CHILD USA
THE THINK TANK FOR CHILD PROTECTION

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TO: Senator Erin Lynch Prata, Chairwoman, Senate Committee on Judiciary

CC: Representative Carol Hagan McEntee

FROM: Marci A. Hamilton, CEO & Academic Director, CHILD USA, Fox Professor of Practice, University of Pennsylvania and Kathryn Robb, Executive Director, CHILD USAdvocacy

RE: The Science of Child Sex Abuse and the Constitutionality of Window Legislation

I. The Science of Delayed Disclosure Proves the Compelling Need to Revive Expired Civil Statutes of Limitation

Child sex abuse is a global and national scourge that has flourished in youth-serving organizations and families. On average, 1 in 4 girls and 1 in 6 boys will be sexually abused before their eighteenth birthday.[1] Rarely is the perpetrator "Stranger Danger". In fact, the vast majority of the abuse is perpetrated by individuals the child knows. See Kenneth Lanning, Child Molesters: A Behavioral Analysis 5 (2010), http://www.missingkids.com/content/dam/ncmec/en.us/desktop/publications/nc70.pdf.

The effects of child sexual abuse are deep, broad, and lasting in society. The effects include lost earnings; increased healthcare costs; decreased productivity, happiness, and ability to care for children; disrupted or destroyed marriages; drug addiction and its widespread effects and costs and degradation in the comfort that can be drawn from religion itself. See Fiscal Impact of SOL Reform – Fiscal Impact, CHILD USA, https://www.childusa.org/fiscalimpact (last updated September, 2018).

The adverse effects of childhood trauma are indisputable. As explained by the Center for Disease Control ("CDC"), Adverse Childhood Experiences ("ACEs") "have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity." U.S. Dep't Health & Human Services, CDC, About Adverse Childhood Experiences, https://www.cdc.gov/violenceprevention/acestudy/about_ace.html (Apr. 1, 2016).[2] The ACE Study is one of the largest investigations of the effects of childhood abuse, definitively showing a strong correlation between Adverse Childhood Experiences and later impairments (i.e., disrupted neurodevelopment; social, emotional, and cognitive impairment; disease; disability; etc.). See,

[1] NSOPW, Raising Awareness About Sexual Abuse: Facts and Statistics, U.S. DEPT. OF JUSTICE, https://www.nsopw.gov/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#reference. Other studies have placed the incidence of the sexual abuse of boys as low as 1 in 20, but the 20-25% figure for the abuse of girls has remained constant. See National Center for Victims of Crime, Child Sexual Abuse Statistics, NCVC, http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics.

[2] Vincent J. Feletti et al., Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults, 14 Am. J. Preventative Med. 4, 245-58 (1998); S.R. Dube et al., Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study, 286 JAMA 24, 3089-96 (Dec. 2001) (explaining that childhood trauma can lead to negative health outcomes).

e.g., Vincent J. Feletti et al., Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults, 14 Am. J. Preventative Med. 4, 245-58 (1998);

U.S. Dep't Health & Human Services, CDC, Adverse Childhood Experiences (ACEs), https://www.cdc.gov/violence prevention/acestudy/index.html (Apr. 2016). Robert F. Anda et al., The Enduring Effects of Abuse and Related Adverse Experiences in Childhood, 256 EUR. ARCH PSYCHIATRY CLIN. NEUROSCIE. 174, 175 (Nov. 2005) ("Numerous studies have established that childhood stressors such as abuse or witnessing domestic violence can lead to a variety of negative health outcomes and behaviors, such as substance abuse, suicide attempts, and depressive disorders.").

Trauma affects childhood victims of sexual abuse or assault in a way that is wholly distinguishable from victims of other crimes. Historically, because of the trauma associated with child sex abuse, 90% of child victims never go to the authorities and the vast majority of claims expire before the victims are capable of getting to court. See, e.g., Centers for Disease Control and Prevention, The Adverse Childhood Experiences (ACE) Study, http://www.cdc.gov/violenceprevention/acestudy/#1; see also, U.S. Dep't Health & Human Svcs Admin for Children & Families, Administration on Children, You & Families, & Children's Bureau, Child Maltreatment 2012, available at http://www.acf.hhs.gov/sites/default/files/cb-/cm2012.pdf. The decades before disclosure give perpetrators and institutions latitude to suppress the truth to the detriment of children, parents, and the public.

Frequently children are groomed by trusted adults, but often so disabled by the trauma they cannot disclose the abuse until much later in life.[3] As a direct result of the shame and secrecy historically associated with these heinous acts, victims often remain in the shadows - afraid to come forward. See, e.g., Judy Cashmore et al., The characteristics of reports to the police of child sexual abuse and the likelihood of cases proceeding to prosecution after delays in reporting, 74 INTL. J. CHILD ABUSE & NEGLECT, 49, 49-61 (2017) (explaining that delays in disclosing and reporting child sexual abuse to the police are common). In a large study of adults (Hébert et al., 2009) found that: 21.2% of survivors disclosed their abuse promptly; 21.3% disclosed abuse from one month to five years after it occurred; **57.5%** delayed disclosure for more than five years. See also 74 INTL. J. CHILD ABUSE & NEGLECT 1, 4 (2017) (suggesting that on average took it took victims over twenty years to disclose their abuse).

