

IN THE SUPREME COURT OF MARYLAND

Misc. No. 2, September Term, 2024
SCM-MISC-0002-2024

THE KEY SCHOOL, INC., et al.
Appellants,

v.

VALERIE BUNKER,
Appellee.

On Certified Question of Law from the
U.S. District Court for the District of Maryland, No. 1:23-cv-02662
(The Hon. Matthew J. Maddox)

No. 10, September Term, 2024
SCM-REG-0010-2024

BOARD OF EDUCATION OF HARFORD COUNTY,
Appellant,

v.

JOHN DOE,
Appellee.

On Petition for Writ of Certiorari from the
Circuit Court for Harford County, No. C-12-CV-23-000767
(The Hon. Alex M. Allman)

BRIEF OF *AMICI CURIAE*
AMERICAN TORT REFORM ASSOCIATION,
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION,
AND THE MARYLAND DEFENSE COUNSEL, INC.

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QUESTION PRESENTED

Does the Maryland Child Victims Act of 2023, 2023 Md. Laws ch. 5 (S.B. 686) (codified at Md. Code Ann., Cts. and Jud. Proc. § 5-117), constitute an impermissible abrogation of a vested right in violation of Article 24 of the Maryland Declaration of Rights and/or Article III, Section 40 of the Maryland Constitution?

INTEREST OF *AMICI CURIAE*¹

Amici are organizations that represent businesses, insurers, and civil defense attorneys in this state. Over the past two decades, *amici* have become alarmed as state legislatures, including the Maryland General Assembly, have considered reviving time-barred claims. Such action jeopardizes the stability and reliability of the civil justice system, subjecting organizations to liability without the ability to present records and witnesses in their defense, upending past business and insurance underwriting decisions made in reliance on the settled time bar, and making difficult to plan business affairs going forward. While this case arises in the context of childhood sexual abuse, “reviver” legislation, if left unchecked by courts, will undoubtedly spread to other cases involving sympathetic plaintiffs or causes. Accordingly, *amici* have a substantial interest in ensuring that Maryland law continues to adhere to

¹ The parties consented to the filing of this brief. Accordingly, *amici* file this brief pursuant to Rule 8-511(a)(1).

established constitutional principles, which recognize that revival of time-barred claims violates due process by impairing vested rights.

The American Tort Reform Association (“ATRA”) is a broad coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

The American Property Casualty Insurance Association (“APCIA”) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA’s member companies represent 65% of the U.S. property-casualty insurance market and write over 72% of the general liability insurance premiums in Maryland. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus* briefs in significant cases before federal and state courts, including this Court.

Maryland Defense Counsel, Inc. (“MDC”) was founded in 1962 with an initial membership of thirty Baltimore lawyers. Today, the MDC is a statewide bar association with over 300 members, one of the larger civil defense attorney

organizations in the country and a respected resource in civil litigation defense. The MDC brings the defense perspective to the appellate courts through filing briefs as *amicus curiae*.

SUMMARY OF ARGUMENT

“This Court has consistently held that the Maryland Constitution ordinarily precludes the Legislature . . . from retroactively . . . reviving a barred cause of action, thereby violating the vested right of the defendant.” *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 633, 805 A.2d 1061, 1078 (2002). The provision of the Maryland Child Victims Act of 2023, 2023 Md. Laws ch. 5 (S.B. 686) (codified at Md. Cts. & Jud. Proc. Code § 5-117(b)) (“CVA”), purporting to retroactively revive time-barred claims is precisely this type of prohibited law.

Allowing the CVA to stand would significantly undermine the predictability of the civil justice system upon which Maryland residents, businesses, nonprofits, insurers, and other organizations rely when making decisions that involve liability risks. Limitations periods allow people and businesses to make rational decisions when offering products or services, retaining records, securing insurance, and ordering their affairs. They help insurers accurately predict and price risks, protecting the availability and affordability of insurance. They also safeguard the due process rights of defendants who are entitled to a fair trial.

Limitation periods do not merely protect defendants. They foster a civil justice system in which judges and juries can evaluate liability when the best evidence is available. They provide clarity to those who are considering filing a lawsuit and encourage those who are harmed to come forward without unreasonable delay. Ultimately, limitations periods provide assurance to all that, at a set point, exposure to liability ends. Reviving time-barred claims upends settled expectations upon which organizations have relied in making decisions.

