no proposition is better settled than that a state constitution is a limitation upon the powers of the legislature, and not a grant of power, and that the legislature possesses every power not delegated to some other department or to the federal government, or denied to it by the constitution of the state or of the United States" (citing cases)). And it permeates the Court's precedents over the ensuing decades. *See, e.g., Kimball v. City of Grantsville City*, 57 P. 1, 4–5 (Utah 1899) ("The state having thus committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution, it has plenary power for all purposes of civil government. Therefore, in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government."); *Tribune Reporter Printing Co. v. Homer,* 169 P. 170, 172 (Utah 1917) ("[I]t must be remembered that matters of public policy are clearly within the province of the Legislature. The Legislature has power to determine what [state policy] shall be, and in the exercise of this power it is limited only by the state and federal Constitutions."); *State ex rel. Stain v. Christensen*, 35 P.2d 775, 780 (Utah 1934) ("It is the established doctrine in this and other jurisdictions that the whole lawmaking power is committed to

the Legislature except such as is expressly or impliedly withheld by our Federal and State Constitutions."); *State v. Mason*, 78 P.2d 920, 925 (Utah 1938) ("The Legislature has every power which has not been fully granted to the Federal Government or which is not prohibited by the State Constitution."); *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 18, 144 P.3d 1109 ("At the time of statehood, the State of Utah committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution." (internal quotation marks omitted)).

In other words, unlike the default under the federal constitution—Congress may not exercise a power unless it's specifically enumerated—Utah's default constitutional rule is that the state legislature may exercise any legislative power unless the constitution specifically forbids it. *Spence v. Utah State Agric. Coll.*, 225 P.2d 18, 23 (Utah 1950) (noting the "state is committed" to the "doctrine firmly established in the laws of most jurisdictions . . . that a state constitution is in no manner a grant of power, it operates solely as a limitation on the legislature, and an act of that body is legal when the constitution contains no prohibition against it"); *see also Salt Lake City v. Christensen Co.*, 95 P. 523, 525 (Utah 1908) ("It is too well settled to require more than passing mention that state Constitutions are mere limitations and not grants of powers."); *Parkinson v. Watson*, 291 P.2d 400, 405 (Utah 1955) (noting "well recognized principle that in state

governments, the legislature being the representatives of the people, wherein lies the residuum of governmental power, constitutional provisions are limitations, rather than grants of power"); *Shurtleff*, 2006 UT 51, ¶ 18 (stating "[t]he Utah Constitution is not one of grant, but one of limitation" (internal quotation marks omitted)).

Utah's constitutional framers were fully aware of these principles while drafting the State's foundational document. During the convention, the delegates:

> Resolved, as the sense of this convention, that the Constitution shall contain only the general plan and fundamental principles of the State government *together with such limitations* of power thereof as may be deemed wise and expedient for the preservation of civil, political and religious liberty.
>
> Resolved further, that matters *purely of a legislative character, not intended as necessary limitations of power,* should not be inserted in the constitution, but left to the Legislature, acting within its constitutional powers.

1 *Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March, 1895, to Adopt a Constitution for the State of Utah* 212-13 (Star Printing Co. 1898) (emphasis added) [hereinafter *Official Report*].

The resulting constitution shows the delegates put the principle in action. After vesting the legislature with "Legislative power," article VI prohibited the legislature from enacting certain "private or special" laws,

Utah Const. art. VI, § 26 (1896), releasing state or municipal debts, *id.* § 27, authorizing gambling, *id.* § 28, delegating certain powers, *id.* § 29, granting extra payments to officials or contractors, *id.* § 30, or lending its credit, *id.* § 31. The declaration of rights also prohibits the legislature from passing certain legislation, including bills of attainder, ex post facto laws, and laws impairing contractual obligations. *Id.* art. I, § 18 (1896 and current).

Apart from the ex post facto provision, the framers did not include in the Utah constitution any express bar on retroactive legislation generally, *Salt Lake City v. Tax Comm'n ex rel. Mountain States Tel. & Tel. Corp.*, 813 P.2d 1174, 1177 (Utah 1991), much less a specific prohibition against reviving time-barred claims—even though other contemporaneous state constitutions contained such bars. *See* Supp. Mitchell Br. at 19-20 (citing Alabama and Mississippi constitutional provisions barring their legislatures from reviving time-barred claims). This omission is even more telling considering that just ten years earlier the United States Supreme Court had held that the Fourteenth Amendment did not prohibit a state from reviving a time-barred claim for payment of a debt. *Campbell v. Holt*, 115 U.S. 620, 628-29 (1885).[4]

[4] The Supreme Court reaffirmed *Campbell's* holding without dissent 60 years later. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-16 (1945). So it has long been settled federal constitutional law that a "state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the

In particular, the Supreme Court stated that it was not "beyond legislative power" to revive a time-barred claim for a debt. *Id.* at 628.

