IN THE UTAH SUPREME COURT

TERRY MITCHELL, Plaintiff, v. RICHARD WARREN ROBERTS Defendant.	PUBLIC Case No. 20170447-SC

SUPPLEMENTAL BRIEF OF AMICUS CURIAE UTAH LEGISLATURE

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT, THE HONORABLE EVELYN J. FURSE, CASE NO. 2:16-cv-00843-EJF

Ross C. Anderson
Law Offices of Rocky Anderson
Eight East Broadway, Suite 450
Salt Lake City, UT 84111
Rocky@andersonlawoffices.org
Attorney for Plaintiff

Troy L. Booher
Zimmerman Booher
341 South Main Street, 4th Floor
Salt Lake City, Utah 84111
tbooher@zbappeals.com
Attorneys for Defendant

Brian M. Heberlig
Linda C. Bailey
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 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, Utah 84111-2216
nak@clydesnow.com
skz@clydesnow.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
Attorneys for Amicus Curiae Utah Legislature

Tyler Green
Stanford Purser
Office of the Utah Attorney General
320 Utah State Capitol
P.O. Box 142320
Salt Lake City, UT 84114-2320
tylergreen@agutah.gov
spurser@agutah.gov
Attorneys for Amicus Curiae Office of the Attorney General

James S. Jardine
Samuel C. Straight
Ray Quinney & Nebeker, PC
36 South State Street, Suite 1400
Salt Lake City, UT 84111
jjardine@rqn.com
sstraight@rqn.com
Attorneys for Amici Curiae Richard Miles and Brenda Miles

Craig K. Vernon
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
cvernon@jvwlaw.net
Attorney for Amici Curiae Jane Does 1-4, and John Does 1 and 2

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Pursuant to Rule 25 of the Utah Rules of Appellate Procedure and this Court's orders of July 10, 2019, and August 30, 2019, the Utah Legislature (Legislature) submits this amicus curiae supplemental brief in support of the constitutionality of legislative revival of a child sexual abuse claim that was barred by a previously applicable statute of limitations.[1]

INTRODUCTION

The Court requested supplemental briefing on the following 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?

This question goes to the scope of the Legislature's power to exercise its constitutional responsibility to establish the laws of the state, and the Legislature appreciates the Court's allowance of amicus curiae supplemental briefing.

SUMMARY OF THE ARGUMENTS

Historical analysis of the language of the Utah Constitution shows that the intent of the people was to grant their elected representatives, the Legislature, plenary authority to enact laws that reflect the Legislature's policy choices for the state. That plenary authority necessarily includes the power to make and revise judgments about the wisdom and length of statutes of limitations. Statutes of limitations are, by their nature, creatures of legislative

[1] The Legislature's position on amicus curiae supplemental briefing is consistent with the position taken by Plaintiff Terry Mitchell on supplemental briefing. The Legislature takes no position on the merits of the underlying case that is pending in federal district court.

public policy that regulate the privilege to litigate. Because the constitution grants the Legislature this broad authority, a court may limit the Legislature's exercise of its legislative power, including its power to revive previously time-barred civil causes of action, only when the court determines that the Legislature's actions are proscribed by constitution.

Defendant argues that the due process clause and the open courts clause of the Utah Constitution act as backstops against the Legislature's authority when it comes to time-barred claims because a defense of an expired statute of limitations is a vested right.[2] An examination of the original public meaning of these two clauses reveals that only the due process clause offers any protection to a vested right in a defense. However, the due process clause does not insulate a vested right from deprivation; rather, it merely ensures that the Legislature does not arbitrarily remove that right. The Court, therefore, should conclude that the Legislature has the authority to revive a time-barred cause of action so long as there is a rational basis for doing so and that the Legislature had a rational basis for reviving a time-barred civil cause of action for child sexual abuse.

[2] This brief does not analyze the protections of the ex post facto clause because that clause applies only to criminal cases. *See generally* *Stogner v. California*, 539 U.S. 607, 632–33 (2003).

ARGUMENTS

I. The framework for interpreting a constitutional provision requires looking to historical records to ascertain original public meaning, giving deference to the Legislature where the original public meaning is in doubt.

The primary goal in interpreting the Utah Constitution is to ascertain the original public meaning of the constitution's provisions by reviewing the constitutional text in the context of the people's understanding of that text at the time of the text's enactment. *Richards v. Cox*, 2019 UT 57, ¶ 13. This analysis requires examining constitutional language, not just "'as barren words found in a dictionary, but as symbols of historic experience illumined by the presuppositions of those who employed them.'" *American Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235 (quoting *Dennis v. United States*, 341 U.S. 494, 523, 71 S.Ct. 857 (1951) (Frankfurter, J., concurring)). Additional tools available for making this analysis include corpus linguistics and an examination of the political and legal environment and assumptions of the time. *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 100, 416 P.3d 663. The Legislature also examines the evolution of the case law as it relates to the constitution's original public meaning. After exploring the original public understanding of the reach of the pertinent constitutional clauses, the Legislature then addresses the standards the Court should apply in determining whether revival of a time-barred civil claim comports with the Utah Constitution.

An overarching principle guiding this Court's analysis of the constitutionality of the Legislature's decision to revive a civil cause of action for child sexual abuse is the presumption of constitutionality afforded to legislative enactments. In addition, if the Court concludes that the meaning of a constitutional provision is in doubt, the Court affords

deference to legislative interpretations regarding the reach of constitutional proscriptions and resolves any doubts about whether a statute is constitutional in favor of constitutionality. *Richards*, 2019 UT 57, ¶ 39.

II. An examination of the original public meaning of the Utah Constitution reveals that the legislative power is plenary except as restricted by the constitution itself and that neither the due process clause nor the open courts clause precludes the Legislature from reviving a time-barred cause of action.

A. The original Utah Constitution created a plenary legislative power that includes the power to revive time-barred causes of action.

The legislative power was originally vested solely in the Utah Legislature and, since 1900, has been shared in its entirety between the Legislature and the people:

> (1) The Legislative power of the State shall be vested in:
> (a) a Senate and a House of Representatives which shall be designated the Legislature of the State of Utah; and
> (b) the people of the State of Utah as hereinafter stated.

Utah Const. art. VI, § 1 (1900). The task of determining the public's understanding of a term or phrase at the time a constitutional provision was adopted can be a difficult one. Judges often rely on dictionaries to get a sense of a word's meaning; however, the reliability of a dictionary definition is lacking because a dictionary does not provide any indication of the ordinariness of the word. *See* *State v. Rasabout*, 2015 UT 72, ¶ 50, 356 P.3d 1258 (Lee, A.C.J., concurring).

The Legislature, therefore, begins its analysis by employing the tool of corpus linguistics. Specifically, the Legislature consulted the Corpus of Historical American English (COHA) database from the years 1860–1910. Using this database, the Legislature searched for the phrase "legislative power" and for each match, the Legislature examined

the collocates six words to either side of the phrase. The search yielded only four terms that appeared ten or more times: exercise, executive, states, and general. (Addendum A) None of these terms provides clear evidence of the ordinary meaning of the phrase "legislative power"; rather, the terms suggest that the public rarely used the phrase outside of identifying the powers of various branches of the government. In that regard, the phrase is best understood as a term of art with no other public meaning. Although the COHA search turned up other terms, these other terms appeared so infrequently that they did not provide any additional information.

There is other historical evidence, however, that illustrates the breadth of the grant of authority to the Legislature. For example, the framers of the Utah Constitution resolved to make the Utah Constitution primarily one of limitation:

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

Resolution of Samuel R. Thurman, Official Report of the Proceedings and Debates of the Convention, Day 15 (Mar. 18, 1895) [hereinafter Constitutional Convention].[3] The public shared the view that the legislative power was plenary with only the constitutions acting as a limitation on that power. An 1871 treatise noted,

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

> In creating a legislative department and conferring upon it the legislative power, the public must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose [in the state constitution], and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency, for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 86 (2d ed. 1871). Case law from that same time period reiterates this understanding: "The state having thus committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution, it has plenary power for all purposes of civil government." *Kimball v. City of Grantsville City*, 57 P. 1, 4 (Utah 1899).

Defendant acknowledges the plenary authority granted by the Utah Constitution to the Legislature, but he argues that the grant implicitly excluded the power to disturb a vested right, such as a statute of limitations defense. [Roberts Suppl. Br. at 3–4, 7–11] In support of his argument, Defendant points to discussions that occurred on Days 22 and 47 of the 1895 constitutional convention as suggesting that legislative actions cannot eliminate vested rights. The discussion on Day 22, however, is in the context of what would become Utah's eminent domain provision and bears little on the question of legislative power generally. Constitutional Convention, Day 22 (Mar. 25, 1895) (remarks of Charles Stetson Varian). On Day 47, except in the first instance–where a constitutional convention committee report suggested that a prohibition on the sale of liquor may disturb a vested right in property–the entire discussion focuses on competing proposals for a constitutional

provision regarding state ownership of water, one of which gave the Legislature authority to control and acquire water in the state. The dispute centered around the provision's legal effect on the "vested" rights of individual water users. Constitutional Convention, Day 47 (Apr. 19, 1895). It seems illogical to limit an otherwise broad grant of policymaking authority to the Legislature on the basis that the constitutional framers voiced concerns about providing broad legislative authority in the context of water ownership.