In many cases, including here, plaintiffs have used the CVA's reviver provision to assert claims alleging organizations were negligent when hiring or supervising employees or volunteers decades ago. Records have been either lost or destroyed in the ordinary course of business, witnesses' memories have faded and many of those who could have testified regarding an organization's policies, practices, and actions are long gone or no longer alive. In some revived claims, the alleged perpetrators are dead.² The heavy cost of defending against or paying these decades-old claims will not fall upon the perpetrators of these crimes, but will be borne mainly by schools, nonprofit organizations, and other entities that provided services to children, impacting those they serve today.

² While the CVA prohibits revival of time-barred claims on behalf of victims of abuse who are deceased at the commencement of the action, Md. Cts. & Jud. Proc. Code § 5-117(d), it has no similar constraint when the perpetrator or witnesses are no longer alive.

Whether the CVA includes a statute of limitations, a statute or repose, or both, this Court’s precedent establishes that the legislature may not revive time-barred claims. Abandoning these constitutional protections to permit revived claims would significantly undermine due process and the finality of statutory limitation periods, not just in the context of this case, but in any type of civil action. Tort law, by its very nature, often involves traumatic situations and serious injuries that have a dramatic, life-long impact on a person’s life. Nevertheless, limitation periods exist because they are “fundamental to a well-ordered judicial system.” *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). That the CVA implicates claims of sympathetic plaintiffs or an important public policy goal, should not affect the Court’s established vested-rights analysis. A departure from precedent would permit the General Assembly to reopen the courthouse doors to other stale claims, a possibility openly contemplated during legislative hearings.

Partly in recognition of these concerns, this Court has already decided that reviver statutes like the CVA are unconstitutional, *see Dua*, 370 Md. at 633, 805 A.2d at 1078, and the “great preponderance” of state appellate courts agree. *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996). They continue to reach this outcome today. *See, e.g., Aurora Pub. Sch. v. A.S.*, 531 P.3d 1036, 1050 (Colo. 2023); *Thompson v. Killary*, 683 S.W.3d 641, 648 (Ky. 2024); *Mitchell v. Roberts*, 469 P.3d 901, 903 (Utah 2020).

For these reasons, this Court should find that the CVA's revival of time-barred claims constitutes an impermissible abrogation of a vested right in violation of Article 24 of the Maryland Declaration of Rights and Article III, Section 40, of the Maryland Constitution.

ARGUMENT

I. REVIVING TIME-BARRED CLAIMS UNDERMINES MARYLAND'S CIVIL JUSTICE SYSTEM

The CVA's claims-revival provision defies the fundamental purposes of a statutory limitations period, which encourage promptness in instituting claims, prevent stale claims, and address problems associated with extended delays in bringing a cause of action. *See Harig v. Johns-Manville Prod. Corp.*, 284 Md. 70, 75, 394 A.2d 299, 302 (1978). Time bars avoid situations in which a defendant must litigate after "evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* They "allow[] individuals the ability to plan for the future without the indefinite threat of potential liability." *Hecht v. Resol. Tr. Corp.*, 333 Md. 324, 635 A.2d 394, 399 (1994). By "preventing surprises through the revival of claims that have been allowed to slumber," time bars "promote justice." *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). They allow judges and juries to evaluate liability when the best evidence is available, which facilitates accurate decision making. Without them, cases become more susceptible to

being decided based on sympathy and bias, rather than law and evidence. In each of these ways, time bars are essential to a fair and well-ordered civil justice system.

Reviving time-barred claims significantly exacerbates these concerns and abrogates vested rights. The legislature may, as a matter of public policy, set a lengthy statute of limitations or perhaps *prospectively* even permit a particular type of civil action to be filed at any time. When the legislature extends or eliminates a statute of limitations going forward, organizations can make rational decisions to address the new liability exposure. But when the legislature revives time-barred claims, the retroactive alteration of the law disturbs settled expectations that organizations relied upon in their decision making. They might not have offered a product or service subject to such lengthy liability exposure or set a longer record retention policy, for example. *See infra* Section II.

