Case No. 20170447-SC

IN THE UTAH SUPREME COURT

TERRY MITCHELL
***Plaintiff*,**

v.

RICHARD WARREN ROBERTS
***Defendant*,**

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* RICHARD AND BRENDA MILES

FROM THE UNITED STATED DISTRICT COURT, DISTRICT OF UTAH, MAGISTRATE JUDGE EVELYN J. FURSE, NO. 2:16-CV-00843-EJF

James S. Jardine (#1647)
Samuel C. Straight (#7638)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Email:jjardine@rqn.com
sstraight@rqn.com

Attorneys for Amici Curiae

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I. INTRODUCTION

The Court asked the parties for supplemental briefing on this question:

> Under the Utah Constitution, does the Utah Legislature have the power to revive a claim that was barred by the previously applicable statute of limitations, and if so, what limitations, if any, does the Utah Constitution impose on that power?

The Court directed the parties specifically to address the "original public meaning" of "[1] the grant of legislative power found in article VI, section 1 of the Utah Constitution; [2] the due process clause found in article I, section 7 of the Utah Constitution; and [3] the open courts provision found in article I, section 11 of the Utah Constitution."

The Court granted Richard and Brenda Miles permission to file this amicus brief. Their interest in this case is explained in the next section. This brief will focus primarily on the original public meaning of the Due Process Clause of the Utah Constitution. That discussion will do much, however, to illuminate the nature of legislative power under article VI, section 1. Indeed, both clauses play an important role in answering the Court's questions. At the time the Utah Constitution was ratified, legislative authority was the power to make general laws to govern future behavior. Thus, retroactive legislation that deprived persons of vested rights was not considered legislation at all and was beyond the authority of the legislature. And because retroactive legislation impairing vested rights was beyond the

authority of the legislature, it violated the Due Process Clause.

The Open Court Clause was, in many ways, a more specific application of the same principle: the protection of vested claims and defenses against retroactive invasion.[1]

In short, a historical analysis confirms that the question before this court was answered correctly more than a century ago in *Ireland v. Mackintosh*, 61 P. 901 (Utah 1900). That holding has been repeatedly reaffirmed for more than a century. There is no persuasive reason to depart from it now.

II. BACKGROUND AND STATEMENT OF INTEREST

In 2016, the Utah Legislature attempted to revive certain time-barred claims against alleged perpetrators of sexual abuse. *See* Utah Code § 78B-2-308. Amici, Richard and Brenda Miles, were sued under that provision on

[1] Some states were even more specific, adopting constitutional provisions that expressly bar revival of time-barred claims. *See* Miss. Const. of 1890, art. 4 § 9; Ala. Const. of 1875, art. IV, § 56. Other states adopted provisions expressly forbidding retroactive laws. *See* Colo. Const. art. II, § 11. Such specific provisions do not lead to the conclusion that retroactive laws impairing vested rights are constitutional in other states. Rather, these more specific provisions reaffirm the view that such laws were looked upon with serious disfavor. And most states obviously considered such provisions redundant and unnecessary. As noted below, even in the absence of such constitutional clauses, it was almost universally accepted that retroactive legislation reviving time-barred claims was unconstitutional under more general due process clauses.

October 3, 2018, for false allegations that first arose and were thoroughly investigated and debunked more than three decades earlier. The certified questions in this case will determine whether that lawsuit can go forward.[2]

The false and absurd allegations against the Miles are traceable to a therapist, Dr. Barbara Snow, who admitted using coercive therapy techniques to coax very young children into accusing their parents, neighbors, babysitters, and others of satanic ritual sexual abuse that included sacrificing animals and children.[3] Dr. Snow's techniques led to false allegations against dozens of innocent people in five different Utah communities. Multiple police agencies investigated the allegations against

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[2] The Miles moved to dismiss the claims against them based on this Court's consistent line of precedent from *Ireland* to *State v. Apotex Corp.,* 2012 UT 36. The federal court stayed the claim against the Miles pending the outcome of this action precisely because the timeliness of that claim hinges on this Court's decision. *See Jane Doe 1 v. Miles*, Case No. 1:18-cv-00121-JNP (District of Utah), Docket No. 24.

[3] Barbara Snow & Teena Sorensen, *Ritualistic Child Abuse in a Neighborhood Setting*, 5 Journal of Interpersonal Violence, 474, 476 (Dec. 1990). Noting "the suggestive and coercive nature of Dr. Snow's techniques," this Court reversed a conviction that arose from one of Dr. Snow's patients. *See Hadfield v. State*, 788 P.2d 506, 508 (Utah 1990). *See also State v. Bullock*, 791 P.2d 155, 168 (Utah 1989) (Stewart J. dissenting) ("The record is replete with instances of the use of coercion, threats, pressure and suggestion by both Dr. Snow and several parents."). The Tenth Circuit described Dr. Snow's conduct as "disturbing and irresponsible." *Bullock v. Carver*, 297 F.3d 1036, 1058 (10th Cir. 2002).

the Miles at the time and found no supporting evidence.[4] The FBI determined the entire nationwide satanic ritual abuse scare was a "moral panic" based on junk science and flawed therapeutic techniques.[5]

The claims against the Miles were time barred two decades ago.[6] They remain barred unless Utah Code § 78B-2-308 revives them. When Utah's Constitution was adopted, it was accepted almost without question, that "due process" prohibited retroactive legislation that impaired vested rights. And there was also consensus that an accrued statute-of-limitations defense was a