After finishing their task, the delegates reiterated to the people of Utah that the constitution's legislative article "permit[ed] future lawmakers to perform any needed thing, [while] circumscrib[ing] their powers in a way to prevent either extravagance or the misuse of legislative authority." 2 *Official Report* at 1836.

The voters ratified the constitution. Then, significantly, the state legislature enacted a law for inclusion in the first state code that expressly recognized the legislature could make retroactive laws if they expressed that intent. Utah Rev. Stat. § 2490 (1898) ("No part of the Revised Statutes is retroactive, unless expressly so declared."). Like the constitution, the statute did not limit certain subjects or rights that would be beyond the reach of retroactive civil legislation. This tends to show that the public did not understand the state constitution to bar retroactive legislation, even as to reviving time-barred claims. *See Maese*, 2019 UT 58, ¶ 46 (stating that "the 1898 Code, having been drafted in 1896 and approved in 1897, can provide persuasive evidence about what the people of Utah would have understood our state constitution to mean").

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plaintiff his remedy, and divest the defendant of the statutory bar." *Id.* at 311-12.

So it was well understood in mid-1890's Utah—by courts, commentators, the framers, and the people—that "[w]hat the Constitution does not prohibit the Legislature may do." *Scott v. Salt Lake Cty.*, 196 P. 1022, 1024 (Utah 1921). That's why this Court has long recognized that "[b]efore an act of the Legislature can be held unconstitutional it must be clear and free from doubt that it contravenes some provision of the Constitution." *Id.*

B. Defendant fails to show that legislative power did not include authority to revive time-barred claims.

Given this history and constitutional framework, it is highly improbable that the public would have understood that legislative power included hidden limits on vested defenses. Yet Defendant asserts everyone knew the legislative power necessarily implied an inherent and rather broad self-limitation against interfering with any and all so-called "vested rights" generally, and against reviving time-barred claims specifically. Supp. Roberts Br. at 3-15. But his arguments fail to show that section 308(7) clearly and beyond-a-doubt exceeds the legislature's power under Article VI, section 1.

Defendant first argues that this Court's cases prove his point. Supp. Roberts Br. at 4-5. But the posture of this current dispute suggests otherwise. If the Court's cases already offered "[d]ispositive evidence," *id.* at 4, that the legislature could not revive time-barred claims, the federal court would not

have certified that issue to this Court, and the Court in turn would not have requested supplemental briefing based on the lack of any prior "in-depth analysis under the Utah Constitution of a statute like" section 308(7). Supp. Br. Order at 1.

Beyond that, the Utah cases Defendant primarily relies on do not show that the original public meaning of legislative power excludes the authority to revive a time-barred claim for child sexual abuse. For example, *Ireland v. Mackintosh*, upon which Defendant hangs most of his argument, doesn't analyze any Utah constitutional provision, including article VI, section 1. *See generally* 61 P. 901 (Utah 1900). Instead, the Court begins by (1) acknowledging the United States Supreme Court's holding in *Campbell* allowing a state legislature to revive a time-barred claim to collect a debt and (2) recognizing a split of authority on the issue. *Id.* at 902. That by itself disproves Defendant's argument.

After discussing the statute at issue there and the purpose of statutes of limitations, the *Ireland* Court declared that legislation must be "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.* at 904. The Court then found that the statute in question failed to show any indication that the legislature "intended to revive causes of action which had before the passage of that act become barred." *Id.*

Accordingly, the Court concluded "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 . . . when appellant's right of action . . . 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.* Whatever the Court said about vested rights is best read as unnecessary dicta given the Court's conclusion that the statute at issue did not apply retroactively in the first place. Regardless, the Court's opinion provides no clear basis supporting Defendant's public meaning argument.

The same goes for *Roark v. Crabtree*. There the Court again reiterated the "long-standing rule of statutory construction that a legislative enactment which alters the substantive law or affects vested rights will not be read to operate retrospectively *unless the legislature has clearly expressed that intention*." 893 P.2d 1058, 1061 (Utah 1995) (emphasis added). In a section titled "Legislative Intent," the Court determined that a statute of limitations for sex-abuse claims contained no express declaration of retroactivity and the legislative history suggested that the law was meant to be prospective only. *Id.* at 1061-62. And in a section titled "The Nature of Section 78-12-25.1," the Court then noted that even absent legislative intent, the law could apply retroactively if it affected only procedural rather than substantive rights. *Id.*

at 1062 ("this exception has been narrowly construed to permit retroactive application where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights, . . . and to prohibit retroactivity when a statute enlarges, eliminates, or destroys vested or contractual rights." (internal quotation marks and citation omitted)).

