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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JOHN DOE 1, and JOHN DOE 2, Plaintiffs, v. RICHARD MILES and BRENDA MILES, a community, Defendants.	Case No. 1:18-cv-00121-JNP The Honorable Jill N. Parrish **PLAINTIFFS' MEMORANDUM IN OPPOSITION OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Plaintiffs Jane Does 1 - 4, and John Does 1 and 2 (together "Plaintiffs") submit this *Memorandum in Opposition Of Defendants' Motion To Dismiss For Failure To State A Claim* pursuant to Federal Rule of Civil Procedure 12(b)(6).

TABLE OF CONTENTS

MOTION TO DISMISS STANDARD

For the purposes of ruling on a Motion to Dismiss brought under Federal Rule of Civil Procedure 12(b)(6), "the court accepts all allegations of material fact as true and construes the pleadings in the light most favorable to the plaintiffs."[1] "A complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2]

ARGUMENT

I. THE DEFENDANTS ASSERT "BACKGROUND FACTS" THAT ARE NOT RELEVANT TO THE ALLEGATIONS IN THE COMPLAINT.

The Defendants' Motion to Dismiss contains detailed "Background Facts" concerning satanic ritualistic sexual abuse that has little relevance to the allegations in the complaint. Plaintiffs are survivors of horrific sexual abuse. Sexual abuse of children is criminal, horrific and never justified whether it is carried out by individuals like Defendants or whether it is part of satanic ritual.

There is no allegation in the Complaint that the Defendants sexually abused the Plaintiffs as part of satanic ritual abuse. The Defendants assert that this case "originates from long-ago debunked reports that in the mid-1980s a large group of adolescents and adults in Bountiful, Utah, operated a satanic ritualistic sex ring." *Defendants' Motion to Dismiss for Failure to State a Claim* (hereafter *"Defs.' Mot. to Dismiss"*), page 3. The Complaint makes no mention of satanic worship, or satanic rituals. There is no allegation that Defendants dressed up in black robes and distorted the LDS temple ceremony while sexually victimizing the Plaintiffs. Plaintiffs allege that Defendants committed horrific sexual crimes against them as children. Crimes of this nature

[1] *WMX Techs. v. Miller*, 80 F.3d 1315, 1318 (9th Cir. 1996), *citing Everest & Jennings, Inc. v. American Motorists Ins.,* 23 F.3d 226, 228 (9th Cir. 1994).
[2] *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 698 (9th Cir. 1988).

always have commonality with other crimes of this nature. Namely, adults doing inexplicable and harmful sexually deviant things to children. So, while there is commonality between what happened in the case at bar to those sexually victimized in the SRA context, Defendants' argument must be recognized for what it is; an attempt to discredit Plaintiffs by associating their horrific sexual abuse of Plaintiffs with satanic ritual abuse that had occurred during that time and in the same geographic area.

Because Plaintiffs did not allege satanic ritual abuse (SRA) in their Complaint, Defendants' argument at this stage is nonsensical. It begs the question as to why Defendants have raised the issue, particularly since the Defendants correctly state (since this is a motion to dismiss to be decided on the pleadings only) that "[t]he Court need not rely on these background facts in resolving the Motion to Dismiss." *Defs.' Mot. to Dismiss*, page 5. However, since the topic has been raised by Defendants, the Plaintiffs, out of respect to the many survivors of sexual abuse in Utah in the 1980's, feel it is necessary to briefly respond.

Defendants' "Background Facts" seem to focus on Dr. Barbara Snow, who treated many survivors of sexual abuse in the 1980's, including survivors of sexual abuse in the SRA context. Barbara Snow is not mentioned in Plaintiffs' Complaint. Plaintiffs disagree with Defendants' attempt to cloud the real issue in this case by providing irrelevant information to cast an unfavorable light on Dr. Snow. What is part of Plaintiffs' Complaint, however, is a declaration (attached as an exhibit to the Complaint) from Dr. Paul L. Whitehead, a medical doctor specializing in psychiatry and neurology-psychiatry who treated Jane Doe 1, Jane Doe 2, Jane Doe 5, and John Doe 1 and concluded that each "suffered from being sexually abused and assaulted in a group setting by numerous adults including Perpetrator, Richard Miles, and Brenda Miles."[3]

[3] Exhibit 5 to Plaintiffs' Complaint, Declaration of Paul. L. Whitehead, M.D., pg. 2.