Defendant further argues that the "original constructions of other western states" indicate that the framers, and the public at large, understood the legislative power to implicitly prohibit disturbance of a vested right, including revival of a time-barred claim. [Roberts Suppl. Br. at 16] In support of this argument, Defendant relies on pre-1895 decisions from six western states that each concluded that the state legislature was precluded from reviving a time-barred cause of action. To the extent that these decisions glean information of public understanding, it is worth recognizing that two of the six states referenced (Colorado and Texas) had express constitutional prohibitions against retrospective legislation.[4]

Without more,[5] the historical evidence relied upon by Defendant does not support a conclusion that the otherwise broad constitutional grant of legislative authority to the

[4] Defendant also argues that, in 1895, twenty-five of the forty-four states prohibited revival of a time-barred cause of action. [Roberts Suppl. Br. at 14] Defendant fails to recognize that, at the time, several of the twenty-five states also had express constitutional or statutory prohibitions against retrospective legislation.

[5] Defendant does point to several cases and treatises in the years predating and immediately following adoption of the Utah Constitution as supporting a limited vesting of legislative

Legislature includes an implicit prohibition against disturbance of vested rights, such as legislative revival of a time-barred cause of action. For this reason, the Court should conclude that the legislative power includes the power to revive a cause of action unless another constitutional provision limits that authority.

B. The original Utah Constitution protects a vested statute of limitations defense under the due process clause but does not prohibit legislative deprivation of that right through revival of a time-barred cause of action.

The due process clause, which has been included in the Utah Constitution without amendment since the constitution's adoption in 1895, reads: "No person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7. The Legislature again begins its analysis of the original public meaning of the due process clause with the results from the COHA database for years 1860–1910. The Legislature searched for the phrase "due process," and for each match, the Legislature examined the collocates six words to either side of the phrase. The nine most common collocates were all terms derived from the text of the due process clause itself: law, without, property, liberty, nor, deny, clause, taken, and deprived. (Addendum A) This search suggests that

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power in the Legislature. [Roberts Suppl. Br. at 9–12] These sources are of limited value to the question presented here. *In re Handley's Estate*, 49 P. 829 (Utah 1897), is an unrelated separation of powers case because the Legislature sought to retrospectively set aside a judicial judgment and is therefore distinguishable on its facts. The other sources add little to the analysis because they (1) involve retrospective elimination of a plaintiff's cause of action; (2) are cited for dicta; or (3) contain statements that are countered in other sources of the time, *see, e.g.*, *Campbell v. Holt*, 115 U.S. 620, 628 (1885). At most, these sources create doubt in the meaning of the constitutional grant of legislative power, and thus, the Court should presume the constitutionality of the legislative action to revive a time-barred cause of action.

the phrase has little to no public meaning outside its use as a term of art. Other collocates exist that are not from the constitutional phrase, but each other collocate appears three or fewer times and thus does not yield additional understanding of the phrase.[6]

The Legislature next examined other sources for insight into the original public meaning of these phrases, including the constitutional convention debates, ratification era newspaper articles, and the case law predating and surrounding the constitutional convention. Transcripts from the 1895 constitutional convention demonstrate that the framers of the constitution held an expansive view of due process. However, the framers did not elaborate on their view, and the logical conclusion from this is that the concept of due process was not in need of further definition because the concept was pre-constitutional and had been put into legal documents back to Magna Carta. *See* *Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 674 (Utah 1985) (noting that the "due process clauses found in both state and federal constitutions appear to have originated with the Magna Carta"). In fact, the framers cited United States Supreme Court Justice Storey's remarks that "the rights of personal liberty and private property shall be held sacred . . . no freeman shall be taken or imprisoned . . . or disseized of his freehold, etc., but . . . by the law of the land." The framers, speaking through Charles Stetson Varian, then affirmed, "By 'the law of the land" is meant the due process and course of law, and that has been affirmed of necessity, as it appears by the people of the United States when they adopted

[6] The Legislature also searched the database using the entire text of the due process clause and the phrase "without due process of law." Neither search yielded any different result.

the 14th amendment of the Constitution." Constitutional Convention, Day 31 (Apr. 3, 1895) (remarks of Charles Stetson Varian). Mr. Varian then quoted justices from New York and Pennsylvania to define due process as primarily a systematic and reliable legal procedure to ensure protection of private rights.[7] *Id.* The framers' remarks indicate that the framers had a view of due process that is consistent with, and not more than, the protections outlined in federal law and adopted in many states.

At the time of the Utah Constitution's adoption in 1895, the due process clause was a common feature in state constitutions. Like Utah's due process clause, the language in many states' due process clauses mirrored the language in the federal due process clause. Michael J. DeBoer, *The Right to Remedy by Due Course of Law—A Historical Exploration and an Appeal for Reconsideration*, 6 FAULKNER L. REV. 135, 137 & n. 3 (2014). This context reinforces the notion that the due process protection in the Utah Constitution is a "legal term of art." "A cardinal rule of statutory construction" used by this Court is that "a legislature's use of an established legal term of art incorporates the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Utah Stream Access Coal. v. Orange St. Dev.*, 2017 UT 82, ¶ 21, 416 P.3d 553 (citation

[7] An 1890 newspaper article in the Salt Lake Tribune supports a conclusion that the framers' understanding reflected the public's understanding of the due process protection as a type of legal process. The article reported on a district court's decision to uphold the Board of Medical Examiners' authority to determine a physician's qualifications to practice medicine in the state on the basis that the physician received due process of law before being deprived of his property (his right to practice medicine), even though the process was provided by a state board rather than a court. *Medical Board Sustained: Judge Smith Routes the "Irregulars" at All Points*, SALT LAKE TRIBUNE (January 27, 1890) (Addendum B).

and internal quotation omitted). The same logic applies by extension to constitutional use of terms of art. *See South Salt Lake City v. Maese*, 2019 UT 58, ¶ 27 n.10.

In 1885, the United States Supreme Court addressed the meaning of due process as a term of art in *Campbell v. Holt*, 115 U.S. 620 (1885). There, the Supreme Court analyzed whether the Texas Legislature's revival of a contracts claim violated the due process clause found in the Fourteenth Amendment of the United States Constitution. *Id.* at 621, 628. The Fourteenth Amendment provided, "[N]or shall any state deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV; *Campbell*, 115 U.S. at 622. The Supreme Court addressed whether a legislature could revive a cause of action where a statute of limitations defense is vested without violating the due process protection. *Campbell*, 115 U.S. at 628. The Supreme Court concluded that, under the federal constitution, a defense of an expired statute of limitations is not a vested right beyond the power of a legislature to eliminate: "no right is destroyed when the law restores a remedy which has been lost." *Id.*[8]

It was in this context that the framers drafted the Utah Constitution with a due process clause that is virtually identical to the federal due process clause. The framers did not attempt to distinguish Utah's due process clause or to indicate that Utah's clause

[8] The United States Supreme Court has subsequently reaffirmed this holding: "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); "[I]t cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment," *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 315–16 (1945).

provided additional protections beyond those provided by the federal provision.[9] Indeed, the framers' lack of discussion regarding the scope of the clause at the constitutional convention supports a conclusion that Utah's due process clause was intended to embody the already well-known and well-established legal concepts of the federal due process clause.[10] Moreover, in 1895, several other states had express constitutional prohibitions against retrospective legislation. *See, e.g.*, *Denver, S.P. & P.R. Co. v. Woodward*, 4 Colo. 162, 163–69 (Colo. 1878) (stating that, as of 1878, Colorado, New Hampshire, and Missouri had constitutional provisions that prohibited their legislatures from enacting retrospective legislation); *Mellinger v. City of Houston*, 3 S.W. 249, 252–54 (Tex. 1887)

[9] Defendant argues that the canons of interpretation against superfluity and redundancy require the Court to conclude that Utah's due process clause is broader than the federal constitution. [Roberts Suppl. Br. at 29–31] This Court, however, has previously interpreted state constitutional provisions to offer the same level of protection as the federal constitution. *See, e.g.*, *Wood v. University of Utah Med. Ctr.*, 2002 UT 134, ¶ 29, 67 P.3d 436, *abrogated on other grounds by Waite v. Utah Labor Comm'n*, 2017 UT 86, 416 P.3d 635; *Bailey v. Bayles*, 2002 UT 58, ¶ 11 n.2, 52 P.3d 1158 (stating that "Utah's constitutional guarantee of due process is substantially the same as the due process guarantees" of the federal constitution (citation and internal quotation marks omitted)).

[10] An 1890 Salt Lake Herald article reinforces that understanding:

> Some claim that law and governments are unnecessary, but so long as men are imperfect there will be a necessity for laws to protect the rights of the weak against the encroachment of the strong. These rights are varied, some belonging to all men alike, while others, such as political rights or privileges, are merely granted to the individual by the legislative power, and are liable to be taken away again, even without process of law. Civil and religious rights on the other hand, are inherent in the individual, and can be removed only by due process of law.