The Court concluded that the statute could not be applied retroactively because it affected a defendant's vested right to an expired statute of limitations defense. *Id.* at 1062-63. The Court cited to *Ireland* and Am. Jur. 2d, and claimed to follow the majority rule. *Id.* But again, *Roark* doesn't clearly support Defendant's position given the Court's discussion of legislative intent. More important, regardless of how one interprets *Roark's* holding and analysis, the Court never grounded its decision in the Utah Constitution or any original public meaning about legislative power.

Nor does *In re Handley's Estate* help Defendant's cause. To be sure, the Court noted that the vested rights at issue could not be retroactively impaired. 49 P. 829, 831 (1897). But context matters. There, the statute in question required courts to reopen certain final judgments decreeing estate inheritance (the vested right) and reexamine the previously adjudicated matter. *Id.* The Court rightfully objected to the idea that after the judiciary had tried a case, interpreted and applied the law in force at the time, and

entered a final judgment, the legislature could subsequently "give to the law a different construction, requiring a different decree, and invent a new remedy or change the old one, and require the court to retry the case and enter a new decree according to its new construction, and new and changed remedy." *Id.* Upholding such a law, the Court reasoned, would improperly allow the legislature to "exercise judicial powers, authorize and require the courts to set aside final judgments and decrees, devest titles, and destroy and annihilate vested rights. The people of the state have not [e]ntrusted such powers to the legislature." *Id.* The analysis focused on separation-of-powers concerns—an express constitutional bulwark against legislative excess, *see* Utah Const. art. V, § 1, there applied to keep the legislature from reviving judicially adjudicated final judgments—and does not show any original public understanding that the legislature necessarily lacked power to revive unadjudicated and previously time barred claims.

Defendant also argues that some convention delegates made statements suggesting the legislature could not take away vested rights. Supp. Roberts Br. at 8-9. But Plaintiff points out that the delegates' vested rights discussions were limited to real property rights, contract rights, and corporate charters. *Id.* at 21-22. All issues that the constitution addressed. *See, e.g.,* Utah Const. art. I, §§ 7, 18, 22; *id.* art. XII, §§ 1, 2, 3 (1896). That

reality undermines Defendant's claim to inviolable and unenumerated vested rights that impliedly limit legislative power.

Finally, Defendant falls back on the alleged weight of authority and commentary circa 1895 and the views of a few western states to bolster his argument about the original public meaning of legislative power. *Id.* at 11-17.[5] But the question is not which side of the split has more support and then

[5] Defendant's weight of authority claim should be viewed with skepticism as it relates to implied limits on legislative power. For example, Cooley discusses limitations statutes in chapter XI about due process protections ("the law of the land") not in chapter V about legislative power and its limits. *See* Supp. Roberts Br. at 12 & Addendum A at 448. And Professor Ames's quotation relies solely on Cooley (while noting *Campbell* disagrees). *See* Supp. Roberts Br. at 12 & Addendum H at 319-20 n.5. Bishop's quote relies primarily on two Wisconsin cases, Supp. Roberts Br. at 12 & Addendum I at 176 n.3, even though Wisconsin applies a balancing test to determine whether a retroactive law affecting vested rights is permissible. *See* Roberts Br. at 29-30 n.17.

Similarly, Defendant claims "[m]any states relied on the legislature's lack of power to disturb vested rights" and cites cases from Arkansas and Mississippi. Supp. Roberts Br. at 13-14. But the Arkansas case addressed a non-retroactive statute, *Rhodes v. Cannon*, 164 S.W. 752, 754 (Ark. 1914), as did the case it relied on for the vested right proposition, *Couch v. McKee*, 6 Ark. 484, 494-95 (1846), and neither case appears to have analyzed the grant of legislative power under the Arkansas constitution. *Id.* The Mississippi case based its decision on the due process clause, *Dingey v. Paxton*, 60 Miss. 1038, 1057 (1883), and Mississippi's 1890 constitution contains an express bar against reviving time-barred claims. Miss. Const. art. 4, § 97.