In fact, the average age of disclosure in a majority of cases involving childhood sex abuse is fifty-two (52). N. Spröber et al., Child Sexual Abuse in Religiously Affiliated and Secular Institutions, 3 (Mar. 27, 2014), https://www.childusa.org/search?q=BMC; CHILD USA, Average and Median Age of CSA Disclosure, (2018), www.childusa.org/law. At least thirty-three percent (33%) of such cases are never reported. See id.; see also Mary-Ellen Pipe et al., Child Sexual Abuse: Disclosure, Delay, and Denial 32 (2013) ("failure to disclose is common among sexually

[3] See generally BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN MIND AND BODY IN THE HEALING OF TRAUMA (2014); Penelope K. Trickett et al., The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study, 23 DEVELOPMENT & PSYCHOPATHOLOGY, 453-76 (2011); S. J. Berkowitz et al., The Child and Family Traumatic Stress Intervention: Secondary Prevention for Youth at Risk Youth of Developing PTSD, 52 J. Child Psychol. Psychiatry, 676-85 (Jun. 2011).

abused children."). One-third of victims never disclose their abuse. CHILD USA, Average and Median Age of CSA Disclosure, (2018), www.childusa.org/law.[4]

Data shows that Adverse Childhood Experiences (ACES), like childhood sexual abuse, are strongly correlated with later impairments (i.e., disrupted neurodevelopment; social, emotional, and cognitive impairment; disease; disability; etc.). Repressed memories leading to delayed discovery of childhood sexual abuse by a victim is one of the ways in which the brain protects survivors of this heinous crime. It is fundamentally unfair to punish victims for the biologic response to the trauma of childhood sexual abuse by locking the courthouse doors.

II. Under Rhode Island Law, Statutes are Presumptively Constitutional and May Be Given Retroactive Effect

It is a well-established principle of constitutional analysis under Rhode Island law that "legislative enactments are presumed to be constitutional". Brennan v. Kirby, 529 A.2d 633, 639 (R.I. 1987). A party seeking to challenge the validity of a statute must "prove beyond a reasonable doubt" that the statute violates the State or Federal Constitution. Gorham v. Robinson, 57 R.I. 1, 7 (R.I 1936). See also Brennan, 529 A.2d at 639–41 (R.I. 1987). When a retroactive statute is challenged under the due process clause, the Rhode Island Supreme Court has "traditionally held that the purpose of a statute must be such that, on balance, outweighs the unfairness of retroactivity". Rhode Island Depositors Economic Protection Corp., 659 A.2d at 102 (citing Lawrence v. Anheuser–Busch, Inc., 523 A.2d 864, 870 (R.I. 1987)). The '"two major factors to be weighed in determining the validity of a retroactive statute are [1] the strength of the public interest it serves and [2] the unfairness created by its retroactive operation, and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter." Brennan, 529 A.2d at 639 (quoting Harv. L. Rev. at 727).

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III. Amending Rhode Island's Statutes of Limitations for Child Sexual Abuse to Include a Revival Window Is Consistent with the National Trend to Give Survivors Access to Justice

The following twenty-four jurisdictions have held that a retroactive procedural change in law, like revival of a civil SOL, is constitutional: Arizona, California*, Connecticut*, Delaware*, Georgia*, Hawaii*, Idaho, Iowa, Kansas, Massachusetts*, Michigan, Minnesota*, Montana*, New Jersey, New Mexico, New York*, North Dakota, Oregon, Pennsylvania, South Dakota, Washington, Washington D.C.*[5], West Virginia, Wyoming. An asterisk indicates that the state has revived expired civil SOLs for child sex abuse. The trend in recent cases is to find window legislation constitutional.[6]

IV. A Time-limited Civil Revival Window Is Constitutional Under the United States Constitution and the Rhode Island Constitution

[5] Washington D.C. has already passed SOL reform legislation with a revival window in 2019; D.C. ACT 22-593 eliminates the criminal SOL, extends the civil SOL to age 40 with a 5-year discovery rule, and opens a 2-year revival window. This legislation has been approved by the mayor but must be passed by Congress.