The practical issues that arise when a legislature revives time-barred claims are evident in the wake of the CVA, which permits filing lawsuits, indefinitely, no matter how long ago a claim arose or a limitations period expired. Attorneys have already filed hundreds of revived claims against schools, religious institutions, juvenile detention facilities, social service agencies, and other private, nonprofit, and government entities since the law took effect on October 1, 2023. *See* Alex Mann, *Federal Judge Plans to Send*

Child Victims Act Question to Maryland Supreme Court, Baltimore Sun, Mar. 22, 2024; see also Alex Mann, *39 People Sue Agencies Over Alleged Abuse at Baltimore County Youth Facility*, Baltimore Sun, Mar 12, 2024 (reporting claims against state agencies stemming from allegations of abuse at the Good Shepherd Services residential treatment center dating back as far as four decades); Lea Skene, *200 Victims Allege Child Sex Abuse in Maryland Youth Detention Facilities*, Assoc. Press, Feb. 8, 2024 (reporting claims involving abuse at juvenile detention facilities, some of which are no longer in operation, as early as 1969). One revived action separately before this Court questions whether an organization had sufficient measures in place in hiring and supervising its employees as far back as 1939—85 years ago. See Class Action Complaint ¶ 182, *John Doe v. Roman Catholic Archbishop of Washington*, No. C-16-CV-23-004497 (Prince George County, Cir. Ct., filed Oct. 1, 2023), *cert. granted*, No. SCM-REG-0009-2024 (Md. May 28, 2024).

The sudden barrage of old claims and the challenges of defending them given the passage of time, loss of records, witnesses, and institutional memory, and nature of the allegations involved, is borne mainly by schools, nonprofit organizations, and other entities that provided services to children, not those who committed the abuse. For example, in a constitutional challenge to a similar law in Colorado, organizations representing school districts, local governments, and their insurers recounted a revived claim involving

allegations from the early 1980s, in which a school district could not “confirm whether the alleged perpetrator had been an employee, let alone whether and to what degree the individual may have interacted with the claimant.” Brief of *Amici Curiae* Colorado School Districts Self Insurance Pool, et al., at 5-6, *Aurora Pub. Sch. v. Saupe*, No. 2022SC824 (Colo. filed Jan. 17, 2023). Meanwhile, a similar revival law in New York has placed child welfare agencies, public schools, and the children they serve today in jeopardy, leading to calls for a state-funded bailout because “[i]t’s not for current sixth graders to pay for the sins of the past.”³

The implications of permitting the legislature to revive time-barred claims extend beyond the context of childhood sexual abuse. Over time, there will be many other sympathetic plaintiffs, important causes, and unpopular industries and defendants. It is never easy to tell a person that their time to sue has ended. As a result, allowing revival of time-barred claims here will inevitably lead to future calls to permit other time-barred claims alleging injuries based on conduct that occurred decades ago to proceed. In fact, during a Maryland legislative briefing on reviving time-barred childhood sexual abuse

³ Michael Gormley, *NYS Bill Proposes \$200M Fund to Help Schools Pay Child Victims Act Judgments*, Newsday, Mar. 9, 2024 (quoting bill sponsor); see also Susanti Sarkar, *As Survivors Seek Justice, New York Child Welfare Agencies Face the Costs of Decades-Old Sexual Abuse Lawsuits*, The Imprint, Feb. 19, 2024; Stephen T. Watson, *Schools Face Millions in Child Victims Act Payments, But Proposed State Relief is Stalled*, Buffalo News, July 30, 2023.

claims, a Senator contemplated whether the legal arguments made by proponents in support of the CVA would equally apply to legislation permitting claims for discrimination, segregation, and other trauma experienced by African Americans during the 1950s (when some CVA-revived cases arose). *See* Maryland House Judicial Proceedings Committee Session, Jan. 19, 2023, <https://www.youtube.com/watch?v=ks45I1mnvNs>, at 1:50-1:55 (dialogue between Senator Charles E. Syndor III, Esq. and Kathryn Robb, Esq. of Child USA).

Efforts are underway in states that have revived time-barred childhood sexual abuse claims to expand these provisions. California, New York, and Hawaii subsequently revived claims brought by those who allege injuries from sexual assault as *adults*.⁴ Vermont almost immediately expanded its 2019 childhood sexual abuse claims-revival law to apply to claims alleging physical abuse,⁵ and then contemplated further extending that law to emotional abuse.⁶

Plaintiffs' lawyers and advocacy groups will also seek to revive other types of claims. For example, proposed Maine legislation would have retroactively expanded the state's statute of limitations for product liability

⁴ S. 66-A (N.Y. 2022); A.B. 2777 (Cal. 2022); S.B. 2439 (Haw. 2024).

⁵ S. 99 (Vt. 2021).