Defendant also asserts that as of 1895, 25 states, including several western states, prohibited legislatures from reviving expired statutes of limitations. Supp. Roberts Br. at 14 n.10, 16-17. But he includes in those totals various states that have constitutional or statutory bars against retroactive laws or reviving time-barred claims. *Compare id. with* Roberts Br. at 29-30 n.17 (identifying states with such bars) and Supp. Mitchell Br. at 19-20 & n.48 (as corrected by the Errata) (same). None of those states support Defendant's point about legislative power. If anything, the express prohibitions prove the

adopting the majority view. Even if more states did forbid laws reviving time barred claims,[6] it would not matter given the historical record in this case. The critical fact still remains that the United States Supreme Court and other states took the opposite view. *See, e.g., Ireland*, 61 P. at 902 (stating that *Campbell* is "supported by a few of the state courts"). And there is no compelling evidence that Utah's public understood the issue differently.

What we do know is that everyone understood the Utah's constitution to grant plenary legislative power to the legislature, subject to any constitutional limits. And Utah's constitution protects various "vested" rights. *See, e.g.,* Utah Const. art. I, §§ 7, 14, 18, 22. Yet unlike other state constitutions, Utah prohibited neither retroactive legislation generally nor the revival of time-barred claims specifically. In the wake of a recent U.S. Supreme Court precedent allowing states to revive such claims and a split of

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Attorney General's point about legislative power: Utah's framers and the public were aware that if they wanted to prevent the legislature from enacting retroactive legislation or reviving time-barred claims, their new constitution would need to include an express provision saying so.

[6] Whether that was true or not in 1895, the parties appear to agree that currently there are more states following the federal approach than there are states that completely prohibit laws reviving time-barred claims (not including states that have an express constitutional or statutory provision prohibiting retroactive legislation or reviving time-barred claims). Mitchell Resp. Br. at 52-57; Roberts Br. at 29-30 n.17; *see also* footnote 8 *infra*.

authority among sister states, the Utah constitution's silence speaks volumes.

At bottom, Defendant's legislative power argument stands on shaky ground: The legislature cannot impair who-knows-how-many unenumerated "vested rights." This notion poses significant problems and is incompatible with a textualist approach to interpreting a written constitution. *See, e.g.,* Supp. Mitchell Br. at 13, 22-23 (noting problems with Defendant's vested rights theory); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012) (expressing omitted-case cannon as "[n]othing is to be added to what the text states or reasonably implies . . . . That is, a matter not covered is to be treated as not covered"). For instance, under Defendant's theory, an unenumerated vested right like an accrued statute of limitations defense is completely beyond legislative reach, while property rights, and other fundamental rights (like parental rights), can be deprived, taken, or otherwise subject to government regulation. *See, e.g.,* Utah Const. art. I, § 7 ("No person shall be deprived of life, liberty or property, without due process of law."); *id.* § I, § 22 ("Private property shall not be taken or damaged for public use without just compensation."); *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 72, 250 P.3d 465 (statutes that impair fundamental rights are subject to heightened scrutiny and unconstitutional unless they (1) further a compelling state interest, and (2)

are narrowly tailored to achieve the statute's purpose). That is not, and should not become, the law.

II. Utah's Due Process Clause Does Not Clearly Bar the Legislature From Reviving Time-Barred Claims.

The Attorney General's Office concurs with Plaintiff's analysis of the original public meaning of the State's Due Process Clause. Supp. Mitchell Br. at 15-30. Originally understood and properly applied, the Due Process Clause does not clearly bar the legislature from reviving a time-barred claim for child sexual abuse.

Rather than repeat that analysis here, the Office emphasizes a related point. The record of how Utah's 1895 constitutional convention enacted article I, section 7 does not support Defendant's view that the due process clause contains more protection than the identical language in the U.S. Constitution. In *State v. Poole*, the Court adopted the federal interpretation of federal constitutional text for an identical state constitutional provision. 2010 UT 25, ¶¶ 14-17, 232 P.3d 519 (reviewing confrontation clause). The Court noted that the framers of the Utah Constitution had "rejected language that was not identical to the federal confrontation clause." *Id.* ¶ 15. And a United States Supreme Court decision issued eighteen years earlier had "put Utah's founders on notice of the federal interpretation" of that clause. *Id.* The framers "could certainly have incorporated greater protections had they

desired" yet they "expressly declined to do so." *Id*. This Court concluded that, in the context of the governing federal law, there was "simply no indication" that the framers intended to incorporate greater protections in the identical state constitutional language. *Id*.

Section 7 similarly mirrors the due process language of the 14th Amendment. "No person shall be deprived of life, liberty or property, without due process of law." Utah Const. art I, § 7; *cf*. U.S. Const. amend XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *see also* U.S. Const. amend V ("No person shall be . . . deprived of life, liberty, or property, without due process of law").