Civil Government: A Synopsis of Honorable F.S. Richards' Lecture, SALT LAKE HERALD (April 13, 1890) (Addendum B).

(relying on a Texas constitutional provision providing that "no . . . retroactive law shall be made" to preclude revival of a time-barred cause of action); *see also* Mitchell Suppl. Br. at 19–20. Yet Utah's Constitution included no such provision.[11]

Furthermore, no Utah court, or court of binding jurisdiction, has adopted an alternative meaning of this clause with respect to revival of a time-barred civil cause of action.[12] Indeed, even in the case of *Ireland v. Mackintosh*, 61 P. 901 (Utah 1900), which was decided shortly after the adoption of Utah's Constitution, the Court did not foreclose the Legislature's authority to revive a time-barred civil claim on constitutional grounds. The Court determined that it could not apply the statute retrospectively because Macintosh "acquired a vested right . . . to plead that statute [of limitations] as a defense" once the statute of limitations expired. *Id.* at 904. However, in making that determination, the Court

[11] The first Utah Legislature apparently interpreted the due process clause to allow it authority to adopt laws that had the effect of reaching back in time to alter substantive rights. In 1898, in its first effort to codify the law after the constitution's enactment, the Utah Legislature adopted Section 2490, which is now codified at Section 68-3-3. Section 2490 provided that a provision of the Utah Code is not retroactive, unless the Legislature expressly declares the provision to be retroactive. Revised Statutes of Utah, § 2490 (1898). This interpretation is particularly insightful because thirteen of the sixty-three legislators in the first Legislature after statehood were also framers to the constitution. *See South Salt Lake City v. Maese*, 2019 UT 58, ¶ 46 n.17.

[12] This approach is consistent with several other states. The Connecticut Supreme Court identified twenty-one states, including itself, that followed the federal approach, with seventeen of those states doing so on the ground that the state due process clause did not offer any more protection than the federal due process clause. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 509, 512–13, 516 (Conn. 2015). Although this constitutes a minority of states, it is worth noting that only ten states that have not followed the federal approach have done so expressly on state due process grounds. *See id.* at 510 (excluding Utah).

relied on the fact that the Legislature "neither by its expressed terms nor by intendment shows that [it] intended to revive cause of action which had before the passage of that act become barred." *Id.*[13] The Court's characterization of a defendant's stake in a defense of an expired statute limitation as a vested right does not undercut this conclusion.[14]

That the *Ireland* court did not foreclose the Legislature's authority on constitutional grounds is evident in subsequent case law, which recognizes legislative authority to make laws that revive time-barred claims if the Legislature expressly states its intent to do so. For example, in *Roark v. Crabtree*, 893 P.2d 1058 (Utah 1995), Roark filed, in 1993, a claim for sexual abuse of a child that had become time barred on December 1, 1980, on the basis that the Legislature had recently amended the statute of limitations to allow a plaintiff four years after the discovery of the sexual abuse. *Id.* at 1060. Crabtree moved to dismiss on the basis that Roark's claims were time barred and the amendments extending the statute of limitations could not be applied retrospectively. *Id.* The Court observed that "[it] is a

[13] A subsequent decision did characterize the decision in *Ireland v. Mackintosh*, 61 P. 901 (Utah 1900), and *In re Swan's Estate*, 79 P.2d 999 (Utah 1938), as "hold[ing] that a right to plead a defense of statute of limitations may become a vested right which cannot be impaired without denying due process of law." *McGuire v. University of Utah Med. Ctr.*, 603 P.2d 786, 790 (Utah 1979). However, a careful reading of *Ireland* and *Swan's Estate* reveals that neither case included a constitutional analysis.

[14] Defendant also cites two cases, *Buttrey v. Guaranteed Sec. Co.*, 300 P. 1040 (Utah 1931), and *Halling v. Industrial Comm'n of Utah*, 263 P. 78 (Utah 1927), which he claims support his position that a vested right cannot be taken away by legislation. [Roberts Suppl. Br. at 19] These cases are not dispositive because they involve retrospective elimination of a plaintiff's cause of action. *Buttrey*, 300 P. at 1045; *Halling*, 263 P. at 81. Furthermore, the statement from *Buttrey* is dicta. *Buttrey*, 300 P. at 1045 (concluding that the cause of action was saved by a savings clause).

long-standing rule of statutory construction that a legislative enactment which alters . . . vested rights will not be read to operate retrospectively *unless the legislature has clearly expressed that intention*." *Id.* at 1061 (emphasis added). The Court then examined the legislative history to determine whether the Legislature had expressed any such intent. *Id.* The Court concluded that the Legislature had not, and it then applied the rule that because a defense of an expired statute of limitations is a vested right, the Court could not apply the statute retrospectively. *Id.* Nowhere in the analysis of *Roark*, or in any subsequent case, does the Court conclude that Legislature's ability to revive time-barred claims is foreclosed by the constitution. *See, e.g.*, *State v. Lusk*, 2001 UT 102, ¶¶ 25–31, 37 P.3d 1103;[15] *Del Monte Corp. v. Moore*, 580 P.2d 224, 225 (Utah 1978); *State Tax Comm'n v. Spanish Fork*, 100 P.2d 575, 576 (Utah 1940); *In re Swan's Estate*, 79 P.2d 999, 1001–02 (Utah 1938). Indeed, the only case that arguably precludes revival of time-barred claims is *State v. Apotex Corp.*, 2012 UT 36, 282 P.3d 66.[16] The *Apotex* court, however, purports to rely entirely on precedent, none of which involves an express statement of legislative intent or a constitutional analysis on the legislative authority to revive. *Id.* ¶ 67.

[15] Although *State v. Lusk*, 2001 UT 102, 37 P.3d 1103, is a criminal case, it relied on civil cases for its analysis. *Id.* ¶¶ 25–31 ("We believe that this language from *Del Monte* regarding civil actions similarly applies to criminal prosecutions.").

[16] The court in *State v. Apotex Corp.*, 2012 UT 36, 282 P.3d 66, did not determine whether the Legislature expressed its intent for the legislation to apply retrospectively to expired claims. *Id.* ¶ 67. To the extent that the Legislature did express such an intention, the Legislature maintains that the *Apotex* decision is an aberration in an otherwise consistent body of case law.

For the foregoing reasons, the state due process provision does not outright foreclose the Legislature from reviving a time-barred civil claim. Therefore, the Court should analyze whether the due process clause precludes the Legislature from reviving a time-barred cause of action for child sexual abuse using the traditional rational basis test, discussed *infra* pages 22–24.

C. The open courts clause likewise does not preclude the Legislature from reviving a time-barred cause of action.

The open courts clause in 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, any civil cause to which he is a party.

Utah Const. art. I, § 11. Like the due process clause, the open courts clause was included in the original Utah Constitution and has remained unchanged since its adoption. The Legislature again consulted the COHA for evidence of original public meaning, but the database only produced two search results for "open courts." (Addendum A) This extremely small sample yielded no insight into the original public understanding of this phrase as neither result provided a context applicable to the protection provided by the Utah Constitution.[17]

[17] Because "open courts" is a shorthand for the constitutional protection, the Legislature also searched the phrase contained in the constitution itself, "courts shall be open," recognizing that this phrasing would have been unusual among the public and that the corpus linguistics tool is much more limited when the phrase searched uses many words. As expected, the COHA produced no results.

Like the corpus linguistics search, the constitutional convention transcripts yield little information about the framers' intent regarding the open courts clause. In fact, the Legislature located only two places where the framers mentioned the open courts clause during the 66-day constitutional convention. The first discussion was to introduce the clause and make amendments. During this discussion, David Evans and Thomas Maloney both reported that the open courts provision was "very usual in many of the [state] constitutions" and "has come to us with the approval of the ages." Constitutional Convention, Day 20 (Mar. 23, 1895) (remarks of David Evans & Thomas Maloney). The second mention came much later in the convention, during an exchange about the enforceability and practicality of a prohibition against a corporation exchanging a list of discharged employees to another corporation for the purpose of preventing the discharged employees from obtaining employment with another corporation. During this discussion, John Henry Smith questioned the necessity of the provision, pointing out that the due process clause and the open courts clause provide a remedy for the discharged employees. Constitutional Convention, Day 44 (Apr. 16, 1895) (remarks of John Henry Smith). The inference to draw from Mr. Smith's remarks is that the open courts clause was aimed at providing protections to injured parties by providing access to courts. There is simply nothing in the constitutional convention history that indicates that the open courts clause is intended to protect a particular defense from legislative modification.

The lack of discussion of the framers' intent regarding the open courts clause may be because the open courts clause, like the due process clause, is pre-constitutional, is rooted in Magna Carta and, as has been recognized by this Court, is "an extension of the

due process clause," *Berry*, 717 P.2d at 674, 679; *see also* *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 34 n.2, 974 P.2d 1194 (Stewart, J. concurring) (citing Lord Coke's explanation that Magna Carta guarantees an injured individual a right to remedy). The two clauses, however, are not duplicative, *see* *Berry*, 717 P.2d at 675, and unlike the due process clause, the open courts clause does not have an analogue in the federal constitution from which the framers could derive meaning.