⁶ H. 8 (Vt. 2023).

claims from six to fifteen years.⁷ California considered a bill to revive time-barred actions under the state’s unfair competition law alleging that businesses misled the public on the risks of climate change⁸ and a separate bill proposing a ten-year statute of limitations for torts involving certain human rights abuses that would have applied retroactively to revive claims for events that occurred up to 115 years earlier.⁹ And New York, since passing its childhood sexual abuse reviver statute, has revived certain environmental claims.¹⁰

Should this Court uphold the CVA’s claims-revival provision, calls for reviving time-barred claims will become more frequent in Maryland and pressure on legislators to pass these types of proposals will rise. Altering Maryland’s constitutional law to permit revival of any type of time-barred claim will undermine the predictability and stability of the state’s civil justice system, and make it difficult, if not impossible, for courts to accurately and fairly evaluate liability.

⁷ LD 250 (Maine 2019) (reported “ought not to pass”).

⁸ S.B. 1161 (Cal. 2016) (reported favorably from committee, but died without floor vote).

⁹ A.B. 15 (Cal., as amended Mar. 26, 2015) (claims-revival provision removed and legislation made prospective before enactment).

¹⁰ S. 8763A (N.Y. 2022) (reviving claims by water suppliers alleging injuries related to an “emerging contaminant”).

II. REVIVING TIME-BARRED CLAIMS CREATES TURMOIL FOR BUSINESSES AND INSURERS

The revival of time-barred claims significantly undermines the predictability that organizations, including insurers, rely upon to make decisions. In a market economy, “expectations determine decisions and actions.” Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 Ala. L. Rev. 1329, 1344 (2000). Legislation such as the CVA disturbs society’s settled expectations and the predictability of the civil justice system, both of which are essential to continuing investments in industry and to the availability and affordability of insurance. *See id.*

Predictability in the law allows individuals and businesses to forecast and anticipate liability risks, which in turn influences their investments. A person considering whether to provide a product or service may decide not to do so if there is a substantial risk of liability. A person may, for example, have decided not to open a summer camp or day care center had that person known that he or she could be served with a lawsuit sixty years later stemming from the alleged conduct of a volunteer or employee who is long gone.

Understanding the statutory period to file a lawsuit also influences other operational decisions. For instance, if an organization is on notice that there is an infinite period to file a lawsuit, it can attempt to protect itself from liability by meticulously documenting its employment decisions, policies, training

provided, and responses to reports of misconduct, and keeping those records forever. In addition, a firm that anticipates the risk of lawsuits may keep more cash in reserve for litigation expenses and cut back on capital expenditures. *See generally* Matteo Arena & Brandon Julio, *The Effects of Securities Class Action Litigation on Corporate Liquidity and Investment Policy*, 50 J. Fin. & Quantitative Analysis 251 (2014) (evaluating the risk of litigation on corporate savings and investment policy). When legislation retroactively revives time-barred claims, reasonable decisions made in reliance on the law are upended. Businesses are then confronted with unanticipated exposure to liability for which they could not plan. The sudden influx of old claims that reviver statutes allow, or even a single claim that cannot be fairly defended due to the loss of records and witnesses, can bankrupt an organization or threaten its ability to continue to provide needed services. *See, e.g.,* Dietrich Knauth, *New York City Youth Club to Exit Bankruptcy with \$22 Million Sex Abuse Settlement*, Reuters, July 20, 2022 (reporting that, to pay settlements of revived claims, a youth club was forced to sell a clubhouse that had provided after-school programs for under-privileged children living in nearby public housing); Xander Landen, *Bennington Family Center Suit Tests New Child Sex Abuse Law*, VT Digger, June 10, 2019 (reporting that a child care center could be forced to close its doors after it was impeded in its defense of revived lawsuits because critical

evidence of an agency's investigation into the allegations had been lost in a fire).

It is also important that insurers, who play an indispensable role in modern life by assuming and managing risk, can rely on the predictability of the civil justice system. A necessary precondition to managing risk is the ability to identify it, charge a competitive premium based on the risk, and establish reserves sufficient to cover all potential exposure for all covered types of losses. The underwriting and actuarial process by which insurers evaluate a given risk requires that insurers can reasonably predict the magnitude of the risk and the likelihood that it will come to pass so that they can decide whether, and at what price, to assume the risk. Insurers also vary the coverage they offer—and the price of that coverage—depending on the type and likelihood of risk, typically providing coverage either for incidents that happen during the policy period or for claims presented during the policy period. Like underwriting decisions, insurers' and policyholders' choices between these forms of coverage depends on the ability to make predictive judgments in reliance of statutory limitations periods and a stable civil justice system.