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[4] *See Jane Doe 1 v. Miles*, Case No. 1:18-cv-00121-JNP (District of Utah), Docket No. 4 (Defendants' Motion to Dismiss). During this time, hundreds of individuals across the country claimed that "thousands of offenders were abusing and even murdering tens of thousands of people as part of organized satanic cults." Kenneth V. Lanning, *Investigator's Guide to Allegations of "Ritual" Child Abuse*, National Center for the Analysis of Violent Crime, at 1 (January 1992). Although there was "little or no corroborative evidence" of these activities, numerous cases were filed against alleged perpetrators. David Frankfurter, *The Satanic Ritual Abuse Panic as Religious-Studies Data*, International review for the History of Religions, vol. 50, No. 1, 108 (2003); Kenneth V. Lanning, *supra*, at 1. Some spent years in prison for crimes they did not commit. Sarah Pruitt, *Babysitters Accused of Satanic Crimes Exonerated After 25 Years* (June 21, 2017), available at https://www.history.com/news/babysitters-accused-of-satanic-crimes-exonerated-after-25-years.

[5] Kenneth V. Lanning, *supra*, at 1.

[6] 2008 Utah Laws Ch. 3 (H.B. 78), UT ST §78B–2–308(2); Utah Code Ann. § 78–12–25.1(2) (West 2007); 1992 Utah Laws Ch. 185 (H.B. 92), UT ST. 78–12–25.1(2); Utah Code Ann. Ch. 12 § 78–12–25(2) (1953).

vested right. This Court has, for more than a century, repeatedly reaffirmed that original understanding and should do so again here.

III. UNDER THE ORIGINAL UNDERSTANDING OF THE UTAH CONSTITUTION, THE UTAH LEGISLATURE DOES NOT HAVE POWER TO TAKE AWAY A VESTED RIGHT.

At the time the Utah Constitution was ratified, it was an almost universally accepted tenet of constitutional law that a legislature could not take away vested property rights. Vested rights were considered "sacred and inviolable, even against the plenitude of power of the legislative department." *People v. Morris*, 13 Wend. 325, 328, 1835 WL 2510 (N.Y. Sup. Ct. 1835). Once a vested right is acquired, this Court said at the turn of the century and shortly after the Utah Constitution was adopted, "the legislature is powerless to disturb" that right. *Ireland v. Mackintosh*, 61 P. 901, 903 (Utah 1900).

This was *not* an extra-constitutional limitation on legislative power; rather, it was based in the separation of powers between legislative, executive, and judicial functions—a division enshrined in article V, section 1 of the Utah Constitution—and a shared and common understanding that "due process of law" required each department to act only within its sphere. A law that impaired vested rights was not "an exercise of the legislative power at all." Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 789 (1936). That is because laws are general and *prospective*. The legislature has the power to

declare general laws *for the future*. The judiciary has the power to *decree* the law as it applied to past acts. Retroactive legislation that impairs vested rights is a decree applied to past acts rather than a declaration of what the law shall be for future acts. A legislative decree that impairs vested rights was almost universally considered a violation of due process – indeed, not a legislative act at all. Thus, the rule against retroactive deprivation of vested rights is not extra-constitutional; it is deeply rooted in the constitution.

The idea that an accrued statute-of-limitations defense was a vested right protected by these constitutional principles is also deeply rooted. Indeed, it was constitutional orthodoxy at the time the Utah Constitution was adopted.

The Open Courts Clause of the Utah Constitution was largely a more specific application of these same principles – a specific protection for vested claims *and defenses* against retroactive legislation.

A. A "law" that purports to retroactively impair vested rights deprives a person of property without due process of law.

In a compelling article, Professor Michael McConnell and his co-author, Nathan Chapman, demonstrate by a thorough review of history, constitutional commentary, and case law from Magna Carta to the present, that from the American founding through the adoption of the Fourteenth Amendment, the "basic idea of due process" was that "the law of the land,"

i.e., due process of law, "required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L. J. 1672, 1781 (2012). That is, "due process has from the beginning been bound up" with the division of powers among the branches of government. And its *primary* concern was limiting *legislative* power to legislative functions, as opposed to executive or judicial functions.

> The legislature could enact general laws for the future, including the rules for acquisition and use of property, but could not assume the "judicial" power of deciding individual cases. This meant the legislature could not retrospectively divest a person of vested rights that had been lawfully acquired under the rules in place at the time.

Id. at 1782.[7]

[7] Importantly, this is different than the notion of "substantive due process," which developed much later. Originally, while the Due Process Clause "was widely understood to apply to legislative acts," legislative acts might violate due process "not because they were unreasonable or in violation of higher law," which is the notion of substantive due process, "but because they exercised judicial power …." Chapman & McConnell, *supra* at 1677. Substantive due process, in contrast, treats certainly liberties "as inviolate, even as against prospective and general laws passed by the legislature and enforced by means of impeccable procedures. No significant court decision, legal argument, or commentary prior to the adoption of the Fourteenth Amendment, let alone the Fifth, so much as hinted that due process embodies these features." *Id.* at 1679-80.

Legislative acts—proper laws—had two things in common: they were generally applicable and prospective. They are distinguished from judicial acts "by being prospective and for the general welfare." *Id*. at 1727. Legislation that violates these principles "conflict[s] with the separation-of-powers notion that the power to make laws—the power to 'legislate'—is the power to establish general rules for the future, not to determine specific applications of law or to punish past acts."[8] *Id*. at 1719. That legislatures "were limited to making general and prospective law" was the "central feature" of due process in the nineteenth century. *Id*. at 1739.