[6] In five states, the matter is still an open question. Allstate Ins. Co. v. Kim, 829 A.2d 611, 622-23 (Md. 2003); Doe v. Roe, 20 A.3d 787, 797-799 (Md. 2011) (open question). Catholic Bishop of N. Alaska v. Does, 141 P.3d 719, 722-25 (Alaska 2006) (open question); Chevron Chemical Co. v. Superior Court, 641 P.2d 1275, 1284 (Ariz. 1982); City of Tucson v. Clear Channel Outdoor, Inc., 105 P.3d 1163, 1167, 1170 (Ariz. 2005) (barred by statute, Ariz. Rev. Stat. Ann. § 12-505 (Ariz. 2010)); Mudd v. McColgan, 183 P.2d 10, 13 (Cal. 1947); 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 632 (Cal. Ct. App. 2001), cert. denied, 535 U.S. 1033;(2002); Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm'rs, 948 P.2d 1002, 1011-13 (Colo. 1997); Rossi v. Osage Highland Dev., LLC, 219 P.3d 319, 322 (Col. App. 2009) (citing In re Estate of Randall, 441 P.2d 153, 155 (Col. 1968)); Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. at 439-40; Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1258-60 (Del. 2011); Riggs Nat'l Bank v. District of Columbia, 581 A.2d 1229, 1241 (D.C. 1990); Canton Textile Mills, Inc. v. Lathem, 317 S.E.2d 189, 193 (Ga. 1984); Vaughn v. Vulcan Materials Co., 465 S.E.2d 661, 662 (Ga. 1996); Roe v. Doe, 581 P.2d 310, 316 (Haw. 1978); Gov't Employees Ins. Co. v. Hyman, 975 P.2d 211 (Haw. 1999); Hecla Mining Co. v. Idaho State Tax Comm'n, 697 P.2d 1161, 1164 (Idaho 1985); Peterson v. Peterson, 320 P.3d 1244, 1250 (Idaho 2014); Metro Holding Co. v. Mitchell, 589 N.E.2d 217, 219 (Ind. 1992); Harding v. K.C. Wall Products, Inc., 831 P.2d 958, 967-968 (Kan. 1992); Ripley v. Tolbert, 921 P.2d 1210, 1219 (Kan. 1996); Sliney v. Previte, 473 Mass 283, 41 N.E.3d 732 (Mass. 2015); Rookledge v. Garwood, 65 N.W.2d 785, 790-92 (Mich. 1954); Pryber v. Marriott Corp., 296 N.W.2d 597, 600- 01 (Mich. Ct. App. 1980), aff'd, 307 N.W.2d 333 (Mich. 1981) (per curiam); Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 416 (Minn. 2002); In re Individual 35W Bridge Litigation, 806 N.W.2d 820, 830-31 (Minn. 2011); Cosgriffe v. Cosgriffe, 864 P.2d at 778; Alsenz v. Twin Lakes Village, 843 P.2d 834, 837-838 (Nev. 1992), aff'd, 864 P.2d 285 (Nev. 1993) (open question); Panzino v. Continental Can Co., 364 A.2d 1043, 1046 (N.J. 1976); Bunton v. Abernathy, 73 P.2d 810, 811-12 (N.M. 1937); Orman v. Van Arsdell, 78 P. 48, 48(N.M. 1904); Gallewski v. Hentz & Co., 93 N.E.2d 620, 624-25 (N.Y. 1950); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1079-80 (N.Y. 1989); In Interest of W.M.V., 268 N.W.2d 781, 786 (N.D. 1978); Pratte v. Stewart, 929 N.E.2d 415, 423 (Ohio 2010) (open question); McFadden v. Dryvit Systems, Inc., 112 P.3d 1191, 1195 (Or. 2005); Owens v. Maass, 918 P.2d 808, 813 (Or. 1996); Bible v. Dep't of Labor & Indus., 696 A.2d 1149, 1156 (Pa. 1997); McDonald v. Redevelopment Auth. of Allegheny Cnty., 952 A.2d 713, 718 (Pa. Commw. Ct. 2008), appeal denied, 968 A.2d 234 (Pa. 2009); Stratmeyer v. Stratmeyer, 567 N.W.2d at 223; Lane v. Dep't of Labor & Indus., 151 P.2d 440, 443 (Wash. 1944); Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 146 P.3d 914, 922 (Wash. 2006), superseded in part by statute Wash. Rev. Code 25.15.303, as recognized in Chadwick Farms Owners Ass'n v. FHC, LLC, 160 P.3d 1061, 1064 (Wash. 2007), overruled in part by 207 P.3d 1251 (Wash. 2009); Pankovich v. SWCC, 163 W. Va., 259 S.E.2d 127, 131-32 (W. Va. 1979); Shelby J.S. v. George L.H., 381 S.E.2d 269, 273 (W. Va. 1989); Neiman v. Am. Nat'l Prop. & Cas. Co., 613 N.W.2d 160, 164 (Wis. 2000); Society Ins. v. Labor & Industrial Review Commission, 786 N.W.2d 385, 399-401 (Wis. 2010) (open question); Vigil v. Tafoya, 600 P.2d 721, 725 (Wyo. 1979); RM v. State, 891 P.2d 791, 792 (Wyo. 1995).

A. A Time-limited Civil Revival Window Is Constitutional Under the United States Constitution

The United States Supreme Court has rejected the proposition that retroactive elimination of a viable civil statute of limitations defense constitutes a denial of due process.[7] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). The United States Supreme Court reaffirmed this principal in Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994), that retroactive civil legislation is constitutional if the legislative intent is clear and the change is procedural. The Landgraf Court explained the duty of judicial deference as follows: "legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments." Landgraf, 511 U.S. at 272. The Court explained that retroactive provisions "often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." Id. The Court went on to observe that "the constitutional impediments to retroactive civil legislation are now modest . . . . Requiring clear intent [of retroactive application] assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." Id. at 272-73.