As the framers noted, however, Utah was not unique in adopting an open courts clause. *Id.* at 674 (noting that thirty-seven states have an open courts provision nearly identical to Utah's). At the time of the Utah Constitution's adoption in 1895, the open courts clause was a common feature in state constitutions, and most states' constitutions contain similar guarantees. *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 65 n.90–96, 416 P.3d 635 (Lee, A.C.J., concurring) (citing more than a dozen states with open courts provisions similar to Utah's as of 1895). In this regard, the open courts clause too is a "legal term of art," and nothing in the constitutional history or plain language of the Utah Constitution indicates that the constitutional framers intended Utah's clauses to have a broader effect than the other states' provisions. *See South Salt Lake City v. Maese*, 2019 UT 58, ¶ 27 n.10 (noting that when a legislative body copies language from another source, the legislative body intends to incorporate the cluster of ideas and body of law surrounding it).

An examination of the nineteenth century case law interpreting the states' open courts clauses indicates that the open courts clause was not intended to be a restriction on the Legislature's authority to alter statute generally but rather a restriction on the

Legislature's authority to limit access to courts for purposes of vindicating vested *causes of action*. *See* *Waite*, 2017 UT 86, ¶ 65 (Lee, A.C.J., concurring) (citing cases addressing a person's access to a forum, filing fee requirements, effects of a statute of limitations or repose on a person's ability to assert a claim, elimination of a cause of action with retrospective effect, unequal burdens in litigation, and unnecessary delays). In none of these cases does the court speak of the open courts clause in a manner that suggests the clause operates as a protection of a defendant's ability to assert a *particular* defense. *See id.* ¶ 77 (Lee, A.C.J., concurring) (noting that nineteenth century case law recognized that "no one had a general vested right *in the law*" remaining unchanged but rather that "only vested *causes of action* were protected"); *see also* *Parker v. Sanders*, 46 Ark. 229, 235 (1885) (stating that under the state's open courts provision, "[n]o one has a vested right to any particular remedy").

The reach of the Utah open courts clause has, since its adoption, "spawned extensive debate" in Utah appellate court opinions. *In re Adoption of B.Y.*, 2015 UT 67, ¶ 57, 356 P.3d 1215. The point of contention has always resided in whether the open courts clause provides only a procedural guarantee of access to the courts or whether the open courts clause also acts as a limitation on the Legislature's substantive powers to abrogate a cause of action. *Id.* In a seminal case on this topic, this Court said:

> The clear language of the section guarantees access to the courts and a judicial procedure that is based on fairness and equality. A plain reading of [the open courts clause] also establishes that the framers of the Constitution intended that an individual could not be arbitrarily deprived of effective remedies designed to protect basic individual rights. A constitutional guarantee of access to the courthouse was not intended by the

> founders to be an empty gesture; individuals are also entitled to a remedy by "due course of law" for injuries to "person, property, or reputation."

Berry By & Through Berry v. Beech Aircraft Corp., 717 P.2d 670, 674–75 (Utah 1985) (citations omitted).

This language highlights the constitutional parameters of the open courts clause—it guarantees an opportunity to seek a remedy, including presenting defenses, not an opportunity to make particular arguments. Indeed, since the *Berry* decision, this Court has never extended the open courts clause to include a substantive protection of the right to assert a particular defense, even if that defense has become vested. *See, e.g.*, *Waite*, 2017 UT 86, ¶ 20 (accepting, by the parties' stipulation, that the Legislature's abrogation of a plaintiff's cause of action implicated the open courts clause); *id.* ¶¶ 63–64 (Lee, A.C.J., concurring) (concluding that original public meaning of open courts clause supports a conclusion that the open courts clause has a substantive component to prohibit Legislature from eliminating vested causes of action); *In re Adoption of B.Y.*, 2015 UT 67, ¶ 58 (noting that the putative father, in arguing that the Adoption Act's strict compliance requirements violated the constitution, had not claimed that the Legislature had eliminated a "remedy for an injury done to him," i.e., a cause of action for damages); *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶¶ 49–50, 974 P.2d 1194 (Stewart, J., concurring) (disagreeing with Justice Zimmerman's contention that the open courts clause is merely a procedural protection because both the plain language of the open courts clause and the history surrounding its adoption indicate that the framers of the constitution wanted to protect an individual's right to assert a cause of action for injury). These cases demonstrate

that the open courts clause acts as a substantive check on the Legislature's plenary power to "modernize" the law only regarding a party's access to court to obtain a remedy for an injury. *Waite*, 2017 UT 86, ¶ 18. For these reasons, the historical record supports a conclusion that the open courts clause does not prohibit legislative revival of a time-barred cause of action.

III. Neither the due process clause nor the open courts clause per se prohibit the Legislature from reviving a time-barred claim, and there is a basis for the Legislature to revive a time-barred cause of action for child sexual abuse.

Although the constitutional provisions do not outright preclude the Legislature from reviving a time-barred cause of action, the Court still must conduct an analysis of whether the constitution offers some limited protection to Defendant's affirmative defense of the expired statute of limitations. The due process clause does not insulate a vested right from deprivation; rather, it merely ensures that the Legislature does not arbitrarily remove that right. The Legislature therefore will address the standard for determining whether revival of the time-barred cause of action for child sexual abuse constituted an arbitrary deprivation of the statute of limitations defense. Furthermore, although the Legislature asserts that the open courts clause does not protect Defendant's right to assert the particular defense of expired statute of limitations, the Legislature will address the standard for conducting an open courts analysis. Under both analyses, the constitution does not prohibit the Legislature from reviving a time-barred cause of action for child sexual abuse.

A. The standard for analyzing a due process claim is rational basis, and the Legislature has a rational basis for reviving a time-barred claim for child sexual abuse.

1. The standard for analyzing whether the due process clause prohibits legislative revival of a time-barred claim is rational basis.

"With various exceptions legislative enactments, other than those defining criminal offenses, are not generally subject to the constitutional prohibitions against retroactive application. The legality of retroactive civil legislation is tested by general principles of fairness and by due process considerations." *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 390–91 (Utah 1980). Utah appellate courts have not yet addressed how the "principle[] of . . . due process" bears on the Legislature's authority to revive a time-barred claim. Rather, the Utah appellate courts to date have spoken only to the principle of fairness: i.e., did the party substantially rely on the previous law "sufficient to result in a vested right"? *Id.* at 391–92. Accordingly, the Legislature submits this analysis of the constitutionality of the Legislature's revival of a time-barred claim using general principles of state due process.

"When undertaking a substantive due process analysis under both [the due process clause] of the Utah Constitution and the Fourteenth Amendment of the United States Constitution, this court applies a rational basis test unless the governmental action implicates a fundamental right or interest." *State v. Angilau*, 2011 UT 3, ¶ 10, 245 P.3d 745 (citation and internal quotation marks omitted). Thus, a court first must determine "whether *the precise interest at stake* is fundamental in the sense of being justified not by the mere abstract formula[] informed by a judge's instincts of fairness, but by a clear

indication that that interest is deeply rooted in this Nation's history and tradition and in the history and culture of Western civilization."[18] *In re Adoption of J.S.*, 2014 UT 51, ¶ 52, 358 P.3d 1009 (alteration and emphasis in original) (citation and internal quotation marks omitted). "Absent such evidence, the right at stake is not fundamental, and the applicable standard of scrutiny is a highly deferential inquiry into rationality or arbitrariness." *Id.* ¶ 53. In other words, "[i]f there is no fundamental right at issue, a statute will not violate substantive due process if it is rationally related to a legitimate state interest." *Angilau*, 2011 UT 3, ¶ 10 (citation and internal quotation marks omitted). The Court's "rational basis analysis is limited to determin[ing] whether the legislature overstepped the bounds of its constitutional authority in enacting [the statute at issue,] not whether it made wise policy in doing so." *Id.* (alterations in original) (citation and internal quotation marks omitted).

Defendant's interest in asserting a statute of limitations defense is not a fundamental right. Utah appellate courts have long recognized that a statute of limitations is "a legislative creation," one that the "legislature can certainly choose *not* to create." *Id.* ¶ 11 (emphasis added) (citing legislative creation and control as bases for determining that the minor defendant had no fundamental right to be tried in the juvenile court system); *see also Ireland v. Mackintosh*, 61 P. 901, 904 (Utah 1900) (noting that "'[l]imitations derive their authority from statutes,'" not from common law, which "'[has] no fixed time as to the bringing of actions'" (second alteration in original) (quoting *United States v. Thompson*,

[18] Both the Utah appellate and federal courts have been reluctant to judicially recognize new fundamental substantive due process rights not mentioned in the state or federal constitution. *In re Adoption of J.S.*, 2014 UT 51, ¶¶ 30, 36, 38, 358 P.3d 1009.