But when section 7 was originally proposed at the convention, the proposal read: "No person shall be deprived of life, liberty, or property, *or be outlawed or exiled* without due process of law." 1 *Official Report* at 257 (emphasis added). Without explanation, a delegate moved to strike the italicized portion. *Id*. Mr. Wells then observed that the italicized portion was copied from another state constitution, and needn't remain, as it was duplicative of the word liberty. *Id*.

The remaining language—substantively identical to that in the U.S. Constitution—passed without additional comment or debate.[7] And, as noted

[7] The delegates frequently compared proposed language to the United States Constitution. For example, just moments before section 7 was taken up by

by Plaintiff, the framers had copies of all the other state constitutions, including two (Missisippi and Alabama) that had provisions expressly barring the legislature from reviving expired claims. Supp. Mitchell Br. at 19-20. But no one proposed such language for inclusion in Utah's constitution. As in *Poole*, the framers "could certainly have incorporated greater protections had they desired" yet they "declined to do so," while "reject[ing] language that was not identical to the federal [language]." *Poole*, 2010 UT 25, ¶ 15.

To be sure, the federal interpretation of similarly worded federal provisions is not presumptively controlling. *Maese*, 2019 UT 58, ¶ 27. But this

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the convention, the delegates debated whether to add a legislative enactment provision to the habeas corpus language in article I, section 5 that went beyond the habeas language in the federal constitution. Mr. Evans sought an amendment to make the language match the federal constitution, even calling the federal language the "usual language," and noting that using different words might lead to a different construction of the clause in the courts. 1 *Official Report* at 257. Similarly, Mr. Goodwin opposed an amendment that departed from the federal language, stating: "Without being at all sarcastic, I do not believe we, as a body, can, without at least a day's consideration, improve on that original instrument [the United States Constitution]." *Id*. at 256.

These types of discussions, plus decades of this Court's constitutional jurisprudence, disprove Defendant's theory that the Court must interpret Utah constitutional provisions differently than similarly worded federal constitutional counterparts. Supp. Roberts Br. at 25-31. Indeed, Defendant's argument is simply a more extreme version of the "truism" that a state constitutional provision may provide greater protections than a similar federal constitutional provision and "fails to advance an adequate state constitutional analysis." *State v. Worwood*, 2007 UT 47, ¶ 18, 164 P.3d 397.

Court has long found United States Supreme Court interpretations of the Due Process Clause to be "highly persuasive" in construing Utah's language. *Terra Utils., Inc. v. Pub. Serv. Comm'n*, 575 P.2d 1029, 1033 (Utah 1978) (stating "the decisions of the Supreme Court of the United States on the federal due process clauses are highly persuasive as to the application of that clause of our state Constitution"); *Untermyer v. State Tax Comm'n*, 129 P.2d 881, 885 (Utah 1942) (same); *see also General Elec. Co. v. Thrifty Sales, Inc.*, 301 P.2d 741, 745 (Utah 1956) (stating "it is proper for us to look to the federal adjudications as helpful and persuasive in the interpretation of our [due process] provision").

Significantly, the framers' approval of section 7's language nearly identical to its federal counterparts came just ten years after the United States Supreme Court ruled that the Fourteenth Amendment Due Process Clause did not prohibit a state from reviving expired claims. *Campbell*, 115 U.S. at 628-29. It is "beyond debate" that this was the state of federal law "at the time the framers were drafting the Utah Constitution." *Maese*, 2019 UT 58, ¶ 33. So even though the Utah "framers did not debate" what the language of section 7 meant at the constitutional convention, "they toiled in a legal environment" where the identical federal language expressly excluded the implicit legislative constraints Defendant now seeks. *Id.* ¶ 34.

And though some other state courts do not follow—for a variety of reasons—the federal approach in interpreting their respective state constitutions, *see* Supp. Roberts Br. at 14 n.10; Roberts Br. at 29 n.17; Mitchell Resp. Br. at 52-57, Utah's convention record shows no push-back against, or concern with, the then contemporary state of federal law. Nor does the record suggest that the state constitution should constrain the legislature more than the Fourteenth Amendment does. There is simply nothing in the convention record to support Defendant's position that section 7 incorporated more protections than those in the federal due process clause—and certainly nothing to suggest that the original public meaning of the clause enshrined a vested right to a statute of limitations defense as beyond legislative reach.