Predictability is also important for insurers to appropriately manage risks they have already assumed. For instance, insurers must be able to identify and quantify risks to which they are exposed so that they can establish reserves sufficient to cover all potential exposure for all covered types of losses.

As part of this process, insurers must be able to locate a point at which historically distant events no longer pose a current and future risk—where “the past” is definitively and conclusively past.

When making decisions, businesses and insurers have relied on the understanding that “reviving a time-barred cause of action . . . violate[s] the vested right of the defendant” under the Maryland Constitution. *Dua*, 370 Md. at 633, 805 A.2d at 1078. They have done so when structuring their operations and deciding which risks to assume and how to manage them. As this Court has recognized, people and businesses must be “guided in their personal and business dealings” by established legal principles. *Bozman v. Bozman*, 376 Md. 461, 494, 830 A.2d 450, 469-70 (2003). The vested rights granted by the expiration of a statutory period to file a claim provides this certainty.

The CVA upends the predictability and finality established by the statutory period to file a claim and will significantly harm businesses and other organizations, and their insurers, if this Court does not adhere to established law and find the revival of time-barred claims unconstitutional. First, it would establish that any claim moving forward, however stale or unanticipated, could be reestablished or revived—and, as discussed earlier, incentivize prospective plaintiffs, their lawyers, and advocacy groups to seek similar legislation to pursue long-expired actions. This would significantly change how businesses operating in Maryland, and the companies that insure them, evaluate liability

risks. Second, it would retroactively change the rules by which organizations in Maryland previously decided to assume and manage their risks, which could result in market instability.

If statutory periods for filing claims cannot be relied upon, then Maryland's insurance marketplace could be impaired as individual insurers, making their own business decisions, are forced to consider how to respond to the loss of a crucial risk spreading mechanism. *See* Am. Property Casualty Ins. Ass'n et al., *It's Not Just the Weather: The Man-Made Crises Roiling Property Insurance Markets* 15 (Aug. 2022) (observing that when state lawmakers restrict the ability of insurers to "manage their overall exposure in high-risk markets, insurers are forced to reassess their capacity to meet policy obligations and/or consider pursuing other less volatile markets to avoid the threat of insolvency"). This uncertainty may not only affect the availability and affordability of insurance but also the public at large as affected entities are forced to reduce or discontinue important services.

In fact, because of revival laws like the CVA and the uncertainty they create, organizations that provide services to minors are already facing increased insurance costs and difficulties obtaining insurance, in addition to significant new liability exposure for otherwise time-barred claims. *See* Kay Dervishi, *Child Victims Act Leads to Insurance Woes*, City & State, Feb. 10, 2020 (reporting that schools and nonprofits, in the wake of New York's claims-

revival law, “have faced increased insurance costs” and “have lost coverage for sexual abuse claims altogether”). But the effect on the insurance market of permitting revival of time-barred claims may be far broader. The uncertainty that a reviver creates if the Court finds this approach constitutionally acceptable may extend across all forms of insurance because it opens the door to the possibility that the legislature could revive other types of expired claims. Due to the potential for a legislative reviver, insurers writing business in Maryland will need to consider the risks indefinite liability could have on their operations. Businesses will also need to account for this uncertainty when making decisions about what products or services to provide and how they operate. Ultimately, this new unpredictability will harm Maryland consumers and businesses.

III. INVALIDATING THE REVIVAL WINDOW IS REQUIRED BY MARYLAND PRECEDENT AND CONSISTENT WITH THE MAJORITY APPROACH AMONG STATES

A. Maryland Courts Have Consistently Found Reviving Time-Barred Claims Unconstitutional

This Court has “consistently held that the Maryland Constitution ordinarily precludes the Legislature (1) from retroactively abolishing an accrued cause of action, thereby depriving the plaintiff of a vested right, and (2) from retroactively creating a cause of action, or *reviving a barred cause of action*, thereby violating the vested right of the defendant.” *Dua*, 370 Md. at

633, 805 A.2d at 1078 (emphasis added); *see also Langston v. Riffe*, 359 Md. 396, 418, 754 A.2d 389, 400 (2000) (“Generally, a remedial or procedural statute may not be applied retroactively if it will interfere with vested or substantive rights.”). *Amici* agree with the careful analysis of the Montgomery County Circuit Court, which found that, regardless of whether the CVA includes a statute of limitations, statute of repose, or both, the Maryland Constitution forbids the revival of time-barred claims. *See generally Schappelle v. Roman Catholic Archdiocese of Washington*, No. C-15-23-003696 (Md. Cir. Ct., Montgomery County, Apr. 1, 2024) (Memorandum Opinion and Order).