98 U.S. 486, 489 (1878)). Not only is a statute of limitations a product of legislative creation, a statute of limitations is a policy subject to legislative control. Indeed, "[t]he fixing of a limitation period is highly judgmental and is determined by the Legislature's weighing a number of general policies." *Lee v. Gaufin*, , 575 (Utah 1993). Thus, the Utah appellate courts have affirmed that the Legislature has "broad latitude to set limitations periods under the state and federal due process clauses." *Id.* at 576; *see also* *Orlando Millenia, LC v. United Title Servs. of Utah, Inc.*, 2015 UT 55, ¶ 85, 355 P.3d 965 ("But the Due Process Clause is not a license for judicial second-guessing of legislative policy judgments.").[19] For these reasons, any right to rely on an expired statute of limitations as a defense is not fundamental and the court ought to review the constitutionality of the Legislature's action to revive a time-barred claim under the rational basis standard.[20]

[19] Under federal law, it has long been settled that the right to assert a defense of an expired statute of limitations is not a fundamental right that is deeply rooted in the either the nation's history or the culture of western civilization. *See* *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 315–16 (1945) (explaining that because statutes of limitations are products of legislative policy making over which a legislature has a "large degree of . . . control," a defendant's expired statute of limitations defense " has never been regarded as what now is called a 'fundamental' right"); *Campbell v. Holt*, 115 U.S. 620, 628 (1885) (observing that "no right is destroyed when the law restores a remedy which had been lost" because a defendant is not entitled to be "released from that obligation [to make a plaintiff whole] by lapse of time").

[20] In conducting a due process analysis under the United States Constitution, some federal courts have upheld a legislative enactment that revives a time-barred claim unless the defendant demonstrates special hardship, oppressive effects, or actual prejudice resulting from the lifting of the statute of limitations defense without conducting a rational basis review. *See, e.g.*, *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945); *Campbell v. Holt*, 115 U.S. 620, 628–29 (1885); *United States v. McLaughlin*, 7 F.Supp.2d 90, 91 (D.Mass. 1998). Defendant has not alleged any special hardships, oppressive effects, or actual prejudice.

2. The Legislature articulated a rational basis for reviving a time-barred claim for child sexual abuse.

It is undisputed that the Legislature has a rational basis for reviving a time-barred claim for child sexual abuse. Indeed, in the body of Section 78B-2-308, the Legislature outlined in detail its reasoning both for eliminating the statute of limitations (which the Legislature had done during the 2015 General Session in H.B. 277) and for reviving time-barred claims of child sexual abuse:

> (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;

The Legislature nevertheless conducts a rational basis analysis both because Utah precedent seems to require it, *State v. Angilau*, 2011 UT 3, ¶ 10, 245 P.3d 745, and because at least one federal court and several state courts have determined that the "relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is further by rational means," *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1076 (4th Cir. 1995) (establishing this standard after concluding that some aspects of the analysis in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), are "outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation"); *see also Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 512–16 (Conn. 2015) (applying a rational basis test to determine that the state legislature's revival of a cause of action for child sexual abuse did not violate the state due process clause and noting that New York and Wisconsin apply similar tests).

At least one state court seems to apply two standards in different contexts. The Delaware Supreme Court, in considering a state due process challenge to a revived child sexual abuse claim, imposed the special hardships–oppressive effects standard in analyzing an as applied challenge and the rational basis standard in analyzing a facial challenge. *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1260 (Del. 2011). Under either standard, the Court should conclude that the due process clause does not prohibit the Legislature for reviving a time-barred civil claim for child sexual abuse.

> (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.

Utah Code Ann. § 78B-2-308(1) (West, Westlaw through General Session 2017). (Addendum C). The Legislature has a legitimate legislative interest in ensuring that victims of child sexual abuse have an opportunity, at least in the civil context, to hold a perpetrator accountable for the damages caused by the abuse. Under earlier law, a victim of child sexual abuse had to bring an action either by the time he or she was age twenty-two or within four years of discovering the abuse. *Id.* § 78B-2-308(2). The Legislature's findings that it may take decades for a victim to be able to face the abuse and the perpetrator demonstrate that revival of a time-barred claim is rationally related to the Legislature's purpose of ensuring that victims of child sexual abuse have a civil remedy.

Finally, it is worth noting that in extending the statute of limitations, the Legislature has done nothing to burden the due process rights afforded to Defendant; his fundamental right to due process, to present a defense, still exists within the court proceeding. Another more appropriate view of the Legislature's actions is that rather than taking the rights of Defendant, the Legislature took steps to ensure Plaintiff receives her right to due process

for a grievous wrong alleged to have been committed against her. In making this determination, the Legislature balanced, as is its constitutional responsibility, the relative detriment to alleged defendants of losing a statute of limitations defense against the benefit to alleged plaintiffs of allowing time to file a claim after adequate time for healing. *See* *Orlando Millenia*, 2015 UT 55, ¶ 85. Accordingly, the Court ought to conclude that the legislative revival of a time-barred claim for child sexual abuse in Section 78B-2-308 is constitutional under the state due process clause.

B. The open courts clause does not preclude the Legislature from reviving a time-barred claim for child sexual abuse.

1. If the open courts clause applies to a defendant's vested interest to assert a particular defense, the standard for analyzing whether revival of a time-barred claim violates the open courts clause is the *Berry-Judd* test.

As discussed *supra* pp. 16–21, the open courts clause should be understood to protect a party's right to seek a remedy, by asserting a claim or presenting a defense, and not to protect a defendant's right to assert a particular defense. Nevertheless, even if the open courts clause could be understood to protect a defendant's right to assert a particular defense, the fact that the Legislature deprived Defendant of his statute of limitations defense when it revived the cause of action does not make the Legislature's actions unconstitutional. The open courts clause prohibits "arbitrarily" depriving a party of remedies that protect "individual basic rights." *Berry By and Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985).

In this vein, the Court has adopted a two-condition test that provides that a legislative abrogation of an individual basic right is constitutional if: (1) the law provides

an effective and reasonable alternative remedy or (2) the legislation eliminates a clear social or economic evil through a reasonable means. *Id.* at 680; *see also Judd v. Drezga*, 2004 UT 91, ¶ 11, 103 P.3d 135. If the Court determines that the open courts clause applies to Defendant's statute of limitations defense, the Court should apply this test in answering the supplemental briefing question.[21]

2. Applying the *Berry–Judd* test, the Open Courts Clause does not prohibit the Legislature from reviving a time-barred civil cause of action.

Defendant's open courts clause claim fail under the *Berry–Judd* test because even if the Court decides that legislative abrogation of Defendant's affirmative defense implicates the open courts clause, the Legislature's actions clearly had the effect of eliminating a social evil through reasonable means. One of the "important functions of the Legislature is to change and modify the law that governs relations between individuals as society evolves and conditions require." *Berry*, 717 P.2d at 676. The Legislature did just that when it revived the statute of limitations for child sexual abuse cases: "in the face of new information," which included a developed understanding about the long-lasting effects of child sexual abuse, the Legislature set a new policy that allows a plaintiff more time to assert a claim for child sexual abuse. Utah Code Ann. § 78B-2-308(1). Under existing binding precedent and principles of separation of powers, the Court must give deference to this finding as a reasonable exercise of the Legislature's plenary authority to set policy for

[21] Justice Lee has called for overturning the *Berry-Judd* test in favor of interpreting the open courts clause as prohibiting the elimination of a vested cause of action. *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶¶ 70, 82–85, 416 P.3d 635 (Lee, A.C.J., concurring). Even under this standard, the Legislature has the authority to revive a time-barred statute of limitations.

the state after careful consideration of competing interests. *Judd v. Drezga*, 2004 UT 91, ¶ 15, 103 P.3d 135 ("When an issue is fairly debatable, we cannot say that the legislature overstepped its constitutional bounds when it determined that there was a crisis needing a remedy.").

In summary, the Legislature asserts that the right to assert a particular defense is not an interest protected by the open courts clause. Even if it is, however, the Legislature's policy has the effect of eliminating a social evil through reasonable means.

CONCLUSION

For the foregoing reasons, the Legislature respectfully requests the Court to conclude that the due process clause and open court clause do not preclude the Legislature from reviving a time-barred civil claim unless the Legislature lacks a rational basis for doing so. In this case the Legislature undisputedly had a rational basis for reviving a civil cause of action for child sexual abuse.