Additionally, in the late 1980s, the Church of Jesus Christ of Latter-Day Saints formed the "Strengthening Church Members Committee", a committee "to prevent members from making negative statements that hinder the progress of the Mormon church."[4] In 1990, Bishop Glenn L. Pace was commissioned by the Church as a member of the Committee to investigate SRA. Bishop Pace issued a memorandum on the subject of "Ritualistic Child Abuse," stating:

> I have met with sixty victims. . .. Of the sixty victims with whom I have met, fifty-three are female and seven are male. Eight are children. The abuse occurred in the following places: Utah (37), Idaho (3), California (4), Mexico (2), and other places (14). Fifty-three victims are currently living in the State of Utah. All sixty individuals are members of the Church. Forty-five victims allege witnessing and/or participating in human sacrifice. The majority were abused by relatives, often their parents. All have developed psychological problems and most have been diagnosed as having multiple personality disorder or some other form of dissociative disorder.
>
> * * *
>
> I'm sorry to say that many of the victims have had their first flashbacks while attending the temple for the first time. The occult along the Wasatch Front uses the doctrine of the Church to their advantage. For example, the verbiage and gestures are used in a ritualistic ceremony in a very debased and often bloody manner. When the victim goes to the temple and hears the exact words, horrible memories are triggered. We have recently been disturbed with members of the Church who have talked about the temple ceremony. Compared to what is happening in the occult along the Wasatch Front, these are very minor infractions. The perpetrators are also living a dual life. Many are temple recommend holder. …
>
> I go out of my way to not let the victims give me the names of the perpetrators. … However, they have told me the positions in the Church of members who are perpetrators. Among others, there are Young Women leaders, Young Men leaders, bishops, a patriarch, a stake president, temple workers, and members of the Tabernacle Choir. These accusations are not coming from individuals who think they recognized someone, but from those who have been abused by people they know, in many cases their own family members.[5]

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[4] Peggy Fletcher Stack & Mary Paulson Harrington, *Mormon church said to be keeping files on dissenters*, The Times-News, Aug. 15, 1992 at 5B, a copy of which is submitted herewith as Exhibit A. This page can also be viewed at https://news.google.com/newspapers?dq=strengthening-church-members-committee&id=JTIaAAAAIBAJ&pg=6301,4077100&sjid=zCQEAAAAIBAJ

[5] Memorandum from Glen L Pace, Strengthening Church Members Committee, (July 19, 1990), a true and correct copy of which is submitted herewith as Exhibit B.

Glenn L. Pace, a General Authority for the Church of Jesus Christ of Latter-Day Saints, certainly believed the survivors of SRA that he interviewed. Plaintiffs take no position on SRA, except to let all survivors of sexual abuse in Utah in the 1980's know that "it's not your fault. It's not your shame. You are not alone." Likewise, Plaintiffs take no position on whether Defendants, who seem excessively focused on SRA, were involved at some point in SRA, along with the other perpetrators (who are no longer living) that sexually abused them.

Sexual abuse of children is evil as Bishop Pace recognized. Defendants attempt to discredit Plaintiffs by discrediting other survivors of sexual abuse should also be recognized for what it is. And, for what it is not, which is a valid response to the factual allegations in Plaintiffs' Complaint.

II. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED UNDER UTAH CODE ANN. § 78B-2-308 BECAUSE THE COURT MUST GIVE EFFECT TO THE UTAH STATE LEGISLATURE'S INTENT TO EXPAND OR ELIMINATE "VESTED" RIGHTS IN CIVIL CLAIMS OF CHILD SEXUAL ABUSE WHEN THAT INTENT IS EXPRESSLY STATED, AND THE STATUTE IS OTHERWISE CONSTITUTIONAL.

Plaintiffs' claims fall within the window statute provided in Utah Code Ann. § 78B-2-308 and thus dismissal of these claims on an alleged expiration of the statutory period would be improper. When a statute contains an express intent by the Legislature to eliminate or expand "vested" rights in a statute of limitation defense, the court must give effect to that intention, and allow claims that have been previously time-barred.

In 2016, Utah State Governor Gary Herbert signed into law House Bill 279. This bill "provides a window for the revival of civil claims against perpetrators of sexual abuse of a child," and is highlighted as allowing "child sexual abuse victims to bring a civil action against an alleged perpetrator **even though the statute of limitations has run."**[6] House Bill 279[7] amended Utah

[6] H.B. 279, 2016 Gen. Sess. (Utah 2016) (emphasis added), a true and correct copy of which is submitted herewith as Exhibit C.
[7] *Id.*

Code Ann. § 78B-2-308[8] to read, in part, as follows:

> (1) The Legislature finds that:
> (a) child sexual abuse is a crime that hurts the most vulnerable in our society and destroys lives;
> (b) research over the last 30 years has shown that it takes decades for children and adults to pull their lives back together and find the strength to face what happened to them;
> (c) often the abuse is compounded by the fact that the perpetrator is a member of the victim's family and when such abuse comes out, the victim is further stymied by the family's wish to avoid public embarrassment;
> (d) even when the abuse is not committed by a family member, the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to ensure silence;
> (e) in 1992, when the Legislature enacted the statute of limitations requiring victims to sue within four years of majority, society did not understand the long-lasting effects of abuse on the victim and that it takes decades for the healing necessary for a victim to seek redress;
> (f) the Legislature, as the policy-maker for the state, may take into consideration advances in medical science and understanding in revisiting policies and laws shown to be harmful to the citizens of this state rather than beneficial; and
> (g) the Legislature has the authority to change old laws in the face of new information, and set new policies within the limits of due process, fairness, and justice.
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> * * *
>
> (6) A civil action may be brought only against a living individual who:
> (a) intentionally perpetrated the sexual abuse;
> (b) would be criminally responsible for the sexual abuse in accordance with Section 76-2-202; or
> (c) negligently permitted the sexual abuse to occur.
>
> **(7) A civil action against an individual described in Subsection (6)(a) or (b) for sexual abuse that was time barred as of July 1, 2016, may be brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection (7), whichever is longer.[9]**

The intent of the Utah State Legislature to revive these time-barred claims could not have been any clearer. Since the Utah State Legislature expressly intended Utah Code Ann. § 78B-2-308(7) to apply retroactively to claims that were "time barred as of July 1, 2016", Plaintiffs' claims

[8] Utah Code. Ann § 78B-2-308, as amended by H.B. 279, 2016 General Session, a true and correct copy of which is submitted herewith as Exhibit D.
[9] *Id.* (Emphasis added).

are no longer barred by the previous statute of limitations and may be brought before this court. Further, any "vested rights" claimed by the Defendants have been abrogated by the enactment of § 78B-2-308 because it clearly expresses an intent to revive time-barred claims.

A. Utah Courts allow retroactive application of a statute if 1) there is a clear expression of legislative intent that retroactive application is allowed or 2) the statute is procedural and does not affect "vested rights."

Utah Code Ann § 78B-2-308 is a valid enactment by the Utah State Legislature because it expressly allows the retroactive revival of previously time-barred claims of child sexual abuse and therefore no analysis under "vested rights" is ever required. The Utah Legislature provides clear guidance on when a statute should be applied retroactively, stating, "[a] provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive."[10]

Express legislative intent may be indicated by the plain language of the statute, and by "**explicit statements that the statute should be applied retroactively. . . or by clear and unavoidable implication that the statute operates on events already past**."[11] Utah courts have historically held consistently with this rule, and use a two-part test to determine if retroactive operation of a statute is proper:

> Utah courts have considered "[t]wo rules of statutory construction . . . relevant to" retroactive operation. *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997). "One is the 'long-standing rule of statutory construction that a legislative enactment which alters the substantive law . . . **will not be read to operate retrospectively unless the legislature has clearly expressed that intention**.'" *Id*. (quoting *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1998)) (emphasis added); *see also* Utah Code Ann. § 68-3-3. "The second relevant rule of statutory construction, which is often referred to as an exception to the first, permits retroactive application 'where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights' without enlarging or eliminating vested rights.'" *Id*. at 437-38 (quoting Roark v. Crabtree, 893 P.2d 1058, 1062 (Utah 1995)). "**Traditionally, [the Utah Supreme Court has] begun [its] analysis by applying the first rule of statutory**

[10] Utah Code Ann. § 68-3-3 (West 2018) (emphasis added).
[11] *See* 82 C.J.S. *Statutes* § 414 (1953).

> **construction: Only when [it] conclude[s] that retroactive application is not permitted under that rule do[es] [it] consider whether the second rule of construction permits retroactive operation**." *Id*. at 438 (emphasis added).[12]

Thus, the first and primary test is whether the Utah Legislature intended the statute to apply retroactively.[13] Only after concluding that the plain language of the statute does not evidence an intent for it to apply retroactively does the court consider whether the statute was procedural or affected "vested rights."

The Defendants cite *State v. Apotex Corp.*, claiming that the Utah Supreme Court rejected this two-part test by skipping the first part and holding that, once a defendant has a vested right to rely on a statute of limitations defense, the legislature cannot take that vested right away.[14] This inference is misguided. Just a year after *Apotex*, the Utah Supreme Court again reaffirmed the two-part test in *Waddoups v. Noorda*, stating, "Laws that 'enlarge, eliminate, or destroy vested or contractual rights' are substantive and are barred from retroactive application **absent express legislative intent.**" [15]

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[12] *Mitchell v. Roberts*, No. 2:16-cv-00843-EJF, 2017 U.S. Dist. LEXIS 62170, at *2-3 (D. Utah Apr. 21, 2017).