Any presumptions against retroactivity can be readily overcome by express legislative intent. See Republic of Austria v. Altmann, 541 U.S. 677, 692-93 (2004); see also Landgraf, 511 U.S. at 267-68; Chase Sec. Corp. v. Donaldson, 325 U.S. at 311-12. The requirement of clear intent can be satisfied with express legislative language regarding retroactive application. "[T]he antiretroactivity presumption is just that - a presumption, rather than a constitutional command." Republic of Austria v. Altmann, 541 U.S. 677, 692-93 (2004) (declined to extend Hamdan v. Rumsfeld, 548 U.S. 557 (2006)); see also Landgraf, 511 U.S. at 267-68. When retroactive intent is clear, the anti-retroactivity presumption is overcome.[8]

B. A Time-limited Civil Revival Window Can Be Constitutional Under the Rhode Island Constitution

i. History of the Constitutionality of Revival of Time-Barred Claims

Historically, extending statutes of limitations to retroactively revive otherwise time-barred claims was deemed "wholly within legislative authority" and constitutional under Rhode Island law. See Dandeneau v. Board of Governors for Higher Educ., 491 A.2d 1011, 1012 (R.I. 1985), Twomey v. Carlton House of Providence, Inc., 113 R.I. 264, 271 (R.I. 1974), Spagnoulo v. Bisceglio, 473 A.2d 285 (R.I. 1984) (retroactive application of Uniform Law on Paternity did not deprive putative father of due process of law). "[T]here were no federal or state constitutional restraints on the Legislature's right to restore a remedy barred by the passage of time." Twomey 113 R.I. at 271. In Twomey, the Rhode Island Supreme Court upheld as constitutional an explicitly retroactive amendment to a statute of limitation that revived the remedy for a time-barred personal injury claim. See id. Similarly, the Rhode Island Supreme Court held in

[7] C.f., Stogner v. California, 539 U.S. 607, 610, 123 S. Ct. 2446, 2449 (2003) (retroactive application of a criminal statute of limitations to revive a previously time-barred prosecution violates the Ex Post Facto Clause of the United States Constitution).

[8] It is unconstitutional to revive a criminal law due to the Ex Post Facto clause. That issue is irrelevant to a civil window revival.

Dandeneau that it was constitutional for the General Assembly to retroactively amend the statute of limitation from two to three years and revive plaintiff's claim. Dandeneau, 491 A.2d at 1012.

In 1986, after Dandeneau and Twomey were decided, Rhode Island amended art. 1, sec. 2, of its Constitution and added a civil due process clause. R.I. Const. art. I, § 2. This procedural due process ensures that a person has "notice and an opportunity to be heard" before "any deprivation of . . . life, liberty, or property". Moreau v. Flanders, 15 A.3d 565, 588 (R.I. 2011) (on remand 2011 WL 2096508). Rhode Island's due process clause tracks the language of the Fourteenth Amendment almost word for word[9] and the due process analysis under both Constitutions has been, for the most part, "identical". Wyrostek v. Nash, 984 F.Supp.2d 22, 27 (D.R.I. 2013) (citing Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d 95, 101 (R.I. 1995)).

The Rhode Island Supreme Court, in a matter it deemed of "first impression" since the adoption of the due process amendment, answered a certified question asking whether the "State Constitution bars retroactive application of limitations-enlarging period for claims of childhood sexual abuse to claims already time barred under previously applicable statute of limitations." Kelly v. Marcantonio, 678 A.2d 873 (R.I. 1996). At issue in Kelly was whether a new law relating to victims of child sexual abuse which lengthened the limitation period from three to seven years and contained a discovery of injury rule which would toll statute of limitations until a victim discovered the injury was caused by the alleged act, could apply retroactively to revive previously time barred claims.[10] The Court explained that "the amendment to art. 1, sec. 2, precludes legislation with retroactive features permitting revival of an already time-barred action that would impinge upon a defendant's vested and substantive rights and would offend a defendant's art. 1, sec. 2, due process protections." Id. at 883. Without undertaking any further constitutional analysis, the Court held that "art. 1, sec. 2, in our State Constitution bars the retroactive application of § 9–1–51 to claims already time-barred." Id. at 884.

ii. Constitutional Law Post Kelly Would Not Bar a Time-limited Revival Window

What precedent Kelly set with regard to revival of expired claims via a retroactive statute of limitation, is not well settled, as there are no subsequent published cases in Rhode Island

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[9] Art. 1, § 2 of the Rhode Island Constitution provides, "[n]o person shall be deprived of life, liberty or property without due process of law", while the Fourteenth Amendment of the U.S. Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law". U.S. Const. amend. XIV, § 1; R.I. Const. art. I, § 2.