Neither *Ireland* nor its progeny changes that conclusion. *Ireland* is not based on an analysis of any constitutional language. *See, e.g., Ireland*, 61 P. at 902-04 (containing no analysis of the constitutional language); *Roark*, 893 P.2d at 1061-63 (same); *McGuire v. Univ. of Utah Med. Ctr.*, 603 P.2d 786, 790 (Utah 1979) (same). In fact, this Court has "never conducted an in-depth" constitutional analysis of a statute "that explicitly purports to eliminate certain accrued statute-of-limitation defenses." Supp. Br. Order at 1.

Ireland therefore cannot be read as clearly showing what the "general public understanding [of due process] was at the time of statehood." *Maese*, 2019 UT 58, ¶ 21 n.7 (explaining that understanding what a term meant to

"those who approved the Utah Constitution" is "shorthand for what the general public understanding was at the time of statehood"). Moreover, *Ireland* expressly held that "it was not the intention of the legislature" there to revive expired claims. 61 P. at 904. Anything not essential to this holding—including the statement about vested rights—is dicta. If the intent of the legislature were irrelevant—because vested rights always prevail regardless of the legislature's intent—then the *Ireland* court could have simply held as much without inquiring into legislative intent at all. But it didn't so hold. And this Court should not interpret it that way now, especially given the foregoing analysis of how section 7 was passed. Instead, this Court should view *Ireland* as expressly leaving open the question raised here.

Defendant's best evidence against adopting the federal interpretation is that some sister states reached the opposite conclusion. But this only goes so far. Those state courts reached those decisions for a variety of reasons, some unrelated to the due process language in section 7. *See* Roberts Br. at 29 n.17; Mitchell Resp. Br. at 52-57. The United States Supreme Court and other state courts went one way, while other sister states went another.[8] Even if

[8] The Supreme Court of Connecticut conducted its own survey to see how sister states resolved the constitutionality of a statute that revived expired sex-abuse claims. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 508-14 (Conn. 2015). The court found 18 states (plus Connecticut) that followed the federal approach and allowed revival of expired claims. *Id.* at 509-10. Two other states also allow revived claims depending on the private

this Court disagrees that the historical record amounts to an endorsement of the federal approach, the record does not unequivocally show an endorsement of any other approach, be it a sister state's or a group of sister states'. Under those circumstances, Defendant has not overcome the statute's presumption of constitutionality.

III. The Open Courts Clause Does Not Limit the Legislature's Power to Revive Time-Barred Claims.

At most, the Open Courts Clause as originally understood prevents the legislature from retroactively eliminating a vested *cause of action*. It offers no similar substantive protection to *defenses*. Defendant's open courts argument does not meaningfully suggest otherwise and therefore does not and cannot meet his burden to show that the Open Courts Clause clearly bars the legislature from enacting section 308(7).

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and public interests at stake. *Id.* at 512-13. On the other hand, the court counted 24 states (including Utah) that prohibit legislation reviving expired claims; although 8 of those states did so based on constitutional or statutory prohibitions against retroactive legislation, and another 5 offer little to no meaningful constitutional justification for their decisions. *Id.* at 510-11. That leaves only 10 states (not including Utah) in the Connecticut Supreme Court's reckoning to have held that statutes reviving previously time-barred claims violate their state due process provisions. *Id.* at 511. Defendant puts that number at only 7, Roberts Br. at 29-30 n.17, and Plaintiff argues the number may be even lower. Mitchell Resp. Br. at 52-57. Based on its review of the cases, the Connecticut Supreme Court concluded that "the more persuasive cases" favored the federal approach allowing laws that retroactively revive expired claims. *Id.* at 509.

The Open Courts Clause states:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no 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.

Utah Const. art. I, § 11.

Defendant does not analyze this provision's original public meaning. He instead relies on one or more of the clause's existing interpretations. But no current or proposed understanding of the Open Courts Clause supports Defendants' position.

Currently, the Court uses the *Berry* framework, as revised by subsequent cases, to determine whether a statute violates the Open Courts Clause. *See, e.g., Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶¶ 18-30, 416 P.3d 635 (discussing open courts test derived from *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985) and revisions to the analysis). Defendant never argues that section 308(7) fails *Berry's* three-part test. Nor could he. *Berry's* first inquiry is whether the challenged statute "abrogated a cause of action." *Waite*, 2017 UT 86, ¶ 19. Section 308(7) does not. For that and other reasons, the law passes scrutiny under *Berry*. *See, e.g.,* Supp. Mitchell Br. at 34; Mitchell Resp. Br. at 45-51; Supp. Utah Legis. Br. at 28-29.