[13] *Evans & Sutherland Computer Corp. v. Utah State Tax Comm 'n,* 953 P.2d 435, 437-38 (Utah 1998) (emphasis added). *See also State of Utah v. Jacoby,* 1999 UT App 52, ¶ 10, 975 P.2d 939 ("A statute is presumed to be prospective and will not be applied retroactively **in the absence of clear legislative intent** ... or [unless] it is procedural in nature and does not enlarge or eliminate vested rights."); *Brown & Root Indus. Serv. v. Indus. Comm 'n,* 947 P.2d 671, 675 (Utah 1997) ("The general rule is that statutes are not applied retroactively **unless retroactive application is expressly provided for by the legislature."** (emphasis added)); *Union Pac. R. Co. v. Trustees, Inc.,* 329 P.2d 398, 399 (Utah 1958) ("As to any statutory question, Utah's policy demands the inclusion of an **express authorization to justify any retrospective application of a statute."** (emphasis added)); *McCarrey v. Utah State Teachers' Retirement Bd.,* 177 P.2d 725, 726 (Utah 1947) ("As said in 50 Am.Jur. 494, Statutes, Section 478: 'The question whether a statute operates retrospectively, or prospectively only, is one of **legislative intent.** ... [T]he general rule is that [statutes] are to be ... construed [prospectively] ... **where the intention of the legislature to make the statute retroactive is not stated in express terms,** or clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by necessary implication or terms which permit no other meaning to be annexed to them, preclude all question in regard thereto, and leave no reasonable doubt thereof.'" (emphasis added)); *In re Ingraham 's Estate,* 148 P.2d 340, 341 (Utah 1944) ("Constitutions, as well as statutes, should operate prospectively only, **unless the words employed show a clear intention that they should have a retroactive effect."** (Citing *Mercur Gold Mining & Milling Co. v. Spry, County Collector,* 16 Utah 222, 52 P.382, 284 (Utah 1898) (emphasis added)); *Ireland v.. Mackintosh,* 22 Utah 296, 61 P. 901,902 (1900) ("the object which the statute was passed to attain should be kept in view, and **the construction which will most effectually accomplish the purpose of the statute should be** adopted."(Emphasis added.))

[14] *Defs.' Br. in Supp. of Mot. to Dismiss*, at 21, *citing State v. Apotex Corp.*, 2012 UT 36 ¶ 67.

[15] 2013 UT 64, ¶ 8, 321 P.3d 1108, 1112 (Utah 2013) (emphasis added).

Further, in *Roark v. Crabtree*, the case upon which *State v. Apotex Corp.* primarily relies, the Utah Supreme Court noted that a "legislative enactment which alters the substantive law or affects vested rights" will be applied retroactively if "the legislature has clearly expressed that intention."[16] That case concerned the enactment of § 78-12-25.1 in 1994, which allowed a person to file suit within four years after discovery of past sexual abuse, and was, as the Utah Supreme Court held, **not intended** to be applied retroactively.[17] The quotations of *Roark v. Crabtree* on which the court in *Apotex* and Defendants rely primarily detail the application of the second part of the traditional two-part test and pertain only to whether "vested rights" may be taken away when the legislature did **not intend** to have the statute applied retrospectively.

The language of *Roark* and *Apotex* are not helpful in this case because the first and primary rule of statutory construction is satisfied. Here, the Utah State Legislature clearly expressed the intention for § 78B-2-308 to apply retroactively by plainly stating that "A civil action against an individual. . . that was time barred as of July 1, 2016, may be brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection."[18] Thus, Plaintiffs' claims are not time-barred under Utah Code Ann. § 78B-2-308 because the plain language of the statute evidences a clear expression of legislative intent that retroactive application is allowed.

B. Utah Code Ann § 78B-2-308 is constitutional on its face and does not violate the Utah Constitution's Open Courts Clause or the Due Process Clause because: 1) the statute is rationally related to its legislative purpose; 2) the Utah Legislature expressly indicated that it applies retroactively; and 3) it is a statute of limitation and not of repose.

[16] *Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995).
[17] *Id.*
[18] Utah Code Ann. § 78B-2-308 (West 2018).

Plaintiffs respectfully ask this Court to find that Utah Code Ann. § 78B-2-308 is a valid enactment by the Utah State Legislature under the Utah State Constitution because it is rationally related to the Legislature's purpose of giving redress to victims of child sexual abuse, it is expressly intended to apply retroactively, and it otherwise does not violate the Utah Constitution's Open Courts Clause or the Due Process Clause. Further, Plaintiffs respectfully ask this Court to conclude that, because § 78B-2-308 is a valid enactment by the Utah State Legislature, their claims are not time-barred by the previous statute of limitations.