Thus, the guarantee of "due process" applied to the legislative branch in two ways: "special laws passed by a legislature that deprive an identifiable individual of rights" and "laws that operate retrospectively" violate due process. *Id*. at 1719. Both were considered *judicial* or at least quasi-judicial, rather than *legislative* acts—"judicial" in the sense that it is the province of the judiciary to apply the law as it existed in the past while the legislature says what the law shall be in the future.

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[8] James Madison proposed that what ultimately became the Fifth Amendment be placed in Article I of the Constitution, which is "devoted to enumerating the limits on congressional power …." Chapman & McConnell, *supra*, at 1722. While it was ultimately placed in the bill of rights, "there is no reason to think that the change in lexical organization was understood or intended to be a change in substance or application." *Id*.

Legislative power is limited to prospective legislation because, "[a]s James Kent said, 'The very essence of a law is a rule for future cases.' Laws said how subjects will be bound, while a judicial judgment or sentence applied the existing law by which the subject had been bound." *Id.* at 1731 (quoting *Dash v. VanKleeck*, 7 Johns 477, 502 (N.Y. Sup. Ct. 1811 (Kent, J.)). In 1843 a commentator explained that "'[t]he past is fixed and irrevocable'" and while a legislature "'may enact or abrogate what rules it pleases to govern coming events and the future conduct of men … it cannot annul the rights, the contracts, and the expectations which have grown up under the laws that did exist.'" *Id.* (quoting Annual Message of the Executive to the General Assembly of Maryland (Dec. 1842), in The Independence of the Judiciary, 57 N. Am. L. Rev. 400, 424-25 (1843)).

As summarized by Professor McConnell, "the prospectivity principle and the due process principle became mutually reinforcing: if law must be prospective and rights can be deprived only pursuant to law, then retroactive deprivations, even pursuant to legislative action, are a violation of due process." *Id.* at 1732.

Due process was also, therefore, the foundation of constitutional protection for vested rights—the very notion of "vested rights" grew out of the need to determine the bounds of the Due Process Clause. Once a right had vested, a law depriving that right was *retroactive* and therefore a judicial

rather than a legislative act, and thus a violation of due process. "Both Joseph Story and Theodore Sedgwick, the two leading antebellum constitutional treatise writers, described laws divesting vested property rights as 'acts of a judicial nature,' or the exercise by the legislature of 'judicial functions.'" *Id.* at 1738 (quoting Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law 604 (John Norton Pomeroy ed., New York, Baker, Voorhis & Co., 2d ed. 1874) and 3 Joseph Story, Commentaries on the Constitution of the United States § 1392 (Boston, Hilliard, Gray & Co. 1833)). Laws that deprived persons of vested rights were "consistently labeled" by courts "as 'judicial acts' that usurped the role of the courts and violated both separation of powers and due process." *Id.* at 1726-27.

"The Supreme Court's first decision mentioning the Fifth Amendment's Due Process Clause, *Bloomer v. McQuewan*[, 55 U.S. (14 How.) 539 (1853)] invoked both generality and prospectivity." *Id.* at 1754. In that case, a federal act extended the term of a particular patent after the right to use the patent had been assigned. The question was whether the patent holder could then reassign the extended patent. The Court held that to comply with due process, the statute had to be interpreted to extend the term not only of the patent, but of the assignment because the law could not retroactively deprive the assignee of his right to use the patent, which he acquired under the law

in effect at the time. "[A] special act of Congress, passed afterwards [*i.e.*, retroactively], depriving the appellee of the right to use [the patented articles], certainly could not be regarded as due process of law." *Bloomer*, 55 U.S. (14 How.) at 553.

Simply put, "once a person had acquired property pursuant to the positive law existing at the time of the acquisition, the prospectivity principle precluded subsequent acts of legislation nullifying the acquisition." Chapman & McConnell, *supra* at 1739. This was "orthodox constitutional theory when the Fourteenth Amendment was crafted, and was how an informed reader of the Fourteenth Amendment text would have understood the words 'due process.'" *Id.*

In an important early case, this Court likewise distinguished between legislative acts, which are general and prospective, and acts of a judicial nature. In *In re Handley's Estate*, 49 P. 829 (Utah 1897), the Court relied on article V, section 1 of the Utah Constitution to strike down a retroactive law that impaired vested rights. In that case, the legislature "attempted by retrospective act to furnish a method by which vested rights could be divested …." *Id.* at 831. But once a right vested, the Court declared, it was "beyond the reach of any remedy … the legislature could invent." *Id.* This limitation was inherent in the nature of legislative power. "If we were to affirm the validity of the law in question, we would, in effect, say that the legislature

may exercise judicial powers … and destroy and annihilate vested rights. The people of the state have not intrusted such powers to the legislature." *Id.* Quoting Justice Cooley, the Court explained that the legislature "'is always competent to change an existing law by a declaratory statute'" and there could be no objection "'where the statute is only to operate upon future cases,'" but a retroactive law impairing vested rights would "'be the exercise of judicial power'" and therefore beyond the authority of the legislature. *Id.* (quoting Cooley, Const. Lim. (6th ed.) p. 111). A retroactive law that invades vested rights is not "in its nature and effect a law" but "a decree." *Id.* at 831-32 (quotation marks omitted). Such a law is "not to prescribe a rule for future cases, but to regulate a case which had already occurred …." *Id.* at 832 (quotation marks omitted).

Thus, when it comes to retroactive laws that impair vested rights, article V, section 1 and the Due Process Clause are mutually reinforcing. Because under article V, section 1 the legislature can only exercise legislative power, it cannot retroactively impair rights that vested under prior laws. And any law that attempted to do so would be a violation of due process—*i.e.*, the constitutional process by which law is made by the legislature, enforced by the executive, and interpreted by the judiciary.