Contrary to *Berry*, the Attorney General's Office and prior members of the Court have urged a procedural interpretation of the Open Courts Clause. *See, e.g., Laney v. Fairview City,* 2002 UT 79, ¶ 85, 57 P.3d 1007 (Wilkins, J., concurring in part and dissenting in part) (advocating for a "more procedural interpretation of the Open Courts Clause"); *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.,* 1999 UT 18, ¶ 120, 974 P.2d 1194 (Zimmerman, J., concurring in result) (concluding that the Open Courts Clause provides "procedural, not substantive" protections). It goes without saying that this procedural understanding also provides no quarter for Defendant's argument.

More recently, Associate Chief Justice Lee conducted his own review of nineteenth century caselaw and found "a historical basis for a limited restriction on the legislature's substantive power to abrogate a common law cause of action: To the extent a given cause of action was *vested* as of the time of the legislature's enactment, the Open Courts Clause prohibits retroactive abrogation of such claims." *Waite*, 2017 UT 86, ¶ 63 (Lee, A.C.J., concurring). Under this view, the Open Courts Clause's substantive protections apply only to vested causes of action. But that too fails to help Defendant.

While recognizing the clause protects causes of action, Defendant argues that the provision also protects "'the opportunity to present . . . defenses.'" Supp. Robert's Br. at 32 (quoting *Daines v. Vincent*, 2008 UT 51, ¶ 46, 190 P.3d 1269). That's true only to a limited, procedural extent; not the

way Defendant suggests. His argument relies on caselaw discussing a litigant's right under the Open Courts Clause to a "day in court." *Daines*, 2008 UT 51, ¶ 45 (citing *Miller v. USAA Cas. Ins. Co*. 2002 UT 6, 44 P.3d 663). But Defendant stretches the day-in-court principle too far.

A guarantee to having one's day-in-court promises only judicial access and fair process based on the applicable facts and law, not a substantive guarantee that the law (or certain defenses) will never change. *See, e.g., Miller*, 2002 UT 6, ¶ 42 ("a day in court means that each party shall be afforded the opportunity to present claims and defenses, and have them properly adjudicated on the merits according to the facts and the law" (footnote omitted)); *see also id.* ¶ 38 (citing *Berry*, 717 P.2d at 675 ("The clear language of the [open courts provision] guarantees *access* to the courts and a judicial procedure that is based on fairness and equality." (emphasis added))). To confirm the point, the Court has emphasized that the day-in-court analysis is the same under both the Open Courts and Due Process Clauses. *Id.* ¶ 38. Defendant is certainly entitled to his day in court to defend against Plaintiff's claims. But that says nothing about which defenses will be available under existing law once he's inside the courtroom.

Defendant's argument also lacks support in the Open Courts Clause's text. While the clause expressly protects a person's access to court to defend himself in a civil suit—"no person shall be barred from prosecuting or

defending before any tribunal in this State"—it says nothing about guaranteeing the availability of any particular defenses, vested or not. The clause promises only a "remedy by due course of law" for an "injury." At the time the clause was enacted, "injury" meant "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property"; "remedy" meant "the means by which the violation of a right is prevented, redressed, or compensated"; and "due course of law" was "synonymous with due process of law" and meant "law in its regular course of administration through courts of justice." *Black's Law Dictionary* (1st ed. 1891); *see also* Supp. Mitchell Br. at 31 (discussing corpus linguistics analysis showing that a "'defense' was never understood to be a 'remedy' for an 'injury'").

Here, Defendant hasn't suffered an "injury" from Plaintiff, and he certainly isn't seeking a "remedy" under the Open Courts Clause for her conduct. Rather, Defendant essentially argues that the legislature has injured him by changing a statute of limitations defense he wants to assert against Plaintiff so Defendant can avoid the remedies *Plaintiff seeks* for the *injuries that Defendant caused* her. That turns the Open Courts Clause on its head.

In sum, Defendant has not shown that the Open Courts Clause clearly bars section 308(7).

IV. Legislative Limits and Judicial Review.

The Court also asked for briefing addressing what limits apply to the legislature's power to revive time-barred claims and how the Court should analyze the constitutionality of such statutes. Supp. Br. Order at 2.

As discussed at the outset, the legislature has plenary legislative power except as limited by the state or federal constitutions. *Scott*, 196 P. at 1024 ("[w]hat the Constitution does not prohibit the Legislature may do"). So the limits on the legislature's power generally and its power to revive time-barred claims in particular are the same and derive from the constitution. And those limits are "significant." *Carter*, 2012 UT 2, ¶ 41 ("the constitutional limits on the legislative power are significant").