1. **Utah Code Ann. § 78B-2-308 is a constitutional enactment by the Utah State Legislature because it is rationally related to the legitimate government interest of ensuring that victims of child sexual abuse are given the time necessary to heal before seeking redress.**

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

> We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; **if a challenged action does not violate the Constitution, it must be sustained:**
>
> > **"Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.** We do not sit as a committee of review, nor are we vested with the power of veto."[19]

The Utah Supreme Court described the primary role of the courts in interpreting statutes in *Evans v. State*[20] by stating, "[w]hen we interpret statutes, our primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve." Utah Code Ann. § 78B-2-308 is a constitutional enactment by the Utah State Legislature because it is rationally related to helping victims of child sexual abuse have the necessary time to heal before being able to bring forth their civil claims.

[19] *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194-195 (1978).
[20] *Evans v. State,* 963 P.2d 177, 184 (Utah 1998).

The appropriate level of scrutiny in sustaining the constitutionality of a statute of limitations is rational basis scrutiny.[21] "Under the rational-basis, or least restrictive standard, a statutory classification is constitutional unless it has no rational relationship to a legislatively stated purpose or, if not stated, to any reasonably conceivable legislative purpose."[22] Here, the interest of the Utah Legislature is passing § 78B-2-308 can be clearly drawn from the legislative history of House Bill 279 where, during the House Floor Debate on February 26, 2016[23], Representative Ken Ivory stated:

> This year we intend with HB 279 to move into the "good" category nationally in how we protect children from this heinous act of the sexual abuse of children.
>
> What HB 277 did in eliminating the statute of limitations forward, created a limitation that as of March 23, 2015, anyone that was 22 or younger has no statute of limitations for sexual abuse of children. Anyone that was 22 years old and one day was still barred by time from bringing their claims.
>
> We thought last year that that was enough. We thought that if we protected children going forward, we thought that going forward that would be a good step for the future. And, colleagues, after we passed that bill, I got calls almost every week, agonizing calls from all over our state, all over the nation in fact, from people who had lived in Utah as children, and they would tell me their horrifying story of their experiences as a child and then they would ask, "Does this 277 help me?" And I would ask them, "How old were you on March 23, 2015?" And, invariably, they were older than 22. And I would have to say, "No, I'm sorry. HB 277 does not help you."
>
> I received calls like that every week, several times a week throughout the last year until November. I received a call from a woman in St. George who had a horrifying experience of her being abused, sexually abused, as a child and she asked the same question: "Does it help me?" And I said, "No, I'm sorry... and ... and... but it will." And I immediately called leg. counsel and opened the file

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[21] *See Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30,32 (Utah 1981) (holding that the rational-basis test of scrutiny applied in sustaining the constitutionality of the two-year statute of limitations in the Malpractice Act).

[22] *Lee v. Gaufin*, 867 P.2d 572, 580 (Utah Sup.Ct. 1993) *citing Greenwood v. City of North Salt Lake*, 817 P.2d 816, 820-21 (Utah 1991)*; Blue Cross & Blue Shield v. State*, 779 P.2d 634, 637 (Utah 1989); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 888 (Utah 1988); *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1137 (Utah 1982); *Baker v. Matheson*, 607 P.2d 233, 244 (Utah 1979).

[23] The House Floor Debate on February 26, 2016 on House Bill 279 (Substitute 2) can be viewed and heard by clicking on "HB279S2" on the left column on the page found at http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19980&meta_id=622136.

for HB 279.

What we've seen throughout the nation, we've seen states opening what they call "windows," reviving the statute of limitations for these claims for a specific reason. **What we've learned scientifically that we didn't know is that it takes decades for victims of sexual abuse of children to be able to process the shame, the embarrassment, the intimidation, the threats that were imposed upon them as children to be able to process and come forward and disclose the claim.**

Imagine you were a ten year-old who comes from a broken home, who doesn't fit in, starved for love and attention and affection and you have some trusted teacher or priest or parent or relative or neighbor that showers affection on you as a child, that is more intoxicating than oxygen, and the child would give anything to have that attention, and they build and groom that attention until they get to the point of taking inappropriate acts and then sexual acts and then abusive acts, but that attention is so strong and so hard and you have this person of trust telling them, "It's bad to tell, it's bad to tell," because of the shame, because of the fear, because of the intimidation, "it's bad to tell."

Well, now, scientifically we know that, on average-you have the handouts--on average**, it takes them until age 41 for a child victim of sexual abuse to come forward and present ....**

So what HB 279 does, is, where we've already eliminated the statute of limitations going forward, we now deal with those who have been abused, that were older than 22 on March 23, and we put the statute of limitations of 18 plus 35 years that takes them out past the average age for reporting and allows them to revive their civil statute of limitations claims only against the perpetrator and only against the active aiders and abettors. . .