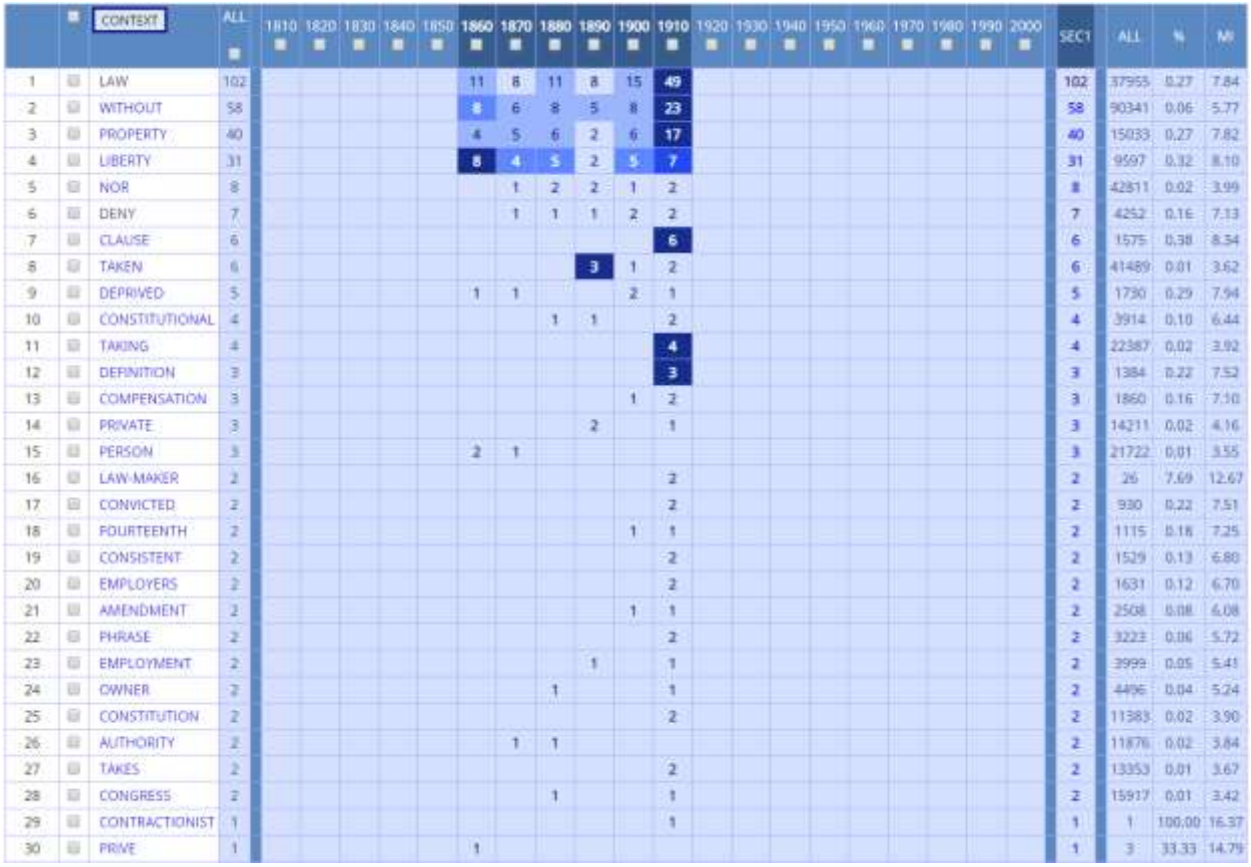
Respectfully submitted this 7th day of October 2019.

/s/

Andrea Valenti Arthur

ADDENDUM A

“Due Process” Collocates +-6



	CONTEXT	ALL	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900	1910	1920	1930	1940	1950	1960	1970	1980	1990	2000	SEC1	ALL	%	MI
1	LAW	102						11	8	11	8	15	49										102	37955	0.27	7.84
2	WITHOUT	58						8	6	8	5	8	23										58	90341	0.06	5.77
3	PROPERTY	40						4	5	6	2	6	17										40	15033	0.27	7.82
4	LIBERTY	31						8	4	5	2	5	7										31	9597	0.32	8.10
5	NOR	8							1	2	2	1	2										8	42811	0.02	3.99
6	DENY	7							1	1	1	2	2										7	4252	0.16	7.13
7	CLAUSE	6											6										6	1575	0.38	8.34
8	TAKEN	6									3	1	2										6	41489	0.01	3.62
9	DEPRIVED	5						1	1			2	1										5	1730	0.29	7.94
10	CONSTITUTIONAL	4								1	1		2										4	3914	0.10	6.44
11	TAKING	4											4										4	22387	0.02	3.92
12	DEFINITION	3											3										3	1384	0.22	7.52
13	COMPENSATION	3										1	2										3	1860	0.16	7.10
14	PRIVATE	3									2		1										3	14211	0.02	4.16
15	PERSON	3						2	1														3	21722	0.01	3.55
16	LAW-MAKER	2											2										2	26	7.69	12.67
17	CONVICTED	2											2										2	930	0.22	7.51
18	FOURTEENTH	2										1	1										2	1115	0.18	7.25
19	CONSISTENT	2											2										2	1529	0.13	6.80
20	EMPLOYERS	2											2										2	1631	0.12	6.70
21	AMENDMENT	2										1	1										2	2508	0.08	6.08
22	PHRASE	2											2										2	3223	0.06	5.72
23	EMPLOYMENT	2									1		1										2	3999	0.05	5.41
24	OWNER	2								1			1										2	4496	0.04	5.24
25	CONSTITUTION	2											2										2	11383	0.02	3.90
26	AUTHORITY	2							1	1													2	11876	0.02	3.84
27	TAKES	2											2										2	13353	0.01	3.67
28	CONGRESS	2								1			1										2	15917	0.01	3.42
29	CONTRACTIONIST	1											1										1	1	100.00	16.37
30	PRIVE	1						1															1	3	33.33	14.79

No significant collocates outside the full phrase “No person shall be deprived of life, liberty or property, without due process of law.

I haven’t checked debates, but I think they just pulled the phrase from the constitution without much thought.

“Legislative Power” Collocates +-6

		CONTEXT	ALL	1810	1820	1830	1840	1850	1860	1870	1880	1890	1900	1910	1920	1930	1940	1950	1960	1970	1980	1990	2000	SEC1	ALL	%	MI
1		EXERCISE	13						2	1	1	4		5										13	7198	0.18	6.80
2		EXECUTIVE	10						1	5	2		1	1										10	4499	0.22	7.10
3		STATES	10						2		4	1	2	1										10	46341	0.02	3.73
4		GENERAL	10						4	1	1	2	2											10	55737	0.02	3.47
5		VESTED	9						6			1		2										9	754	1.19	9.52
6		CONGRESS	9						8				1											9	15917	0.06	5.12
7		CONSTITUTION	7									2	1	4										7	11383	0.06	5.24
8		WHOLE	7						5		1		1											7	53229	0.01	3.02
9		EMPIRE	6										3	3										6	5876	0.10	5.98
10		RESTRICTIONS	5									2	1	2										5	971	0.51	8.31
11		LIMITATIONS	4						1			1		2										4	1469	0.27	7.39
12		EXERCISED	4									1	2	1										4	2293	0.17	6.75
13		SOVEREIGN	4						2				2											4	2956	0.14	6.38
14		BRANCHES	4								2	2												4	5598	0.07	5.46
15		SOURCE	4						1		3													4	5646	0.07	5.45
16		REGARDED	4								2			2										4	9607	0.04	4.68
17		ALSACE-LORRAINE	3											3										3	219	1.37	9.72
18		AUTHORIZED	3							1		2												3	1665	0.18	6.80
19		CONSTITUTIONAL	3						1			1		1										3	3914	0.08	5.56
20		PROVIDE	3								2	1												3	4071	0.07	5.51
21		GRANT	3							1				2										3	9162	0.03	4.34
22		LAWS	3						1		2													3	14710	0.02	3.65
23		BUNDESRAT	2											2										2	72	2.78	10.74
24		USURPING	2						1					1										2	107	1.87	10.17
25		AUTONOMY	2										2											2	207	0.97	9.22
26		UNCONTROLLABLE	2											2										2	430	0.47	8.16
27		CONSTITUTIONS	2						2															2	754	0.27	7.35
28		LEGISLATURES	2							1	1													2	968	0.21	6.99
29		WHEREBY	2								1	1												2	1144	0.17	6.75
30		REGULATE	2						1		1													2	1171	0.17	6.72

ADDENDUM B

CIVIL GOVERNMENT.

A Synopsis of Hon. F. S. Richards' Lecture.

VARIOUS FORMS OF GOVERNMENT.

An Exhortation to a Careful Study of the Principles of Government by the Young People of Utah.

Last Friday evening the main room of the Social hall was well filled with an appreciative and attentive audience, it having been announced that Hon. F. S. Richards would deliver a lecture under the auspices of the Students' Society of the Latter-day Saints college, on the subject of "Civil Government."

The lecturer stated in the opening of his remarks that on account of the comprehensive character of the subject it would be impracticable to enter into detail, but he would present only the most fundamental parts of the system of the government now in vogue in the United States.

All governments may be directly or indirectly classed under three heads, monarchial, aristocratic and democratic, in the first of which the power is vested in a king or queen (in the case of the limited monarchy in conjunction with the legislative body), while in the second the sovereignty is held by a select few of the nobility. These two forms are open to the objection that power is centralized, the common people having but little or no hand in the government. The third division, the democracy, entirely does away with this objection, for in its pure form all the people make the laws, and attend to their execution.

On account of the inconvenience in large communities, attending the assembling together of the entire people, a form of democracy known as the republic was instituted, that being the form of government in the United States.