[10] "Section 9–1–51 reads in pertinent part as follows:
'(a) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within seven (7) years of the act alleged to have caused the injury or condition, or seven (7) years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act, whichever period expires later.
'(b) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents cause the injury complained of, but may compute the date of discovery from the date of the last act *by the same perpetrator* which is part of a common scheme or plan of sexual abuse or exploitation.
'* * *
'(e) As used in this section, "childhood sexual abuse" means any act committed by *the defendant* against a complainant who was less than eighteen (18) years of age at the time of the act and which act would have been a criminal violation of chapter 37 of title 11.' (Emphasis added.)"
Kelly v. Marcantonio, 678 A.2d 873, 875–76 (R.I. 1996).

addressing this particular issue or applying Kelly to any other SOL revival legislation.[11] While the Court subscribed to the theory that "the opportunity to defend on statute of limitations grounds is a vested right protected against legislative deprivation by due process concepts", it does not clarify whether there are limitations to that vested right or if it was absolute. Id. at 884. The Rhode Island Supreme Court has been critical of the "vested right" concept, saying it is "merely conclusory and disfavored when considering due process challenges". Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d at 103 (citing Raymond v. Jenard, 120 R.I. at 638 (quoting Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv.L.Rev. 692, 696 (1960) ("from an analysis of the cases it becomes apparent that it is impossible to reduce the potentially infinite variety of situations in which the problem of retroactivity can arise to a single common denominator"))). Instead the Court explains that it "has traditionally employed a balancing test in cases involving retroactive statutes in which the court weighs the public interest in retroactivity against the unfairness created." And further, that the "unfairness of a retroactive statute is 'measured best by the party's reliance on the preexisting state of the law.'" Rhode Island Depositors Economic Protection Corp., 659 A.2d 95, 101–04 (R.I. 1995) (quoting Brennan, 529 A.2d at 640).

Kelly should not be interpreted to make any legislation that retroactively amends a statute of limitations in a way that revives time barred claims per se invalid. The Kelly holding should be construed more narrowly to apply to the type of law at issue in that case - an amended SOL with no explicit retroactive or revival language - which can easily be distinguished from the retroactive laws considered by the Court in pre-Kelly cases that were held to be constitutional. In Twombey and Dandeneau, the statutory language included an explicit directive for retroactivity of the statute of limitation. See Dandeneau, 491 A.2d at 1012 (The Act was amended during pendency of the appeal to extend the limitations period to three years, and stated '[t]his act shall take effect upon passage and shall apply to all pending cases brought hereunder * * *.'); Twomey, 113 R.I. at 268 (The 1971 act "shall apply retroactively to those actions which had accrued less than two years prior to August 1, 1971".). Whereas the statute at issue in Kelly did not explicitly instruct that expired claims would be revived; in fact, the statutory text makes absolutely no mention of what claims – expired, pending or future – would be affected by the new statute of limitation.

Therefore, if a legislature enacts a time-limited "window", with explicit instructions that the window should temporarily revive the civil SOL for Rhode Island's child sexual abuse victims, the holding in Kelly should not render that revival unconstitutional. Further, the law at issue in Kelly would have had a very different effect than a time-limited revival window. When a revival window is enacted, plaintiffs are required to assert their previously time-barred claims within a set period of time after the revival legislation is enacted, and then those claims would expire again after the window closes. The revival is only temporary. The SOL in Kelly was not time-limited and could have revived decades old claims with its 7-year discovery rule, and those revived claims could have been asserted in Rhode Island courts at any future time as long as the injury was discovered within 7 years before asserting a claim. Further, when states have enacted window legislation for victims of childhood sexual abuse, the laws explicitly provide for the temporary

[11] But see, Theta Properties v. Ronci Realty Co., Inc., 814 A.2d 907, 916–17 (R.I. 2003). In Theta, the court relied on Kelly to rule that a "statute of repose", which is different than a "statute of limitation", could not be revived by an amended corporate dissolution statute.

revival of claims and the legislatures are clear in their intent to do so.[12] In Kelly, the statute made no mention of revival and there was no legislative intent to revive time-barred claims.

The Kelly holding should not be construed to bar any future revival legislation regardless of explicit statutory language, clear legislative intent, and compelling societal interests. Such a broad reading would eviscerate legislative authority and buck the national trend to find a retroactive procedural change in law, like temporary revival of a civil SOL to provide justice to victims of childhood sexual abuse constitutional. See, e.g., Peterson, 320 P.3d 1244 (Idaho 2014); Harding, 250 Kan. 655 (1992); Pryber, 98 Mich. App. 50 (1980); Cosgriffe, 864 P.2d 776 (Mont. 1993) (retroactive application of a revival window for a perpetrator of child sexual abuse does not violate due process); Panzino, 71 N.J. 298 (1976); Lane, 21 Wn. 2d 420 (1944); Vigil, 600 P.2d 721 (Wyo. 1979); see also Allstate, 376 Md. at 297 (finding that retroactive application of a statute did not violate Maryland law or divest the defendant of any vested rights).[13]

The introduction of a time-limited "window," reviving the civil SOL for Rhode Island's child victims would not violate Rhode Island's Constitution. Further, plaintiffs pursuing claims against their abusers must still meet all legal and other procedural safeguards. The retroactive application of a SOL merely serves, in these cases, as a practical and pragmatic device to aid the courts in the search for justice. Not only will temporary revival of the expired procedural statute of limitations not interfere with any vested rights, it will also provide much-needed closure to these victims who have been shut out of justice due to the arbitrary procedural deadline.