* * *

With what we did in H.B. 277, we've eliminated that statute of limitations, but what we have now is we have this 20-year gap until we catch up to those who were in that gap, to allow them to report and to take those perpetrators and disclose them publicly. This doesn't change anything in the liability, it doesn't change anything in the burdens of proof. What it does is take away a procedural defense for someone who has perpetrated these acts on children. In weighing that balance is clearly a matter of public policy in Utah. I think we want to err on the side of protecting children where a defendant may have a right procedurally for a claim that has lapsed. We have the opportunity to get our public policy right, and that's the basis behind H.B. 279.

As with the text of House Bill 279, the legislative history clearly indicates the intent

of the Utah Legislature that previously time-barred claims of child sexual abuse be revived so victims over 22 years of age can pursue justice and the perpetrators be held to account. Utah Code Ann § 78B-2-308 is rationally related to this legitimate legislative purpose because it revives claims that were time-barred under the previous statute and allows those claims to be brought within 35 years of the victim's 18th birthday, a window which recognizes the "decades" of healing necessary before victims may bring forth their claims.[24] Therefore, since § 78B-2-308 has a rational relationship to the legislatively-stated purpose, it is a constitutional enactment of the Utah State Legislature, and should be sustained.

2. The Utah State Legislature has the authority to enlarge a statute of limitation and retroactively revive previously time-barred civil actions without violating the due process clause of the Utah Constitution if it expressly states its intent to do so.

The Utah State Legislature may abrogate "vested rights" in a statute of limitations defense for a civil action by stating its intent to revive those actions through retroactive application of a statute of limitation, or by enlarging the limitation period. The Utah State Legislature recognized this and intentionally drafted House Bill 279 with it in mind. During the House Floor Debate on House Bill 279, Representative Ken Ivory stated[25]:

> In this instance, our Supreme Court has said, if we are going to revive a civil statute of limitation, we need to, as a Legislature, to give a clear expression of intention for doing that, and so in this instance, that's why **it's necessary in this bill, that we give a clear intention of reviving a statute of limitations.** (Emphasis added.)

In their Motion to Dismiss, Defendants cite *Ireland v. Mackintosh* to claim that the Utah Supreme Court has held that vested rights cannot be abrogated by the Utah legislature under the

[24] Utah Code Ann. § 78B-2-308 (West 2018).

[25] The House Floor Debate on February 26, 2016 on House Bill 279 (Substitute 2) can be viewed and heard by clicking on "HB279S2" on the left column on the page found at http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19980&meta_id=622136.

Utah Constitution.[26] Yet, the opinion in that case clearly reserved the right of the Utah Legislature to expressly indicate that a statute may apply retroactively. *Ireland* concerned the amendment of a statute of limitation on an action in contract that was expanded from four years to six years.[27] The Utah Supreme Court held that the amendment did not apply to the originally time-barred action because the Defendant has a "vested right" in a statute of limitations defense.[28] But in the same opinion, the Court recognized that, in reference to the statute, "it was not the intention of the legislature to revive causes of action on claims which had previously become stale" and held:

> It is a rule of construction that statutes "are to be so construed as to have a prospective effect merely, and will not be permitted to effect past transactions, **unless such intention is clearly and unequivocally expressed** but upon the theory that the statute only relates to the remedy, it will seem that it is competent for the legislature to repeal the statute in toto, and make such repeal operate as to all existing claims upon which the statute has not run.[29]

Thus, whether a litigant has a "vested right" in a statute of limitations defense is irrelevant if the Legislature "clearly and unequivocally" expresses an intention to apply a statute retroactively. In cases where the Utah Supreme Court has held that the due process clause of the Utah Constitution is implicated under a "vested rights" theory, the legislature had only intended an amended statute of limitations to apply prospectively.[30] If the Utah State Legislature clearly expresses its intent, it may retroactively revive previously time barred civil actions.

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[26] *Ireland v. Mackintosh*, 22 Utah 296, 300, 61 P. 901, 901 (Utah 1900).
[27] *Id.* at 300.
[28] *Id.* at 310.
[29] *Id.* at 309-10 (emphasis added), *citing* 1 Wood on Lim. Sec. 11, p. 41, 42 and N. 3; Sutherland on Stat. Const. 464; *Pitman v. Bump*, 5 Ore. 17; *Potter v. Ajax Min. Co.*, 19 Utah 421, 57 P. 270.
[30] *See Roark v. Crabtree*, 893 P.2d 1058, 1062. The Defendants cite this case as authority that the Utah State Legislature *can never* abrogate a vested right by statute. Yet, in this case, the "vested rights" approach was only considered after the court found that the statute at issue was not intended to apply retroactively. Further, the court noted that the "long-standing rule of statutory construction" was 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. *Id* at 1061.