Some claim that law and governments are unnecessary, but so long as men are imperfect there will be a necessity for laws to protect the rights of the weak against the encroachments of the strong. These rights are varied, some belonging to all men alike, while others, such as political rights or privileges, are merely granted to the individual by the legislative power, and are liable to be taken away again, even without process of law. Civil and religious rights, on the other hand, are inherent in the individual, and can be removed only by due process of law.

The pure democracy was in existence among the Pilgrim Fathers during the early part of their history, but with increasing numbers they found this form of government to be impracticable, and established a representative form. In fact, the origin of true constitutional liberty can be said to have been in this country, for the early settlers here looked upon all encroachments on their rights with constantly increasing disfavor.

The form of control exercised by the British government over the colonies was compared with the control now held over the territories by Congress, and the great similarity between the two was pointed out.

The speaker then proceeded to relate the history of the United States government, referring to the weakness of the original confederation, and the consequent necessity of a stronger compact between the people of the colonies. The constitution of the United States, which is now the fundamental law of our government, was originated by the colonies, and has stood the test of a century, growing brighter as it is better understood.

This constitution met with much opposition at first, as the people were jealous of centralized power, having seen evil effects of such in the early part of their own history, but it was at last ratified by the people of the states, and went into effect. This instrument is the great bulwark erected between the majority and the civil, religious and political rights of the minority, and any breach of its provisions should be viewed with concern by the people.

According to the principles of the constitution, the government of the United States is divided into three parts, the legislative, consisting of Congress, the executive, at the head of which is the President, and the judicial, the chief representative of which is the supreme court. Each of these divisions has its own peculiar part in the affairs of government, and while one may act as a check upon the other, it is impossible that there should be any interference among these three branches. The first branch makes the laws, the second executes them, while the third may declare null and void any law passed by Congress and approved by the President.

The two branches of Congress, the Senate and the House of Representatives, are so arranged that the best interests of the people may be conserved. Each state has two Senators, elected by its legislature, while the representatives are apportioned to the states according to population, and are elected by the people. Thus one will act as a check upon the other, and since laws must pass both branches of Congress before they can go into effect, unjust legislation is very effectually avoided. Certain prohibitions are laid upon Congress, in order to prevent the passage of such laws as would do a manifest injustice to the people of the country.

The election of the President was explained in detail, the singular fact being shown that the people at large do not vote for that officer, but for electors, who meet for the purpose of electing the president. In case a final result is not reached by the electors, the appointment of the President is left to the House of Representatives, each state, however, having but one vote.

The supreme court has been called the "voice of the constitution," since that instrument is interpreted entirely by that body. But in some cases this body has reversed its decisions, and as the personnel of the court changes there is canged of its opinions changing.

The speaker stated that the foundation of all legislation rests on the divine law as given to Moses, the concession having often deen made, that legislation at variance with divine law cannot stand.

The lecture was brought to a close with an exhortation to a careful study of the principles of government on the part of those who will take an active part in it in the near future.

MEDICAL BOARD SUSTAINED.

Judge Smith Routs the "Irregulars" at All Points.

LAW VALID, BOARD RIGHT.

C. E. Langham and Others Ask for a Receiver for the National Building & Loan Association—Walter J. Sloan's Land Suit Against the Fort Douglas Road—The Supreme Court Calendar for Monday—Probate Cases—Cullings.

C. E. Langham and numerous other stockholders of the National Building & Loan Association of Salt Lake filed an action against the Western Loan & Savings Company, the National Building & Loan Association of Salt Lake, Hudson Smith and C. P. Mason, in the Third District Court yesterday.

The plaintiffs allege that the National Building & Loan Association was regularly incorporated on March 28, 1890, and continued to exercise its corporate rights as a mutual Building, Loan and Homestead Association until July 8, 1893. At that date a series of proceedings were had which resulted in the transfer of the business and assets of the National Building & Loan Association to the Western Loan & Savings Company, and the former ceased to exercise the corporate rights granted by its charter, and since has had only a nominal existence, transacting no business whatever. It is further alleged that at the time of the said transfer the National Building & Loan Association was insolvent, the face value of its assets not being sufficient by a sum exceeding $23,000 to pay its liabilities, which fact was only known by the directors of the association. It is then alleged that the proceedings by which the two associations were merged into one, were illegal, for numerous reasons given, and that the Western Loan & Savings Company was aware of that fact. Plaintiffs also set up that certain of the stockholders of the National Building & Loan Association had borrowed money from the institution, giving deeds of trust in the usual manner, and that the Western Loan & Savings Company are about to sell the properties under the said deeds of trust, which sale plaintiffs claim would be illegal, as the proceedings by which the two institutions were merged into one were illegal. After alleging other irregularities, the plaintiffs pray that the said transfer from the National Building & Loan Association to the Western Loan & Savings Company be declared illegal and void, and that a resolution appropriating the sum of $1500 out of the assets of the former to pay the expenses of said transfer be also adjudged void; that a receiver be appointed to take charge of the assets of the National Building & Loan Association wherever found, and convert them into cash until a sufficient amount is realized to pay the full amount due them upon their withdrawal from the association, and that the Western Loan & Savings Company turn over all assets which they hold by reason of the said transfer, to said receiver; that the last named company be restrained from selling certain specified property mentioned in the complaint, and that it be ordered to turn over to the receiver all books pertaining to the affairs of the National Building & Loan Association; that the said receiver be authorized to prosecute a suit on behalf of the defendant, the National Building & Loan Association and of the shareholders, including the plaintiffs, against the directors of the National Building & Loan Association, and any ex-directors who may be liable, for the recovery of adequate damages amounting to at least $25,000 for the false reports and representation of the condition of said corporation to its shareholders, and for other alleged acts detrimental to the said stockholders, for which they may be held liable. In conclusion, plaintiffs pray for other and further relief consistent with equity, and for costs.

OTHER ACTIONS.

Walter J. Sloan filed an action against the Salt Lake & Fort Douglas Railway Company et al. in the Third District Court yesterday, alleging that the defendants have wrongfully taken possession of certain land belonging to him in this city, and asking that they be restrained from operating their trains over the said land, unless they pay him sufficient money to compensate him for the damages sustained. The plaintiff also prays that the Court adjudge his claim prior to that of the Central Trust Company, which has begun foreclosure proceedings against the railway company.

Helen M. Morgan filed an action against A. B. Sawyer, trustee, in the Third District Court yesterday, asking that he be restrained from selling certain property under a deed of trust, on the ground that she is entitled to six months' further time in which to redeem the said property.

F. H. Auerbach & Bro. began attachment proceedings against the Mayfield Co-op. yesterday to collect $864.98, alleged to be due for goods, wares and merchandise. Clark, Eldredge & Co. are suing the same defendants to collect $632.80.

THIRD DISTRICT COURT.

Dr. Hasbrouck Fined and His Points Overruled—Other Business.

The argument of the demurrer to the complaint in the case of the People vs. Dr. Richard A. Hasbrouck, was concluded before Judge Smith in the Third District Court yesterday morning, and promptly overruled, after which the defendant was fined $50 and costs, to which he duly excepted.

THE JUDGE'S RULING.

In passing upon the matter, Judge Smith stated that he was familiar and had been for years with all the principles involved in the case before him, and hence would render an opinion without further delay.

First he took up the matter of the appointment of the Board of Medical Examiners by Governor Thomas, and held that although the appointments were made without the advice and approval of the Territorial Council, they were valid, under decisions which he cited from the Supreme Court of the Territory and of the United States. He was further of the opinion that the matter was in the nature of a vacancy after thirty days had elapsed succeeding the adjournment of the Council, and that the latter body had presumptively conferred the power of making the appointments upon the Governor by adjourning. As to the alleged discrimination against non-resident physicians, his Honor failed to see that there was sufficient difference to actually amount to discrimination. There was a difference, of course, in the amount of fees to be paid, but this was not unfair to physicians as a class. With relation to the question of judicial powers conferred upon the Board of Medical Examiners, he held that no power of a judicial nature had been conferred, and the whole authority vested in the Board was subject to review by the courts. He believed, however, that the only point raised by the demurrer which was worthy of serious consideration, was in the matter of there being no provision for any of the moneys received by the Board to be disbursed by them. Section 12 of the act provided that all fees received from persons for licenses to practice obstetrics, should be used to defray the expense of the Board, but nowhere else in the act was any provision made as to how other fees should be applied. The act, though, should be taken as a whole, and wherever reference was made to moneys to be paid in by persons desiring certificates, the word "fees" was used, and hence he believed that the sums thus derived were for the use of the person issuing the certificate, or for the use of the Board of Medical Examiners to defray necessary expense.

DUE PROCESS OF LAW.

In reference to another contention of the defendants to the effect that the act deprived physicians, who might be unable to comply with its conditions, of their property (meaning their profession and practice) "without due process of law," Judge Smith held that "due process of law" was not necessarily judicial process, and that the Legislature might constitutionally empower a Board of Medical Examiners to finally determine whether an applicant had the qualifications prescribed in the act—whether his college was respectable or not, or his moral character good—and that the decision of the Board on these points was not subject to review by the courts unless it was shown that the Board acted maliciously or capriciously; also that in determining these questions, the Board did not exercise "judicial power," properly speaking.