V. Even If A Court Were to Find That A Defendant Has A Due Process Right Attached to a Statute of Limitation, that Right Is Overcome by the State's Compelling Interest in Identifying Hidden Child Predators, Protecting Rhode Island's Children, and Giving Survivors Access to Justice

a. Rhode Island Has Compelling Interest in Protecting its Children from the Harm of Sexual Abuse

The state's compelling interest in protecting Rhode Island's children from harm, on

[12] See e.g., N.Y. C.P.L.R. 213-c (civil action for child sex abuse "is hereby revived" for one year); Haw. Rev. Stat. § 657-1.8 ("For a period of eight years after April 24, 2012, a victim of child sexual abuse that occurred in this State may file a claim in a circuit court of this State against the person who committed the act of sexual abuse if the victim is barred from filing a claim against the victim's abuser due to the expiration of the applicable civil statute of limitations that was in effect prior to April 24, 2012.).

[13] Many states hold that the retroactive expansion of an SOL to revive time-barred claims is in no way a violation of a defendant's due process rights, because there is no vested right in an SOL defense as a matter of law. See, e.g., Chevron Chemical Co. v. Superior Court, 131 Ariz. 431, 440 (1982) (explaining that the right to raise a one year SOL defense instead of a two year defense is not a vested property right garnering Fourteenth Amendment protections, "even if the result may be increased liability on the part of the defendant."); Peterson v. Peterson, 320 P.3d 1244, 1250 (Idaho 2014) (Determining that the shelter of an SOL is a matter of remedy and not a fundamental right; the lapse of an SOL does not endow citizens with vested property rights in immunity from suit . . . "Where a lapse of time has not invested a party with title to real or personal property, a state legislature may extend a lapsed statute of limitations without violating the fourteenth amendment, regardless of whether the effect is seen as creating or reviving a barred claim.") (internal citations omitted); Harding v. K.C. Wall Products, Inc., 250 Kan. 655, 668-69 (1992); Pryber v. Marriott Corp., 98 Mich. App. 50, 56-57, 296 N.W.2d 597 (1980), aff'd, 411 Mich. 887, 307 N.W.2d 333 (1981) (per curiam); Cosgriffe v. Cosgriffe, 864 P.2d 776, 779 (Mont. 1993) (explaining that due process is not violated by the retroactive application of a revival window for a perpetrator of child sexual abuse who has no vested interest in an SOL defense); Panzino v. Continental Can Co., 71 N.J. 298, 304-305, (1976); Lane v. Dept. of Labor & Indus., 21 Wn. 2d 420, 426, 151 P.2d 440 (1944); Vigil v. Tafoya, 600 P.2d 721, 724-25 (Wyo. 1979).

balance, outweighs any potential Due Process claim to a statute of limitation defense. This interest is well established in both federal and state laws and cases throughout this country and is sufficiently compelling. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (It is clear that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."); New York v. Ferber, 458 U.S. 747, 756–57 (1982) ("*First.* It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling."); Ashcroft v. Free Speech Coal, 535 U.S. 234, 263 (2002) (O'Connor, J., concurring) ("The Court has long recognized that the Government has a compelling interest in protecting our Nation's children."). "There is also no doubt that[] '[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.'" Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (citing Ashcroft, 535 U.S. at 244). It is also established that "a legislature may pass valid laws to protect children and other victims of sexual assault from abuse. See id., at 245; accord, Ferber, 458 U.S. at 757; Packingham, 137 S. Ct. at 1736 (internal citations omitted).

Rhode Island, along with many other states,[14] follows the Supreme Court in finding a compelling state interest in protecting children. See State v. Taylor, 562 A.2d 445, 454–55 (R.I. 1989) ("The protection of the psychological and physical well-being of minor children is a compelling and therefore also a legitimate state interest."). A '"state's role in protecting children may properly be preventive of harm as well as remedial."' In re Ephraim L., 862 A.2d 196, 200 (R.I. 2004) (quoting In re Lester, 417 A.2d 877, 881 (R.I.1980)). In Kelly, Justice Lederberg, in her dissent, recognized as an important policy consideration the deterrence of institutional behavior, which protects predator priests at the expense of children's safety. Kelly, 678 A.2d at 885 ("deter[ing] institutional behavior in which concern for self-preservation outweighs concern for the children placed under the supervision or authority of institutions" "constitutes a persuasive policy consideration that supports application of the discovery rule to suits against non-perpetrator defendants."). In another case involving clergy sexual abuse, the Superior Court recognized it "*must* exercise its common law jurisdiction to protect the interests of children within its jurisdiction" from a "knowing and deliberate course of conduct" by the "predator priests". Heroux v. Carpentier, 1998 WL 388298, at *10 (R.I.Super.1998). See also, Henry v. Earhart, 553 A.2d 124, 127–28 (R.I. 1989) ("Given the legitimate nationwide concern about child abuse and sexual abuse of children" a regulation providing for screening criminal records of child-care workers was constitutional.). Clearly, Rhode Island has a compelling interest in protecting its children from sexual abuse, and this interest weighs in favor of a narrowly tailored time-limited civil revival window that would expose hidden predators and prevent them from inflicting future harm on Rhode Island's children. Just as New York v. Ferber found in its unanimous decision, the state of Rhode Island's right in preventing sexual abuse of minors is a compelling "government objective of surpassing importance."