In 2011, this Court considered whether the General Assembly’s replacement of the state’s typical three-year statute of limitations for personal injury claims (running from turning 18 years of age) with a seven-year period specifically for claims alleging injuries from childhood sexual abuse (also running from majority) could apply retroactively. *See Doe v. Roe*, 419 Md. 687, 20 A.3d 787 (2011). The Court ruled that the extended period could apply to claims for which the statute of limitations had *not* expired, while carefully distinguishing the inability of the legislature to revive expired claims. 419 Md. at 707-10, 20 A.3d at 799-801. “We would be faced with a different situation entirely had [the plaintiff’s] claim been barred under the three-year limitations period,” the Court observed. 419 Md. at 707, 20 A.3d at 799. That entirely different—and unconstitutional—situation is now before the Court.

This Court has invalidated legislation that revived time-barred claims in other contexts. *See Smith v. Westinghouse Elec. Corp.*, 266 Md. 52, 57, 291 A.2d 452, 455 (1972) (ruling that retroactively extending a time bar for claims from work-related deaths from two to three years was unconstitutional when applied to revive an expired cause of action); *see also Johnson v. Mayor & City Council of Baltimore*, 430 Md. 368, 387, 61 A.3d 33, 44 (2013) (in finding amendment to Workers’ Compensation Act applied prospectively, observing that “we concluded that *Roe* and others *whose claims were not already barred* by the statute of limitations could file their claims pursuant to the lengthier limitations period”) (emphasis added).

This Court has also repeatedly recognized that statutes of repose create a vested substantive right to be free from liability after a legislatively determined date. *See, e.g., SVF Riva Annapolis LLC v. Gilroy*, 459 Md. 632, 636, 187 A.3d 686, 689 (2018); *Anderson v. United States*, 427 Md. 99, 120, 46 A.3d 426, 439 (2012); *Duffy v. CBS Corp.*, 232 Md. App. 602, 623, 161 A.3d 1, 13 (2017), *rev’d on other grounds*, 458 Md. 206, 224, 182 A.3d 166, 177 (2018). The 2017 extension of the statute of limitations for childhood sexual abuse clearly included a statute of repose, in addition to a statute of limitations. *See* 2017 Md. Laws ch. 12 (H.B. 642) (adding paragraph (d) to Md. Cts. & Jud. Proc. Code § 5-117, which provides that “in no event” may an action be brought against a person or government entity that is not the alleged perpetrator more

than 20 years after age 18, and indicating in findings and rules of construction that this provision establishes a “statute of repose”).

Appellants or their supporting *amici* may invite the Court to apply a “balancing test” that defers to legislative policy in enacting the CVA’s reviver provision. But due process in Maryland is not dependent on the level of sympathy for a plaintiff, the level of political support for a law, or the degree of public sentiment against a defendant. “From the earliest cases to the present, this Court has consistently taken the position that retroactive legislation, depriving persons or private entities of vested rights, violates the Maryland Constitution, regardless of the reasonableness or ‘rational basis’ underlying the legislation.” *Dua*, 370 Md. at 625, 805 A.2d at 1073; *see also Muskin v. State Dep’t of Assessments & Tax’n*, 422 Md. 544, 556, 30 A.3d 962, 969 (2011) (“It has been firmly settled by this Court’s opinions that the Constitution of Maryland prohibits legislation which retroactively abrogates vested rights. No matter how ‘rational’ under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking of a person’s property and giving it to someone else.”) (quoting *Dua*, 370 Md. at 623, 805 A.2d at 1072).

What Maryland’s constitutional jurisprudence embraces is equal protection of the vested rights of both plaintiffs and defendants. For example, the General Assembly could not have retroactively reduced the limitations

period provided by Md. Cts. & Jud. Proc. Code § 5-117 in 2023 from twenty years to three years, thereby extinguishing the ability of a person whose claim accrued four years ago to file a lawsuit. *See Dua*, 370 Md. at 633, 805 A.2d at 1078 (“The Maryland Constitution requires that a plaintiff must have a reasonable period of time, after the enactment of the new statute, to bring the cause of action which existed under prior law.”); *Allen v. Dovell*, 193 Md. 359, 363-64, 66 A.2d 795, 797 (1949) (recognizing that the legislature cannot enact a new limitations period that precludes any opportunity to bring suit and must provide plaintiffs with a reasonable time to assert an existing right after its enactment). Nor can the General Assembly retroactively extend the time to bring an expired claim, allowing a lawsuit to proceed against a defendant long after that organization obtained a vested right to be free from liability for such conduct. What the legislature can constitutionally do is to extend the period to file a claim involving past conduct that remains viable as well as for any injury that occurs in the future. The CVA reaches far beyond this limit.