B. It was constitutional orthodoxy at the time the Utah Constitution was adopted that an accrued statute-of-limitations defense was a "vested right" protected by due process.

On one side of the coin, it was "orthodox constitutional theory" in the nineteenth century that "due process" prohibited retroactive legislation that interfered with vested rights. Chapman & McConnell, *supra* at 1739. On the other side, it was also "constitutional orthodoxy" that an accrued statute-of-limitations defense was a vested right. Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 237 (1927).

In 1885, the New Jersey Supreme Court declared that court decisions "are wholly in accord on this subject, and with one voice they declare that when a right of action has become barred under existing laws, the right to rely upon the statutory defense is a vested right that cannot be rescinded or disturbed by subsequent legislation." *Ryder v. Wilson's Ex'rs*, 41 N.J. Law 11 (quoted in *Campbell v. Holt*, 115 U.S. 620, 633 (1885) (Bradley J. dissenting)). The Kentucky Supreme Court said this proposition "is not disputed by any authority known to us[.]" *McCracken Co. v. Mercantile Tr. Co.*, 1 S.W. 585, 586 (Ky. 1886).[9] *See also Toronto v. Salt Lake Cty.*, 37 P. 587, 588 (Utah

[9] *See also Atkinson v. Dunlap*, 50 Me. 111, 117 (1862) ("if the Act was intended to be retrospective, and thereby affected vested rights, it was manifestly unconstitutional"); *Town of Rockport v. Walden*, 54 N.H. 167, 174

(continued . . .)

1894) (defining a vested right as "title, legal and equitable, to the present and future enjoyment of property, or to the present enjoyment of a demand or a legal exemption from a demand made by another").

It was against this constitutional backdrop that the U.S. Supreme Court decided *Campbell v. Holt*, 115 U.S. 620 (1885). Critically, *Campbell* confirmed the orthodox view that the Due Process Clause precluded retroactive deprivation of vested rights. "[I]n an action to recover real or personal property," the Court explained, "the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect … deprives the party of his property without due process of law." *Id.* at 623. Where the Court departed from what had previously been the

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(. . . continued)
(1873) ("this statute is unconstitutional, so far as it was attempted to make it applicable to cases like this where the time of prosecution had expired before the law was passed"); *Willoughby v. George*, 5 Colo. 80, 82 (1879) (noting the "constitutional prohibition" against reviving barred claims; "where the statute has once run and the bar has attached, the right to plead it is a vested right which cannot be taken away or impaired by any subsequent legislation"); *Bigelow v. Bennis*, 2 Allen 496 (Mass. 1861) ("The only restriction on the exercise of this power is, that the legislature cannot remove a bar or limitation which has already become complete …."); *Williar v. Baltimore Butchers' Loan & Annuity Ass'n*, 45 Md. 546, 558 (Md. 1877) ("It has been repeatedly held by this Court that the Legislature cannot by a retroactive law, take away vested rights.").

unanimous view was in determining that the bar of the statute of limitations was not a "vested right" when it came to contract claims.[10] *Id.* at 623-24.

But *Campbell* was a divided opinion and the majority opinion was almost uniformly rejected. In a dissenting opinion, Justice Bradley, joined by Justice Harlan, took the position that "property" should not be limited narrowly to tangible property, but to "every species of vested right," and that it would be "almost an absurdity" to recognize constitutional protections for a statute of limitations affecting tangible property, but not for an action against a person for money. *Id.* at 630 (Bradley, J., dissenting).

For decades after *Campbell*, state courts continued to follow the pre-*Campbell* consensus by rejecting the majority opinion in favor of Justice

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[10] That *Campbell* did not reject the notion that vested rights are protected by due process is also seen in the fact that in subsequent years, the Supreme Court reiterated that rule. In *McCullough v. Com. of Virginia*, 172 U.S. 102, 123–24 (1898), the Court held that no state legislation could disturb a vested right, stating: "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." And in *Stewart v. Keyes*, 295 U.S. 403, 417 (1935), the Court held that where a right of action to recover real or personal property "has been barred by a statute of limitations and a later act has attempted to repeal or remove the bar after it became complete," the removing act violates "constitutional provisions forbidding a deprivation of property without due process of law."

Bradley's dissent. Thus, more than three decades after *Campbell*, the California Supreme Court rejected its majority opinion and said it was "the almost universal course of decision in the United States" to protect the vested right to assert an expired statute of limitations as a defense. *Chambers v. Gallagher*, 171 P. 931, 933 (Cal. 1918). As stated in one treatise at the beginning of the Twentieth Century, *Campbell v. Holt* "stands almost alone" in its view.[11] 3 Ames' Select Essays, p. 567 (1909).

It was during this time of constitutional consensus that the Utah Constitution was ratified. Notably, during the constitutional convention, on April 3, 1895, Delegate Charles Varian directly tied vested rights to due

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[11] *See also Bd. of Educ. of Normal Sch. Dist. v. Blodgett*, 40 N.E. 1025, 1026 (Ill. 1895) (recognizing that Justice Bradley's dissent "is supported by the great weight of authority" and that "in almost all of the states of the Union in which the question has arisen, it has been held that the right to set up the bar of a statute of limitations as a defense to a cause of action, after the statute has run, is a vested right, and cannot be taken away by legislation"); *Rhodes v. Cannon*, 164 S.W. 752, 754 (Ark. 1914) ("the overwhelming weight of authority appears to be that one may have such a vested right [in a statute of limitations defense], and, when it has become vested, the Legislature cannot thereafter deprive one of this defense"); *Lawrence v. City of Louisville*, 29 S.W. 450, 451 (Ky. 1895) ("When one is guilty of a tort, and immunity from suit has arisen by operation of the statute of limitation, the legislature cannot deprive him of it, any more than it can the debtor who has been exempted from a demand by operation of the statute of limitation."); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 242 (1927) (stating that "what seems to be both the majority and the sounder view" was that "such a law is unconstitutional").