[14] See, e.g., In re S.K., 237 Md. App. 458, 469–70, cert. granted, 461 Md. 483 (2018) (explaining that the Supreme Court, Court of Appeals of Maryland, and the Court of Special Appeals of Maryland have all recognized the state interest in child protection). "The State unquestionably has a significant interest in protecting children." Outmezguine v. State, 335 Md. 20, 37 (1994). See also Blixt v. Blixt, 437 Mass. 649, 656 (2002) ("It cannot be disputed that the State has a compelling interest to protect children from actual or potential harm."); A.H. v. State, 949 So. 2d 234, 236 (Fla. Dist. Ct. App. 2007) (in assessing "whether the State has a compelling interest in regulating the sexual behavior of minors, this Court recognizes a compelling state interest in protecting children from sexual exploitation."); In re Dependency of I.J.S., 128 Wash. App. 108, 111 (2005) ("It is well-established that the State has a compelling interest to protect children from harm.").

b. Rhode Island Has a Compelling Interest in Providing a Remedy for Victims of Child Sexual Abuse

Rhode Island also has a compelling interest in granting a remedy to child sexual abuse victims who have not seen justice. This interest is codified in Article I § 5 of the Rhode Island Constitution which guarantees "[e]very person within this state ought to find a certain remedy, by having recourse to the laws for all injuries or wrongs which may be received in one's person." R.I. Const. Art. I § 5. While the constitutional right to a legal remedy for injury "is of course restricted by statutes of limitations", the "Court has long recognized" that the purpose of statutes of limitation which is to prevent unexpected stale claims "is not defeated by providing a 'reasonable opportunity to become cognizant of an injury and its cause before the statute of limitations begins to run.'" Kelly, 678 A.2d 873, 884 (R.I.,1996) (Lederberg, dissenting). Courts have recognized that a claim for injury should not expire before a victim is aware of the injury. Since many victims of child sex abuse do not disclose the abuse or appreciate their injury until well after the statute of limitations expired, opening a limited revival window would finally provide a remedy to their injuries, in line with Rhode Island's compelling state interest. Affording victims who have the courage to come forward a path to justice has the ancillary, and highly positive, societal effect of exposing hidden sexual predators, therefore making the children of Rhode Island considerably safer. The right for children to be safe is as fundamental as the right to access to justice, SOL reform legislation fosters both rights simultaneously. Rhode Island's compelling interest in exposing hidden child sexual predators is therefore buttressed by the basic fundamental need for justice.

VI. Window Legislation Identifies Hidden Predators, Prevents Future Abuse, and Validates the Victims

A revival window has been successfully implemented in several states:

- In California, a one-year window (2003) identified over 300 previously hidden child predators.
- In Delaware, window legislation exposed prolific abuser, pediatrician Earl Bradley, who alone had abused approximately 1,000.
- In Hawaii, a window exposed decades of sexual abuse of young boys by the school psychiatrist at the Kamehameha school; the school had been complicit in a decades-long cover-up.[15]
- In Minnesota, John Clark Donahue, co-founder of the Children's Theatre Company was exposed as a serial abuser;[16] further, the state's three-year revival window helped to identify over 125 child predators.

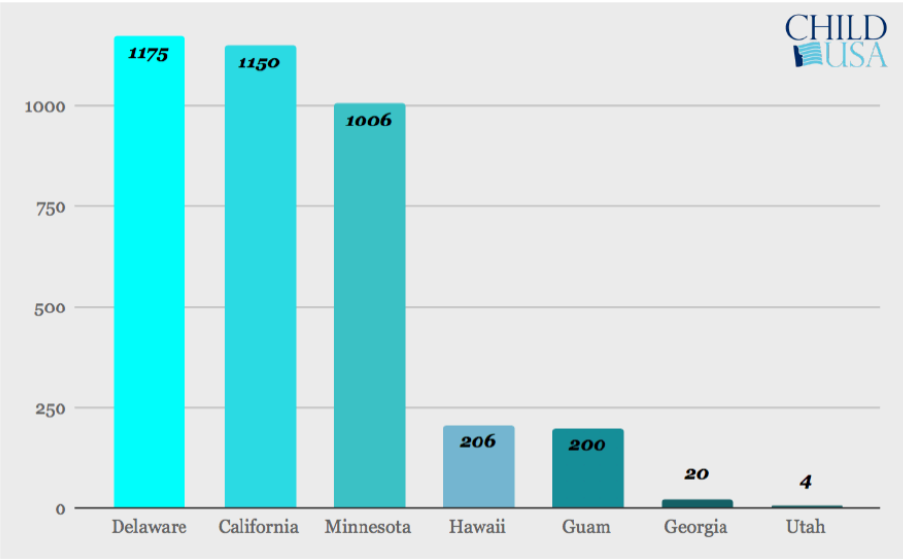
The identification of these and other perpetrators enabled parents to prevent their child's abuse. The windows to justice also identified institutions that have engrained practices allowing this abuse. In addition to validating victims of childhood sexual abuse, these windows show the deep importance of creating institutional liability for covering up child sex abuse. Not only does this liability force institutions and organizations to show how they have endangered children (in many