Additionally, the passing of Utah Code Ann. § 78B-2-308 served as a legislative recognition that sexual abuse is an exceptional circumstance where applying the previous statute of limitations rule leads to an unjust result. Plaintiffs respectfully ask the Court to consider the language of *Russel Packard Development, Inc. v. Carson,*[31] which, in the context of the equitable discovery rule, held:

> We have limited the circumstances in which an equitable discovery rule may operate to toll an otherwise fixed statute of limitations period to the following two situations: (1) "where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct," and (2) "where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action."[32]

The Utah Legislature's extension of the statute of limitations on previously time-barred claims, and the removal of a statute of limitation on prospective claims served as a legislative recognition that sexual abuse is an exceptional circumstance which makes the application of the previous statute of limitations rule irrational and unjust. While this case does not concern an equitable discovery rule, the underlying policy is the same. Where the legislature recognizes that a previous statute of limitation would lead to an irrational and unjust result, as is the case with many short statutes of limitations in child sexual abuse claims, the legislature may expressly amend the statute to achieve a more equitable result.

Here, § 78B-2-308 was extended to remedy the unjust early barring of child sex abuse claims where the reality is that the victim is not yet mentally or emotionally equipped to bring their case due to the abuse they experienced. This is evident in the fact that the Utah Legislature completely removed the statute of limitations for future claims. Thus, Plaintiffs, in the alternative,

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[31] 108 P.3d 741 (Utah 2005).
[32] *Id.* at 747, citing *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995) (internal quotation omitted).

respectfully ask this Court to consider the Legislature's findings, and revive their previously time-barred claims on the basis of equitable relief from the unjust result of the previous statute of limitation.

3. The Open Courts Provision of the Utah Constitution is not implicated in this case because § 78B-2-308 is a statute of limitation and not of repose, and the statute does not completely bar Defendants from defending the claims against them.

"State legislatures possess the discretion to enact statutes of limitations, and these statutes are presumptively constitutional."[33] Utah Code Ann. § 78B-2-308 is a constitutional enactment of the Utah State Legislature under the Open Courts provision of the Utah Constitution because it is a statute of limitation and not of repose. In *Waite v. Utah Labor Comm'n*, the Utah Supreme Court set forth the test for when the Open Courts provision of the Utah Constitution may be implicated, stating:

> There are two issues on appeal. First, whether Utah Code section 34A-2-417(2)(a)(ii) should be read as a statute of limitation or a statute of repose. If it is the former, our analysis ends as Petitioners have not raised any argument that the section would be unconstitutional as a statute of limitation and, indeed, such an argument would likely be unavailing as **"[s]tate legislatures possess the discretion to enact statutes of limitations, and these statutes are presumptively constitutional."** If, on the other hand, we interpret the section as a statute of repose, we must then consider whether it is unconstitutional under the Open Courts Clause.[34]

There, the Court defined the difference between a statute of limitation and a statute of repose, stating:

> A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action. . . Therefore, a statute of repose may bar the filing of a lawsuit even though the cause of action did not even arise until after it

[33] *Avis v. Bd. of Review of Indus. Comm'n*, 837 P.2d 584, 587 (Utah Ct. App. 1992).
[34] *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 6, 416 P.3d 635, 638 (Utah 2017) (emphasis added).

> was barred and even though the injured person was diligent in seeking a judicial remedy.[35]

Thus, a statute of limitation is created when the trigger for the statutory timeframe is the accrual of a cause of action. Generally, "a cause of action accrues upon the happening of the last event necessary to complete the cause of action"[36] and at "the moment an action may be maintained to enforce a legal right."[37] Here, Utah Code Ann. §78B-2-308 is plainly a statute of limitations and not of repose because the statutory timeframe doesn't begin to accrue until a prohibited act by the perpetrator occurs. The act provides that:

> "[t]he victim need not establish which act in a series of continuing sexual abuse incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse."[38]

Therefore, as explicitly stated by the legislature, § 78B-2-308 is a statute of limitation. Any analysis under the Open Courts Provision of the Utah Constitution is unnecessary because statutes of limitations are "presumptively constitutional" and the Open Courts clause concerns limitations on the legislature's ability to prevent claims from being heard before a cause of action may even accrue, which is not the case with a statute of limitation.[39]

However, even if further analysis under the Open Courts provision of the Utah Constitution is necessary, Utah Code Ann § 78B-2-308 actually furthers the purpose of the Open Courts provision rather than limiting it. In House Bill 279, the Utah Legislature recognized the harsh reality that many victims of sexual abuse require "decades of healing" before being able to seek redress.[40] The previous statute of limitations for child sexual abuse often barred plaintiffs from