process and to the prospectivity principle. If an act "operates retrospectively to take what is by existing law the property of one man and without his consent transfer it to another, it is in violation of that clause in the bill of rights which declares that no man can be deprived of his life, liberty or property unless by the judgment of his peers, or the law of the land." Official Report of Utah Constitutional Convention, Day 31 (April 3, 1895).[12] Responding to a question of whether a charter granted to an insurance company could be taken away by legislation, Delegate Thatcher said, "We cannot make any law retroactive." *Id.* Day 57 (April 29, 1895). Delegate Maloney contended that "[y]ou cannot take away vested rights … by any act of the legislature." *Id.* Day 47 (April 19, 1895). And perhaps concerned that it would violate the Due Process Clause of the Fourteenth Amendment, Delegate Franklin Richards said that "the adoption of any article or provision in this Constitution cannot interfere with vested rights …." *Id.* Day 54 (April 26, 1895).

And only five years after the Utah Constitution was adopted, in *Ireland v. Mackintosh*, 22 Utah 296, 61 P. 901, 904 (1900), this Court unanimously rejected the majority opinion in *Campbell* and adopted the view of Justice

[12] Transcripts of most of the Utah Constitutional Convention are available at: https://le.utah.gov/documents/conconv/utconstconv.htm.

Bradley's dissent by categorically holding that the expiration of the statute of limitations creates a "vested, permanent right" that is protected against legislative encroachment. *Id*. at 902.

In this case, Plaintiff has tried to limit *Ireland* by contending that it did not root its analysis in the Due Process Clause. But in *Ireland*, no one disputed that due process protected vested rights. The only dispute was whether an accrued statute-of-limitations defense against a debt was, in fact, a vested right. This Court unanimously held that it was.[13] *See also Miller v. USAA Cas. Ins. Co.*, 2002 UT 6 ¶ 39 (the protection of the Due Process Clause is "'not confined to mere tangible property but extends to every species of vested right'"), quoting *McGrew v. Indus. Comm'n*, 85 P.2d 608, 610 (Utah 1938)).

This holding has been reaffirmed many times since. In *In re Swan's Estate*, 95 Utah 408, 415, 79 P.2d 999, 1002 (1938), the Court relied on *Ireland* to hold that a subsequently amended statute of limitations could not

[13] This Court reiterated the basic constitutional principle that vested rights are constitutionally protected in *Buttrey v. Guaranteed Sec. Co.*, 78 Utah 39, 300 P. 1040, 1045 (1931), where the Court recognized that a cause of action was a vested right, and "vested rights [are] in the nature of a property right, and ought to be regarded as property in the sense that tangible things are property and equally protected by the Constitution against arbitrary interference by the Legislature."

operate retroactively to revive a claim for back taxes which was barred under the prior limitations period. In *Greenhalgh v. Payson City*, 530 P.2d 799, 802 n. 14 (Utah 1975), the Court cited *Ireland* and stated that the "subsequent passage of an act by the legislature increasing the period of limitation could not operate to affect or renew a cause of action already barred." In *Del Monte Corp. v. Moore*, 580 P.2d 224, 225 (Utah 1978), the Court stated that when "the statute has run on a cause of action, so that it is dead, it cannot be revived by any such statutory extension." *Id.*

In *Roark v. Crabtree*, 893 P.2d 1058, 1061 (Utah 1995), the defendant argued that "his right to plead a defense of statute of limitations is a vested right which cannot be impaired without denying him due process of law." This Court agreed and reiterated its decision "to follow the majority rule" that if the retroactive application of a statute of limitations would affect the vested right to a statute-of-limitations defense, the statute "cannot be applied retroactively." Finally, in *State v. Apotex Corp.*, 2012 UT 36, ¶ 64, 67, 282 P.3d 66, 81, this Court again held that "the defense of an expired statute of limitations is a vested right" and "once a cause of action expires, it may not be revived by statutory enactment."

While this Court consistently applied the original understanding of due process as it related to vested rights, in some other states as the twentieth century progressed the original understanding was watered down in favor of

more flexible views. *See* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 102-03 (1993). Rather than a categorical rule protecting vested rights, some courts began to analyze the legislature's reason for laws that retroactively interfered with vested rights and, if those reasons were good enough, allowed the law to take effect—or they simply asked whether the legislature was express in its intent to legislate retroactively. *Id.* Plaintiff quotes a number of these cases in her brief. *See e.g.*, *Gallewski v. H. Hentz & Co.*, 93 N.E.2d 620, 624 (N.Y. 1950) ("[T]he Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated."); *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 832 (Minn. 2011) ("When the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, the statute does not violate due process.").

But these modern reinterpretations were adopted as new rules and only highlight the departure from the original constitutional understanding. And while modern jurists have in many cases departed from the original understanding by adopting such balancing tests, "Nineteenth century jurists believed that the notion of vested-rights retrospectivity was grounded in a

categorical logic that determined the scope of constitutional protection without requiring judicial review of legislative policy" or legislative intent. Kainen, *supra* at 122. The legislative reason was irrelevant; such laws were categorically unconstitutional.

This was the original understanding not just in Utah but in almost every state. Thus, even in the states that currently apply some modified approach that is more forgiving of retroactivity and less protective of vested rights, these approaches are of relatively recent origin and represent a rejection of the original understanding.