**B. Maryland’s Constitutional Law is Consistent
With the Approach of Most States**

Regardless of whether Md. Cts. & Jud. Proc. Code § 5-117(d) contains a statute of limitations, a statute of repose, or both, the protection Maryland’s Constitution provides to the vested rights created by such laws when the set time to file a claim has expired is consistent with most other states. As several

state high courts have recognized, the majority rule among jurisdictions is that a legislature cannot adopt retroactive laws that revive a time-barred claim.¹¹ These states generally apply a vested-rights analysis that is consistent with Maryland law, whether they do so through applying due process safeguards, a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, or another state constitutional provision.¹² Courts have

¹¹ See *Johnson v. Garlock, Inc.*, 682 So. 2d 25, 28 (Ala. 1996) (“The weight of American authority holds that the bar does create a vested right in the defense.”); *Johnson v. Lilly*, 823 S.W.2d 883, 885 (Ark. 1992) (“[W]e have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred.”); *Frideres v. Schiltz*, 540 N.W.2d 261, 266-67 (Iowa 1995) (“[I]n the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute of limitations had run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action.”); *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816-17 (Me. 1980) (“The authorities from other jurisdictions are generally in accord with our conclusion” that there is a substantive right in a statute of limitations after the prescribed time has completely run and barred the action); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341-42 (Mo. 1993) (constitutional prohibition of legislative revival of a time-barred claim “appears to be the majority view among jurisdictions with constitutional provisions”); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996) (recognizing the “great preponderance” of state appellate courts reject claims-revival laws); *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-71 (S.D. 1993) (“Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and this violates due process.”); *Roark v. Crabtree*, 893 P.2d 1058, 1063 (Utah 1995) (“In refusing to allow the revival of time-barred claims through retroactive application of extended statutes of limitations, this court has chosen to follow the majority rule.”).

¹² See *id.*; see also, e.g., *Wiley v. Roof*, 641 So. 2d 66, 68-69 (Fla. 1994); *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475, 484-85 (Ill. 2009); *Givens v. Anchor*

applied these constitutional principles to reject the legislative revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers’ compensation claims, among others.¹³

For example, for over a century, Pennsylvania courts have ruled that the state’s constitution does not permit the legislature to revive time-barred claims. *See, e.g., Lewis v. Pennsylvania R. Co.*, 69 A. 821, 822-23 (Pa. 1908); *Baggs’s Appeal*, 43 Pa. 512, 515, 1862 WL 5187, at *3 (1862); *Maycock v. Gravely Corp.*, 508 A.2d 330, 333 (Pa. Super. Ct. 1986); *see also Urland v. Merrell-Dow Pharmas., Inc.*, 822 F.2d 1268, 1276 (3d Cir. 1987) (“Under Pennsylvania law, after an action had become barred by an existing statute of limitations, no subsequent legislation will remove the bar or revive the

Packing, Inc., 466 N.W.2d 771, 773-75 (Neb. 1991); *Gould v. Concord Hosp.*, 493 A.2d 1193, 1195-96 (N.H. 1985); *Wright v. Keiser*, 568 P.2d 1262, 1267 (Okla. 1977); *Lewis v. Pennsylvania R. Co.*, 69 A. 821, 822-23 (Pa. 1908); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005); *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696-97 (Tenn. 1974); *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992); *Society Ins. v. Labor & Indus. Review Comm’n*, 786 N.W.2d 385, 399-402 (Wis. 2010).

¹³ Kansas is an example of a state in which the state’s high court has found that its constitution precludes revival of time-barred claims extinguished by a statute of repose. *See Shirley v. Reif*, 920 P.2d 405, 412 (Kan. 1996); *Ripley v. Tolbert*, 921 P.2d 1210 (Kan. 1996); *see also Doe v. Popravak*, 421 P.3d 760, 766-67 (Kan. Ct. App. 2017) (recognizing defendants have a substantive right under a statute of repose to not defend against claims of childhood sexual abuse that occurred in the 1970s that were extinguished eight years after the act giving rise to the cause of action).

action.”) (internal citations and quotation omitted). For this reason, proponents of reviving time-barred childhood sexual abuse claims in Pennsylvania have sought a constitutional amendment rather than enact an unconstitutional law. *See* Kate Huangpu, *Relief for Abuse Survivors, Other Constitutional Amendments Halted in Pa.’s Split Legislature*, Spotlight PA, Jan. 16, 2024.