Dr. Hasbrouck will appeal the case to the Supreme Court of the Territory.

In the case of Dr. O. H. Dogge vs. the Board of Medical Examiners, wherein the plaintiff prays for a writ of mandate to compel the defendants to issue a certificate to him, and which was tried with the Hasbrouck case so far as the constitutionality of the act was concerned, a writ of certiorari was issued to the defendants ordering them to certify up to the Court their full proceedings in the matter.

OTHER BUSINESS.

Thomas F. Mulloy, assignee, vs. the Chalk Creek Coal Mining Company; George M. Scott & Co. granted leave to intervene.

Z. C. M. I. vs. the Mayfield Co-op., judgment for plaintiff for $2317.39.

Arthur Parsons vs. the Mayfield Co-op.; judgment for plaintiff for $890.25.

Commercial National Bank vs. J. L. Perkes et al.; judgment for plaintiff for $1146.50.

Court Cullings.

Private advices were received in this city from Washington yesterday to the effect that Colonel Merritt's Commission as Chief Justice of the Supreme Court of Utah was mailed last Monday evening. In view of this fact the commission should have arrived yesterday, but as it did not, it is confidently expected this morning. If the document reaches here this morning Judge Merritt will preside over one branch of the Third District Court to-day.

Judge H. W. Smith returned home to Provo yesterday afternoon.

In the Third District Court, in the divorce suit of W. H. Irvine vs. Adeline M. Irvine, twenty days' time has been granted the ex-husband to prepare and file affidavits on motion for a new trial.

In the Third District Court yesterday morning before Judge H. W. Smith the case of Thomas F. Mulloy, assignee, vs. the Chalk Creek Coal Mining Company was mentioned. Judge McKay asked leave to intervene for George M. Scott & Co., and was given till February 1st to file complaint in intervention.

The Supreme Court.

The Supreme Court will meet again next Monday morning, at which time a number of decisions are expected. The sittings for next week as corrected and revised, are as follows:

Monday, January 29, 1894—Anderson Pressed Brick Company vs. Dubois & Williams, defendants, and Joseph H. Smith et al., intervenors and appellants.

Martha Turner vs. Wells, Fargo & Co., defendant, and F. D. Kimball, intervenor and appellant, and three other cases.

Tuesday, January 30, 1894—C. A. H. McCauley, appellant, vs. John Q. Leavitt et al.

A. Hirsch and S. Hirsch vs. H. E. Steele, appellant.

John M. Young vs. A. T. Schroeder et al., appellants.

Wednesday, January 31, 1894—Andrew Knudson et al. vs. Nells Omanson, appellant.

The Salt Lake Building & Manufacturing Company vs. William P. O'Meara, defendant and appellant, and Reynolds Bros.

Thursday, February 1, 1894—V. M. C. Silva vs. W. L. Pickard et al. appellant.

Lima Machine Works vs. E. H. Parsons et al., appellants.

Selz, Schwab & Co. vs. Tucker & Wallace, appellants.

Friday, February 2, 1894—Sophia V. Benson, appellant, vs. Nicholas Anderson et al.

L. A. Scott Elliot vs. George C. Whitmore et al., appellants.

George C. Whitmore, appellant, vs. John H. Harris.

L. A. Scott Elliot vs. George C. Whitmore, appellant.

L. A. Scott Elliot vs. George C. Whitmore et al., appellants.

L. A. Scott Elliot vs. George C. Whitmore, appellant.

L. A. Scott Elliot vs. George C. Whitmore et al., appellants.

Dennis Danther vs. the Grand Lodge Ancient Order United Workmen, etc., et al., appellants. (Resubmission ordered.)

In Probate Court.

L. M. Bailey filed a petition in the Probate Court yesterday asking that the will of James B. Boggs, deceased, be admitted to probate and that he be appointed administrator, with the will annexed, at the request of the executors of the said will, who are residents of Pittsburg, Pa. The deceased resided in Salt Lake for some time prior to his death, which occurred at Pittsburg, Pa., on November 18, 1893, and owns several pieces of real estate in this city, which the petitioner is unable to state the value of. The will was admitted to probate in Pittsburg and a copy is now on file in the Probate Court for this county. With the expection of legacies in the amount of $350, the deceased left everything to his wife. February 8th was set for the hearing of Mr. Bailey's petition.

OTHER ORDERS.

Estate of George W. English, deceased; decree of due and legal notice to creditors made and appraisers appointed.

Estate of Robert Laidlow, deceased; decree of due and legal notice to creditors.

ADDENDUM C

Utah Code Section 78B-2-308. Legislative findings -- Civil actions for sexual abuse of a child -- Window for revival of time barred claims.

(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.

(2) As used in this section:

(a) "Child" means a person under 18 years of age.

(b) "Discovery" means when a person knows or reasonably should know that the injury or illness was caused by the intentional or negligent sexual abuse.

(c) "Injury or illness" means either a physical injury or illness or a psychological injury or illness. A psychological injury or illness need not be accompanied by physical injury or illness.

(d) "Molestation" means that a person, with the intent to arouse or gratify the sexual desire of any person:

(i) touches the anus, buttocks, or genitalia of any child, or the breast of a female child;

(ii) takes indecent liberties with a child; or

(iii) causes a child to take indecent liberties with the perpetrator or another person.

(e) "Negligently" means a failure to act to prevent the child sexual abuse from further occurring or to report the child sexual abuse to law enforcement when the adult who could act knows or reasonably should know of the child sexual abuse and is the victim's parent, stepparent, adoptive parent, foster parent, legal guardian, ancestor, descendant, brother, sister, uncle, aunt, first cousin, nephew, niece, grandparent, stepgrandparent, or any person cohabiting in the child's home.

(f) "Perpetrator" means an individual who has committed an act of sexual abuse.

(g) "Sexual abuse" means acts or attempted acts of sexual intercourse, sodomy, or molestation by an adult directed towards a child.

(h) " Victim" means an individual who was intentionally or negligently sexually abused. It does not include individuals whose claims are derived through another individual who was sexually abused.

(3) (a) A victim may file a civil action against a perpetrator for intentional or negligent sexual abuse suffered as a child at any time.

(b) A victim may file a civil action against a non-perpetrator for intentional or negligent sexual abuse suffered as a child:

(i) within four years after the person attains the age of 18 years; or

(ii) if a victim discovers sexual abuse only after attaining the age of 18 years, that person may bring a civil action for such sexual abuse within four years after discovery of the sexual abuse, whichever period expires later.

(4) The 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.

(5) The knowledge of a custodial parent or guardian may not be imputed to a person under the age of 18 years.

(6) A civil action may be brought only against a living person 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 a person listed 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.

(8) A civil action may not be brought as provided in Subsection (7) for:

(a) any claim that has been litigated to finality on the merits in a court of competent jurisdiction prior to July 1, 2016, however termination of a prior civil action on the basis of the expiration of the statute of limitations does not constitute a claim that has been litigated to finality on the merits; and

(b) any claim where a written settlement agreement was entered into between a victim and a defendant or perpetrator, unless the settlement agreement was the result of fraud, duress, or unconscionability. There is a rebuttable presumption that a settlement agreement signed by the victim when the victim was not represented by an attorney admitted to practice law in this state at the time of the settlement was the result of fraud, duress, or unconscionability

(Effective May 10, 2016) (West, Westlaw through General Session 2017).

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the 35-page limit, excluding parts exempted by Utah R. App. P. 24(g)(2), set by Utah Supreme Court's July 10, 2019 Supplemental Briefing Order.
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, 13-point Times New Roman.
3. This brief contains no non-public information and complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 7th day of October 2019.

/s/
Andrea Valenti Arthur

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* Utah Legislature was served as indicated.

Two copies by first class mail, postage prepaid, with a copy by email to the following:

Ross C. Anderson
Law Offices of Rocky Anderson
Eight East Broadway, Suite 450
Salt Lake City, UT 84111
Rocky@andersonlawoffices.org
Attorney for Plaintiff Terry Mitchell

Via email only by agreement to the following:

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

Troy L. Booher
Zimmerman Booher
341 South Main Street, 4th Floor
Salt Lake City, Utah 84111
tbooher@zbappeals.com
Attorneys for Defendant Richard Warren Roberts

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

Tyler Green
Stanford Purser
Office of the Utah Attorney General
320 Utah State Capitol
P.O. Box 142320
Salt Lake City, UT 84114-2320
tylergreen@agutah.gov
spurser@agutah.gov
Attorneys for Amicus Curiae Office of the Attorney General

James S. Jardine
Samuel C. Straight
Ray Quinney & Nebeker, PC
36 South State Street, Suite 1400
Salt Lake City, UT 84111
jjardine@rqn.com
sstraight@rqn.com
Attorneys for Amici Curiae Richard Miles and Brenda Miles

Craig K. Vernon
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
cvernon@jvwlaw.net
Attorney for Amici Curiae Jane Does 1-4, and John Does 1 and 2

By: /s/
Andrea Valenti Arthur
Attorney for the Utah Legislature

Case No. 20170447-SC
Federal Case No. 2:16-cv-00843-EJF