Plaintiff cites, for example, a 2010 case where the Wisconsin Supreme Court held that "merely identifying a substantive, or vested, property right is not dispositive for due process purposes," and that the court must "employ [a] balancing test" to determine "whether the retroactive statute has a rational basis." *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 395-97 (Wis. 2010). The Wisconsin Supreme Court had earlier adopted the "unanswerable logic" of the dissent in *Campbell*. *Eingartner v. Ill. Steel Co.*, 79 N.W. 433, 434 (Wis. 1899). It was a century later that Wisconsin adopted a different approach. *See e.g.*, *Neiman v. Am. Nat. Prop. & Cas. Co.*, 613 N.W.2d 160, 164 (Wis. 2000) ("To the extent the language in prior holdings implies that identifying a 'vested' right is dispositive in determining whether a clearly retroactive statute is constitutional, that language is overruled.").

In her initial briefs to this Court, Plaintiff relied on these modern approaches. She argued that the "vested rights" language this court has used in the past to describe the right a defendant acquires when the statute of limitations expires comes "from pre-modern-due-process analysis." (Mitchell Appellee's Br. at 34.) It was "Nineteenth Century cases," Plaintiff pointed out, that held "that a defendant acquires a 'vested right' upon the expiration of the time in which to file a claim." (*Id*. at 34.) But it is exactly these "Nineteenth Century" cases that confirm the original understanding.

Plaintiff says this Court should "decline to revive" the "anachronistic" and "decrepit" doctrine that "vested rights" are beyond the reach of the legislature. (Mitchell Appellee's Br. at 16-17.) But in Utah, this doctrine never died. On the contrary, this Court repeatedly reaffirmed it throughout the twentieth century and into the twenty-first. In 2012, this Court explained that "[it] has consistently maintained that the defense of an expired statute of limitations is a vested right" and that it "cannot be taken away by legislation …." *State v. Apotex*, 2012 UT 36, ¶ 67. This Court's *most recent* decision on this issue (*Apotex*) is consistent with its *first* decision on this issue (*Ireland*). "Since 1900, this court has consistently maintained that the defense of an expired statute of limitations is a vested right." *Roark v. Crabtree*, 893 P.2d 1058, 1062 (1995). Plaintiff thus asks this Court to

discard over a century of consistent and settled jurisprudence reflecting the original understanding of "due process of law."

Nor is Utah alone in this constitutional consistency. Rather than being "anachronistic" and "decrepit," many (perhaps most) states still prohibit revival of time-barred claims, often expressly relying on "due process." *See* Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 Nev. L.J. 63, 98 (2013) quoting Clemens Muller-Landau, *Legislating Against Perpetuity: The Limits of the Legislative Branch's Powers to Modify or Termination Conservation Easements*, 29 J. Land Resources & Envt'l. L. 281, 311 (2009). Relying on the due process clause in its state constitution, the Illinois Supreme Court struck down a statute that, like the one at issue here, retroactively extended the statute of limitations on time-barred sexual abuse claims. "[O]nce a statute of limitations has expired," the court said, "the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action." *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475, 484 (Ill. 2009) (quotation marks omitted). Such a vested right "cannot be taken away by the legislature without offending the due process protections of our state's constitution." *Id*. The court added that "[t]hese principles date back more than a century." *Id*. citing *Bd. of Educ. of Normal Sch. Dist. v. Blodgett*, 40 N.E. 1025 (Ill. 1895)

("the right to plead the statute [of limitations] as a defense is a vested right, which cannot be destroyed by legislation since it is protected by … the State constitution, which declares that 'no person shall be deprived of life, liberty, or property without due process of law'").

Other states likewise continue to hold that "due process" protects the vested right acquired by the expiration of a statute of limitations.[14] The issue is addressed in these states not as one of legislative intent or purpose, but as one of legislative power. Even where a law is expressly retroactive and inherently rational, due process prohibits the retroactive destruction of vested rights. As stated by the Maryland Supreme Court:

> No matter how "rational" under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking one person's property and giving it to someone else. The state constitutional standard for determining the validity of retroactive civil legislation is whether vested

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[14] *See e.g.*, *Falgout v. Dealers Truck Equip. Co.*, 748 So.2d 399, 407 (La. 1999) ("When a party acquires a right, either to sue for a cause of action or to defend himself against one, that right becomes a vested property right and is protected by due process guarantees."); *Menendez v. Progressive Express Ins. Co.*, 35 So.3d 873, 877 (Fla. 2010) ("[E]ven where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right ….") (quotation marks omitted); *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 773 (Neb. 1991) (for "fivescore and 16 years" the court has held due process prohibits removing a "bar or limitation which has already become complete").

> rights are impaired and not whether the statute has a rational basis.

Dua v. Comcast Cable of Md., Inc., 805 A.2d 1061, 1072-73 (Md. 2002).

One relatively recent case is of particular note. In *Kelly v. Marcantonio*, 678 A.2d 873 (R.I. 1996), the Rhode Island Supreme Court addressed whether "it is constitutionally permissible for our General Assembly to revive a previously time-barred cause of action." *Id.* at 880. What makes this case unique is that before 1986 Rhode Island's constitution did not have a due process clause applicable to civil actions. *Id.* at 882. Before the 1986 constitutional amendment, the Rhode Island Supreme Court had found no state or federal constitutional prohibition against reviving time-barred claims. Now that it had a due process clause, however, the court found Justice Bradley's dissent in *Campbell* persuasive and held that the new Due Process Clause in the state constitution "precludes legislation with retroactive features permitting revival of an already time-barred action that would impinge upon a defendant's vested and substantive rights." *Id.* at 883.