In another neighboring state, Virginia, the state supreme court invalidated an attempted reviver of time-barred childhood sexual abuse claims enacted in 1991. *See Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992). In that instance, the Supreme Court of Virginia recognized that “[i]f the legislature can infringe a constitutionally protected right of one class by retroactive legislation, it can infringe the rights of every class.” *Id.* at 675. Following that decision, Virginia voters amended the state’s constitution to permit the revival of time-barred childhood sexual abuse claims, but they carefully limited this provision to intentional tort claims against perpetrators, not claims against nonprofit organizations, businesses, and government entities. *See* Va. Const. art. IV, § 14.

The supreme courts of Colorado, Kentucky, and Utah are the most recent state high courts to reaffirm this principle in the context of laws similar to Maryland’s CVA. *See Aurora Pub. Sch. v. A.S.*, 531 P.3d 1036, 1048-49 (Colo. 2023) (“[W]here the statute of limitations has run and a claim is barred, the right to plead it as a defense is a vested right which cannot be taken away or

impaired by any subsequent legislation.”); *Thompson v. Killary*, 683 S.W.3d 641, 648 (Ky. 2024) (“[O]ur jurisprudence presents nearly 200 years of protection for those possessing a statute of limitations defense.”); *Mitchell v. Roberts*, 469 P.3d 901, 903, 904, 913 (Utah 2020) (recognizing its constitutional prohibition on reviving time-barred claims is “well-rooted,” “confirmed by the extensive historical material,” and has been repeatedly reaffirmed for “over a century”). While these courts “appreciated the moral impulse” underlying the claims-revival provision and expressed “enormous sympathy for victims of child sex abuse,” *Mitchell*, 469 P.2d at 914, they also understood that there is no “public policy exception” to a constitutional prohibition on reviving time-barred claims, *Aurora Pub. Sch.*, 531 P.3d at 1049. Constitutional challenges to reviver laws similar to the CVA are pending before two other states with constitutional precedent similar to Maryland.¹⁴

In comparison, about one-third of states have found that legislation reviving time-barred claims is generally permissible.¹⁵ These states, unlike

¹⁴ See *Dupuis v. Roman Catholic Bishop of Portland, Maine*, No. BCD-23-122, <https://www.courts.maine.gov/news/dupuis/> (Maine, oral argument heard Nov. 9, 2023); *McKinney v. Goins and Caston County Bd. of Educ.*, No. 109PA22-2 (N.C., oral argument scheduled for Sept. 18, 2024).

¹⁵ See, e.g., *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 509 (Conn. 2015) (adopting the federal approach followed by eighteen states); see also *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011); *Sliney v. Previte*, 41 N.E.3d 732 (Mass. 2015); *A.B. v. S.U.*, 298 A.3d 573 (Vt. 2023).

Maryland, typically follow the federal approach. The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 312-13 (1945). Many states do so. *See, e.g., Thompson*, 683 S.W.3d at 651-52 (Nickell, J., concurring) (criticizing federal law on this issue as an “outlier” and recognizing that state “precedent on whether a legislature may retroactively revive a time-barred claim has long conflicted with federal authority”). Indeed, this Court, over a “long line of cases,” has been “explicitly clear that with respect to the abrogation of vested rights, Maryland law “impose[s] greater limitations (or extend[s] greater protections) than those prescribed by the United States Constitution's analog provisions.” *Willowbrook Apartment Assocs., LLC v. Mayor & City Council of Baltimore*, 563 F. Supp.3d 428, 444-45 (D. Md. 2021) (quoting *Muskin*, 422 Md. at 556, 30 A.3d at 969; *Dua*, 370 Md. at 621, 805 A.2d at 1071) (alterations in original). *Stare decisis* and established principles of Maryland case law, not federal authorities providing lesser due process protection, govern this case.

CONCLUSION

For these reasons, this Court should find that the CVA’s revival of time-barred claims constitutes an impermissible abrogation of a vested right in violation of Article 24 of the Maryland Declaration of Rights and/or Article III,

Section 40 of the Maryland Constitution.

Respectfully submitted,

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1. This brief contains 6,332 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2024, the foregoing Brief of *Amici Curiae* was filed and served electronically via MDEC upon all counsel of record.

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