[15] https://www.grandforksherald.com/news/crime-and-courts/4404568-decades-monstrous-sexual-abuse-hawaiis-famous-kamehameha-school
[16] https://www.mprnews.org/story/2016/03/22/new-claim-80s-sex-abuse-at-mpls-childrens-theatre

instances by complicity in a cover up), it also incentivizes them to alter their practices to be more child protective.

The below chart shows the relative success of revival statutes by state. The number of cases is modest overall. Notably, in all of the states that opened windows to justice, no false claims have been reported in the courts.

Number of Lawsuits Filed when a Time-Limited Revival Window was Open



Increasing access to the civil justice system for survivors of child sexual abuse puts the public on notice about child sexual predators who would otherwise go under the radar. Arrests are only made in 29% of child sexual abuse cases, and for children under six, only 19% of sexual abuse incidents result in arrest.[17] This means that over two thirds of child sexual predators are never arrested, let alone convicted. In fact, the average predator will abuse between 50 to 150 children before he is ever arrested. A.C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, & OTHER SEX OFFENDERS (Basic Books, 2003).

Science shows that perpetrators operate into their elderly years, continuing to move through society with unfettered access to children. When considering that perpetrators continue to abuse later in life in light of the science of delayed disclosure, science establishes a need for lengthy statutes of limitation for child sex abuse and for those with expired claims to be revived. Permitting civil lawsuits through a time-limited revival window identifies hidden predators; by showing communities who the predators, children can better be kept safe from them. This helps both individual victims and society as a whole.

A time-limited revival window is narrowly tailored to the end of protecting Rhode Island's children from sexual abuse and validating victims of childhood sexual abuse.

[17] See H. N. Snyder, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics, U.S. DOJ, Bureau of Justice Statistics, https://www.bjs.gov/content/pub/pdf/saycrle.pdf; Darkness to Light, Child Sexual Abuse Statistics, 1, https://www.d2l.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf.

VII. A Time-limited Civil SOL Window Will Protect Rhode Island's Youth and Provide Long-Awaited Justice to Victims

A time-limited civil SOL revival window for victims of child sex abuse is the only way to provide justice for the victims of abuse in Rhode Island and to prevent future child sex abuse. With explicit revival instructions and clear legislative intent, it would be constitutional to amend Rhode Island's statutes of limitations for child sex abuse to include a temporary civil revival window under both Rhode Island and Federal Law. Such legislation is consistent with the national trend to give survivors access to justice.

The recent spate of child sex abuse scandals that have come to light (Pennsylvania's 2018 Grand Jury Report Exposing Large-scale Clergy Sex Abuse; USA Gymnastics Olympic Team Doctor, Larry Nassar; well-connected businessman, Jeffrey Epstein; Penn State Football Coach, Jerry Sandusky; Rockefeller University's Dr. Reginald Archibald; Musician, R. Kelly; and Bill Cosby—just to name a few) shows the ubiquity of child sex abuse in this country. Organizations with knowledge of abuse do not always employ the safeguards necessary to protect the children in their care; this can result in large-scale abuse. To prevent future abuse, institutions and other corporate entities should be held responsible for their role in enabling it.

For too long, victims of these predators and many others have been denied justice. The introduction of a time-limited revival window for Rhode Island's child victims will provide much-needed closure to these victims who have been shut out of justice due to a procedural deadline. It will identify hidden child predators still lurking in Rhode Island, which will in turn protect future generations of Rhode Island's youth.

CONCLUSION

The growing scientific research of delayed disclosure proves the compelling need for the Rhode Island legislature to revive expired civil statutes of limitation. Under Rhode Island law, statutes are presumptively constitutional and can be given retroactive effect. The purpose of SB 315 outweighs any due process challenge to the retroactivity as the revival window is consistent with the national trend to give survivors of child sexual abuse access to justice. Moreover, the time-limited civil revival is constitutional under both the United States Constitution and the Rhode Island Constitution and within legislative authority. Even under the Kelly case the court was not clear whether there were limitations to vested rights, or whether such rights could be trumped by a compelling interest asserted by the Rhode Island legislature, specifically protecting the children of Rhode Island from sexual predators. Moreover, unlike the Kelly case, the language bill SB 315 creates a "time-limited" window, with a very different effect. Even if a court were to determine that a defendant has a due process right attached to a statute of limitation that right is trumped by the state's compelling interest in exposing hidden child sexual predators and protecting the children of Rhode Island and affording survivors of child sexual abuse access to justice.