In short, at the time the Utah Constitution was ratified, it was constitutional orthodoxy that "due process of law" prohibited retroactive legislation that impaired a vested right. And for more than a century, this Court has repeatedly and consistently held that an accrued statute-of-

limitations defense is a vested right. The legislation at issue here, Utah Code § 78B-2-308 is, therefore, beyond the power of the legislature under article V, section 1 and a violation of the Due Process Clause of the Utah Constitution.

C. The Open Courts Clause prohibits the Utah Legislature from retroactively abrogating vested claims or defenses.

The Open Courts Clause of the Utah constitution provides:

> 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, and civil cause to which he is a party.

Utah Const. article I, section 11.

Most other states have a similar provision. *See Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 61 n.84, 416 P.3d 635, 651 (Lee, J. concurring) (listing states). Accordingly, nineteenth-century cases from other states are instructive in discovering the original public meaning of the open courts clause in the Utah Constitution.

Like the Due Process Clause, the Open Courts Clause also contains a prospectivity principle that protects vested rights. It may be viewed, in fact, as a more specific application of these due-process principles and largely a

separation-of-powers principle.[15] As Justice Lee explained in his concurrence in *Waite*, it is a "restriction on the legislature's substantive power" to *retroactively* impair vested rights, though it "does not mean that the legislature cannot prospectively adjust the substantive law as it deems appropriate." *Id*. at ¶¶ 63, 66.

This understanding was widespread when the Utah Constitution was ratified, with many nineteenth-century open-courts cases recognizing constitutional limits on the retroactive application of legislation in a manner abrogating vested claims or remedies. *See id*. ¶ 78. For example, in *Byers v. Pennsylvania R. Co.*, 5 Pa. D. 683, 683 (Pa. Com. Pl. 1896), a two-year statute of limitations was passed which would have eliminated the plaintiff's remedy. Relying upon *both* the state due process clause and the open courts clause,

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[15] One objection to this brief's interpretation of the Due Process Clause is that it does render other constitutional provisions at least partially redundant. Ex post facto laws would, for example, also violate the Due Process Clause. But most constitutions, including the federal constitution, are "shot through with prohibitions that some Founders thought to be redundant with enumerated powers or prohibitions." Chapman & McConnell, *supra* at 1721. Thus, it is not unusual that a law violates numerous constitutional provisions at the same time. "Surely the prohibition on bills of attainder and the requirement of a jury trial, to name just two examples, are comprised within the demand for 'due process.'" *Id*. at 1718. "The Framers specifically enumerated protections they regarded as especially important, and then added a catch-all. It is impossible to give 'due process of law' its historical meaning and avoid redundancy." *Id*.

the court held that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. When it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away." *Id*. at 684-85; *see also Commercial Bank of Natchez v. Chambers*, 16 Miss. 9, 56–58, 61 (Miss. Err. & App. 1847) (holding that legislative enactments that undermine vested rights are contrary to the open courts clause and stating that "the legislature cannot interfere with vested rights in such a way as to destroy them" because it is "beyond the legitimate power of the legislature"); *Lafferty v. Shinn*, 38 Ohio St. 46, 48 (1882) (stating that under the Ohio constitution's open courts clause "it is not within the power of the legislature to abridge the period within which an existing right may be so asserted as that there shall not remain a reasonable time within which an action may be commenced").

This Court has interpreted Utah's Open Courts Clause in a similar manner. In *Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985), the Court stated, "once a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot

constitutionally divest the injured person of the right to litigate the cause of action to a judgment."

The Open Courts Clause protects vested defenses the same as it protects vested causes of action, i.e., protecting "prosecuting or defending." As Justice Bradley recognized, "the right of defense is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other in this respect." *Campbell*, 115 U.S. at 631 (Bradley, J., dissenting). Indeed, this Court has stated that the Open Courts Clause guarantees "that each party shall be afforded the opportunity to present claims *and defenses*, and have them properly adjudicated on the merits." *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 42, 44 P.3d 663, 674 (emphasis added). The Utah legislature cannot take away a vested defense any more than it can take away a vested cause of action. Both are protected by the Open Courts Clause.[16]

[16] Plaintiff argues that "this Court has expressly rejected the argument" that the Open Courts Clause provides "substantive" protection of a vested defense, citing *Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC*, 2015 UT 87, ¶ 20, n.9. But *Flowell* says no such thing. It stands only for the proposition that the creation of a new claim does not abrogate an existing defense. Plaintiff also cites *Amundsen v. Univ. of Utah*, 2019 UT 49, but in that case the legislation was prospective and "does not, by itself, abrogate a cause of action." *Id.* ¶ 44. Thus, the Open Courts Clause was not implicated.

IV. STARE DECISIS CARRIES SPECIAL WEIGHT WHEN A CENTURY OF CONSISTENT PRECEDENT IS STRONGLY SUPPORTED BY THE ORIGINAL UNDERSTANDING.

The doctrine of *stare decisis* should have especially strong force in this case for two reasons. First, there is a century of unbroken, consistent and workable precedent. Second, that precedent is strongly supported by historical analysis of the original intent. In short, because the Court got it right in the first place and has never wavered, there is absolutely no reason to change the law now.