As an initial matter, the constitution separates government power between three co-equal branches. Utah Const. art. V, § 1. The power to legislate entails crafting generally applicable rules based on broad policy considerations. *Carter*, 2012 UT 2, ¶¶ 36-38. Those crucial features help prevent majority tyranny over the individual. *Id.* ¶¶ 40-41. The Bill of Attainder Clause and the prohibitions on "private or special" laws serve related functions and limit legislative power in important ways. *Id.* ¶¶ 42-43.

Of course, the state and federal constitutions' prohibitions against ex post facto laws directly limit the legislature's power to revive time-barred criminal charges. *See State v. Clark*, 2011 UT 23, ¶ 11 n.5, 251 P.3d 829

(explaining that an ex post facto law makes a crime out of a previously committed innocent act, imposes a more burdensome punishment on an already committed crime, or deprives one charged with a crime of a defense that was available at the time the act was committed).

Other constitutional limits may apply depending on the nature of the alleged right affected by the statute reviving the time-barred claim and the type of constitutional argument the plaintiff asserts. *See, e.g., In re Handley's Estate*, 49 P. at 831-32 (invalidating statute that revived already adjudicated and final judgments on separation of powers grounds).

As another critical limit, the constitution places ultimate political power with the people. They share legislative power to initiate legislation and refer certain types of legislation for public approval or rejection. Utah Const. art. VI, § 1. More importantly, the people retain the power to vote their representatives out of office for making unwanted or undesirable laws.

This Court long-ago explained the importance and effect of the public's check on legislative power:

> There is, without doubt, plenty of room, within the pale of the constitution, for ill-advised legislation and bad government, and it is not strange that such is the fact, because all human institutions are imperfect. None are perfect. The provisions of the constitution for frequent renewals of the legislature, however, tend to restrain bad legislation by placing the positions of legislators in the hands of their constituents, and afford a better

> remedy than any which the judiciary can provide. This is true as to legislation for revenue as well as for any other purpose.

Kimball, 57 P. at 5; *see also* Cooley, *Const. Limitations* at 155 ("Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.").

The existing constitutional limits also address the question of how the Court should address laws like section 308(7). The analysis will depend on the nature of the right involved and the type of constitutional challenge being asserted. Here for example, the Court has held that an expired statute of limitations defense is a vested right, *Roark*, 893 P.2d at 1062, and that vested rights are "property" under the Due Process Clause. *Miller*, 2002 UT 6, ¶¶ 39-40. So vested rights are treated like other property rights the Utah Due Process Clause protects. *Halling v. Indus. Comm'n of Utah*, 263 P. 78, 81 (Utah 1927) ("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) (internal quotation marks omitted)). While constitutionally protected property rights are important, they are not categorically beyond legislative reach. The Due Process Clause states that

life, liberty, and property can be "deprived" by government action. Utah Const. art. I, § 7.

Viewed properly, Defendant's challenge to section 308's constitutionality presents a classic substantive due process claim. *In re Adoption of J.S.*, 2014 UT 51, ¶ 22, 358 P.3d 1009 (explaining difference between procedural and substantive due process claims and that a substantive claim attacks a statute "on the ground that the right foreclosed is so fundamental or important that it is protected from extinguishment"). This Court applies a rational basis test to these claims unless the statute affects a fundamental right or interest. *State v. Angilau*, 2011 UT 3, ¶ 10, 245 P.3d 745. Defendant has not shown and cannot show that his asserted vested right is fundamental. *See, e.g., Chase Sec. Corp.*, 325 U.S. at 314 (stating that statutes of limitation have "never been regarded as . . . a 'fundamental' right"); *In re Adoption of J.S.*, 2014 UT 51, ¶ 39 (explaining fundamental rights are "deeply rooted in this Nation's history and tradition" and "in the history and culture of Western civilization" (internal quotation marks omitted)). Defendant's vested right must therefore be treated like other due process property rights and subjected to rational basis review. Section 308 readily clears that hurdle as explained by Plaintiff and the Utah Legislature. Supp. Mitchell Br. at 27-29; Utah Legis. Br. at 10-11.

Conclusion

For the foregoing reasons, the Court should conclude that the legislature has the authority to enact section 308(7) and neither the Due Process Clause nor the Open Courts Clause limits the legislature's power to do so.

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the page limitations stated in the supplemental briefing order because:

   · this brief contains 35 pages or less, excluding the parts of the brief exempted by Rule 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 in 13-point Century Schoolbook font.

3. This brief complies with Utah R. App. P. 21 because it contains no non-public information.

s/ Stanford E. Purser

Certificate of Service

I hereby certify that on the 7th day of October, 2019 a true, correct, and complete copy of the foregoing Supplemental Amicus Brief of the Office of the Utah Attorney General was filed with the Court and served via electronic mail as follows:

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