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[35] *Id*. at ¶ 11, 416 P.3d at 639, *citing Berry v. Beech Aircraft Corp.,* 717 P.2d 670, 672 (Utah 1985).
[36] *Waite*, at ¶ 12, *citing Becton Dickinson & Co. v. Reese,* 668 P.2d 1254, 1257 (Utah 1983).
[37] *Id*., *citing Ash v. State*, 572 P.2d 1374, 1379 (Utah 1977).
[38] Utah Code Ann. § 78B-2-308(4) (West 2018).
[39] *Waite*, at ¶ *6.*
[40] H.B. 279, 2016 Gen. Sess. (Utah 2016) (emphasis added), a true and correct copy of which is submitted herewith as Exhibit C.

seeking redress well before they were mentally and emotionally ready to endure the rigors of litigation. Utah Code Ann § 78B-2-308 furthers the purpose of the Open Courts provision by providing Plaintiffs the right to have their civil cause heard. Further, § 78B-2-308 does not prevent the Defendants from *defending* their case. It merely bars the defense from preventing the Plaintiffs' claims from being heard at all by asserting a now-stale statute of limitations defense. § 78B-2-308, however, does not bar the Defendants from raising *any* defense, and the Defendants are still permitted to defend the claims against them on the merits.

Finally, the United States Supreme Court has held that "what shall be considered a reasonable time" for a statute of limitations "**must be settled by the judgment of the legislature**, and the courts will not inquire into the wisdom of establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice."[41] Here, there is no evidence that Utah Code Ann. § 78B-2-308 is at all insufficient, as it provides those victims of sexual abuse the right to access the courts within 35 years of their 18th birthday, a period which adequately addresses the concerns of the Utah Legislature in passing § 78B-2-308. Therefore, since § 78B-2-308 is a statute of limitation, and not repose, and the furtherance of the § 78B-2-308 is consistent with the Due Process and Open Courts Provision of the Utah Constitution, Plaintiffs' claims are not barred.

C. Plaintiffs' claims are not time-barred under 18 U.S.C. § 2255 because John Doe 1 did not discover that his sexual abuse had been videotaped until 2018, which is within ten years of the discovery of the violation that forms the basis of his claim.

If needed, Plaintiffs will amend their Complaint to make it clear that their claims are brought under 18 U.S.C. § 2255, which provides a civil remedy for "any person who, while a minor was a victim of a violation of" 18 U.S.C. § 2251. Further, Plaintiffs' claims are not time-barred under

[41] *Wilson v. Iseminger*, 185 U.S. 55, 63, 22 S. Ct. 573, 575, 46 L. Ed. 804 (1902) (emphasis added).

18 U.S.C. § 2255(1), because John Doe 1 did not discover that his sexual abuse had been videotaped until 2018. The relevant statute of limitation for 18 U.S.C. § 2255 reads:

> (b) Any action commenced under this section shall be barred unless the complaint is filed—
>
> > (1) not later than 10 years after the date on which the plaintiff reasonably discovers the later of—
> >
> > > (A) the violation that forms the basis for the claim; or
> > >
> > > (B) the injury that forms the basis for the claim; or
> >
> > (2) not later than 10 years after the date on which the victim reaches 18 years of age.[42]

In his declaration, attached as Exhibit 3 to the Complaint, John Doe 1 states:

> As a child, I had vivid recurrent nightmares of people touching me. In these nightmares, I would wake up to discover that my pajama bottoms had been taken off, and that the people had taken my blanket. They would then touch my penis and laugh at me. It was only in the last few months or so that I discovered that I was videotaped and abused as a baby. It was not until my mother met with an attorney that she revealed to me the full names and identities of my abusers, and that they had videotaped my abuse.

John Doe 1 did not discover the violation that formed the basis of his claim that Defendants Richard and Brenda Miles had videotaped his abuse until just this year. The Defendants would have the Court believe that subsection (b)(2) controls and fail to address subsection (b)(1) at all. Further, any claims by the Defendants that previous statutes of limitations should apply are erroneous as the cause of action is tolled until John Doe 1 became aware of the "violation that form[ed] the basis for the claim." Based on these facts, and 18 U.S.C. § 2255(b)(1), Plaintiffs' claims are not barred.

[42] 18 U.S.C. § 2255 (West 2018).

CONCLUSION

This case concerns the horrific type of child sex abuse that the Utah Legislature sought to remedy by giving victims an opportunity to achieve some semblance of justice in holding the perpetrators accountable for their actions. As the Utah Legislature correctly noted in § 78B-2-308(1), the effects of abuse on a victim are long-lasting and can "take[] decades for the healing necessary for a victim to seek redress."[43] The Plaintiffs respectfully ask this court to give effect to the expressed intent of the Utah Legislature and allow their claims to be pursued.

DATED October 17, 2018.

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[43] Utah Code Ann. § 78B-2-308(1)(e) (West 2018).