This Court has explained that *stare decisis*, "is crucial to the predictability of the law and the fairness of adjudication," *State v. Thurman,* 846 P.2d 1256, 1269 (Utah 1993), and therefore "precedents should not be overruled lightly." *State v. Hansen,* 734 P.2d 421, 427 (Utah 1986). In applying *stare decisis*, this Court looks to "the age of the precedent," to "people's reliance on the precedent," to how well it has "worked in practice," and finally to "whether the precedent has become inconsistent with other principles of law." *Eldridge v. Johndrow*, 2015 UT 21, ¶¶ 34, 35, and 40. None of these factors supports rejecting the *Ireland* to *Apotex* line of cases and announcing a new rule.

Indeed, it would be quite remarkable to overrule a century of consistent precedent that works well in practice and is strongly supported by a careful review of the original meaning of the constitutional clauses at issue. And

there are massive reliance interests at stake. Statutes of limitations recognize that potential claims "should sometime come permanently to rest." *Mason v. Mason*, 597 P.2d 1322, 1323 (Utah 1979). Further, they "are not designed exclusively for the benefit of individuals but are also for the public good." *Hirtler v. Hirtler*, 566 P.2d 1231, 1231 (Utah 1977). They allow people to "order their affairs with predictability." *Jacobs v. Hafen*, 917 P.2d 1078, 1081 (Utah 1996). Reversing the *Ireland* to *Apotex* line of cases would eliminate that certainty. No claim would ever be completely dead. Reaffirming these precedents would not prevent the legislature from amending statutes of limitations; it would mean that such amendments would be prospective only and would not revive claims that were already barred, which has always been the rule in this state.

V. CONCLUSION

The facts in the Miles' case show why an accrued statute-of-limitations defense should be recognized as a vested property right. As acknowledged by Justice Bradley's frequently-adopted dissent in *Campbell*, a vested defense is of the "greatest value" and "is a right founded upon a wise and just policy." *Campbell v. Holt*, 115 U.S. 620, 631 (1885) (Bradley, J., dissent). Among other "wise and just" reasons, "statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses." *Id*.

The allegations against the Miles were investigated by multiple police agencies and disproved when they were first made *over three decades ago*. But due to the passage of time, and because any potential civil claim was barred, many of the underlying police and medical records were long ago discarded by their respective custodians. The Miles had no reason to believe a claim could be filed against them 35 years after the allegations were investigated and disproved and thus, like others, they also did not retain evidence in their possession. While the Miles are confident the allegations will again be proven false, the very purpose of a statute of limitations is to prevent the cost and time of having to do so—especially three-and-a-half decades later.

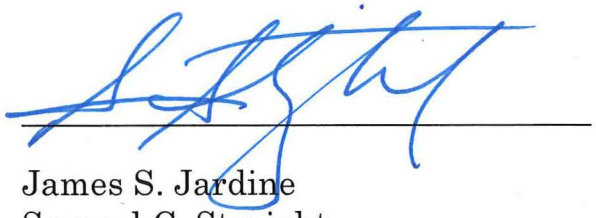
Additionally, the Miles will have lost other important rights. While section 78B-2-308 ostensibly revives the claim against them, it does not protect a defendant's right to bring possible third-party claims. The Miles believe they have such a claim against Dr. Snow. Permitting the revival of expired claims "by allowing legislatures to pick and choose when to act retroactively [by extending limitations periods that have already expired], risks both arbitrary and potentially vindictive legislation, and erosion of the separation of powers." *Stogner v. California*, 539 U.S. 607, 611 (2003) (quotation marks omitted). Defendants like the Miles rely on statutes of limitations not only to move forward with confidence that a potential claim

against them is dead, but also in not demanding tolling agreements or taking other steps to protect possible claims against third-party defendants. Retroactive revival of dead claims, especially decades later, could also deprive defendants of the opportunity to protect themselves with insurance coverage.

Both the Due Process Clause and the Open Courts Clause of the Utah Constitution prohibit retroactive legislation that impairs vested rights. For more than a century, this Court has repeatedly and consistently held that an accrued statute-of-limitations defense is such a right. This Court should answer the certified question by holding that the Utah Constitution deprives the legislature of the power to revive time-barred claims.

Dated this 7th day of October, 2019

RAY QUINNEY & NEBEKER P.C.



James S. Jardine
Samuel C. Straight

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Samuel C. Straight
Attorney's or Party's Name
October 7, 2019
Date

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2019, a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* RICHARD AND BRENDA MILES** was filed via email at supremecourt@utcourts.gov and served via email to the following:

Ross C. Anderson
Lewis Hansen
Eight East Broadway, Suite 410
Salt Lake City, Utah 84111
rocky@andersonlawoffices.org

Brian M. Heberlig
Linda C. Bailey
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
bheberlig@steptoe.com
lbailey@steptoe.com

Neil A. Kaplan
Shannon K. Zollinger
Clyde Snow & Sessions
201 South Main Street, 13th Floor
Salt Lake City, UT 84111-2216
nak@clydesnow.com
skz@clydesnow.com

Troy L. Booher
Zimmerman Jones Booher
341 South Main Street, 4th Floor
Salt Lake City, UT 84111
tbooher@zjbappeals.com

John L. Fellows
Robert H. Rees
Andrea Valenti Arthur Office of
Legislative Research and
General Counsel
W210 State Capitol Complex
Salt Lake City, UT 84114
jfellows@le.utah.gov
rrees@le.utah.gov
avarthur@le.utah.gov

Tyler R. Green
Solicitor General
Stanford E. Purser
Deputy Solicitor General
Sean D. Reyes
Utah Attorney General
P.O. Box 140858
Salt Lake City, Utah 84114-0858
tylergreen@agutah.gov
spurser@agutah.gov

Craig K. Vernon
JAMES, VERNON & WEEKS, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
cvernon@jvwlaw.net

/s/ Brandy Sears

1505986