May 27, 2016

The Hon. Stewart J. Greenleaf
Senate Committee on the Judiciary
Pennsylvania General Assembly
19 East Wing
Main Capitol
Harrisburg, PA 17120-3012

Re: The unconstitutionality of Legislation Reviving Time-Barred Civil Claims for Childhood Sexual Abuse

Dear Chairman Greenleaf:

My name is Stephen L. Mikochik. I am an Emeritus Professor of Constitutional Law at Temple Law School in Philadelphia; a Visiting Professor of Jurisprudence at Ave Maria Law School in Florida; a former civil rights attorney with the U.S. Department of Justice; and a resident of Lancaster County, Pa.

I understand your committee is considering H.B.1947 which would extend the statute of limitations for civil claims of childhood sexual abuse. To the extent the bill would apply retroactively "to revive an action which was barred by a statute of limitations prior to [its] effective date [,]"[1] I respectfully submit such legislation would violate the Remedies Clause of the Commonwealth Constitution.

The Remedies Clause provides: "[E]very man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered

[1] H.B. 1947, § 4(3).

without sale, denial or delay."[2] The clause has no counterpart in the Federal Constitution, and the Pennsylvania Supreme Court has given "due course of law" an interpretation independent of "due process of Law:"

Although similar to the oft-used term "due process," the term "due course of law" has a distinct meaning in the Remedies Clause: The right to due process protects people against official deprivations of liberty or property by the state, except by "law of the land." By contrast, the right to "due course of law" provides an independent guarantee of legal remedies for private wrongs by one person against another, through the state's judicial system.[3]

The Remedies Clause protects "vested rights," that is, "[A] title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another."[4] To that end, our Supreme Court has construed the Clause to prohibit the legislature from retroactively eliminating an accrued cause of action.[5] As for when a claim accrues under the Remedies Clause, the Court has indicated that "the date the law is frozen for a case is the date the injury occurs, and thus the date the cause of action and the relevant defenses accrue."[6]

As the above language implies, the Remedies Clause protects defenses as well as causes of action. In that regard, the Supreme Court has "refused to apply retroactive legislation that reduces a defendant's defenses or 'exemptions from demands' based on the concept of a vested right [.]"[7]As the Court explained more than a century ago:

> A legal exemption from liability on a particular demand, constituting a complete defense to an action brought, stands on quite as high ground as a right of action. If the law of the case at the time when it became complete is such an inherent element in it that a plaintiff may claim it as a vested right, on what possible ground can it be held that a defendant has no vested right with respect to an exemption or defense?[8]

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[2] Pa. Const. Art. I, § 11.

[3] *Konidaris v. Portnoff* Law Assocs., 598 Pa. 55, 71 (Pa. 2008) (citation and internal quotations omitted).

[4] *Lewis v. Pennsylvania R.Co.*, 220 Pa. 317, 324 (Pa. 1908) (internal quotations omitted) (*quoted in Konidaris*, 598 Pa. at 74).

[5] See *Menges v. Dentler*, 33 Pa. 495, 498 (Pa. 1859) (*quoted in Konidaris*, 598 Pa. at 72-73). *See* also *Ieropoli v. AC&S Corp.*, 577 Pa. 138, 155-156 (Pa. 2004).

[6] *Konidaris*, 598 Pa. At 74.

[7] *id.* at 73.

[8] *Lewis*, 220 Pa. at 324. *In accord Konidaris*, 598 Pa. at 74; *Ieropoli, 577 Pa. at 151*. The Konidaris Court held that the appellants had failed to demonstrate "how their ... [position was] the same as an affirmative defense against an accrued cause of action," 598 Pa. at 75, implying that such defenses were protected under the Remedies Clause. The statute of limitations is such a defense. *See* Pa.R.C.P. 1030(a).

Notably, a "vested right with respect to an exemption or defense" can exist "even in the statute of limitations when the bar has attached[.]"[9] Thus, in a case where plaintiff unsuccessfully maintained that the discovery rule had extended the time for filing her claim of childhood sexual abuse, the Supreme Court further concluded that the provision tolling the statute of limitations for such claim during a plaintiff's minority "could not be applied retroactively to revive a claim that was otherwise time-barred by the statute in effect at the time of the injury."[10] Though the Court did not explain its reasoning, the conclusion it reached nonetheless conformed to its Remedies Clause jurisprudence. If a provision tolling the statute of limitations cannot apply retroactively, it follows that one extending or eliminating such limitation cannot apply retroactively as well.

Admittedly, in *Bible v. Department of Labor & Industry,* [11] the Supreme Court quoted language from *Agostin v. Pittsburg Steel Foundry Corporation,*[12] that "[n]o one has a vested right in a statute of limitations or other procedural matters. The legislature may at any time alter, amend or repeal such provisions without offending constitutional restraints."[13] As the Bible Court further recognized, however, *Agostin* went on to explain that "[s]o long as there is no omission of a remedy for the enforcement of a right for which a remedy existed when the right accrued, a want of **due process** is in no way involved [,]"[14] thus identifying Due Process, not the Remedies Clause, as the constitutional restraint at issue. Indeed, Neither the *Bible* nor the *Agostin* court even mentioned the Remedies Clause, relying variously on Section 9 and 17 of the Commonwealth Constitution and the Fourteenth Amendment of the Federal Constitution instead.[15]

I should note that the Remedies Clause analysis in Prof. Hamilton's letter to the General Assembly last year is seriously flawed. The Letter claims that the Remedies Clause "is a constitutional guarantee for plaintiffs and not defendants."[16] Though citing *Konidaris v. Portnoff*

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[9] *Lewis*, 220 Pa. at 324.

[10] *Dalrymple v. Brown*, 549 P. 217, 221 & n. 2 (Pa. 1997). *See also id.* At 222, n. 3("The minority tolling provision was not effective until 1984. It cannot revive a cause of action which accrued and expired prior to its effective date.").

[11] 548 Pa. 247 (Pa. 1997).

[12] 354 Pa. 543 (Pa. 1946).

[13] *Id.* At 549 (*quoted in Bible*, 548 Pa. at 252). As the Letter of Marci A. Hamilton to the Members of the Pennsylvania Assembly (Sept. 29) at 3 indicates, the Commonwealth Court's opinion in *McDonald v. Redevelopment Auth.*, 952 A.2d 713, 718 (Pa. Commw. Ct. 2008), *appeal denied,* 600 Pa. 772 (Pa. 2009), contains similar language. As in *Bible*, however, it did not rely on the Remedies Clause, not surprisingly since the case involved a public and not a private defendant. *Cf.* Hamilton Letter at 3 ("In *McDonald*, which involved statutes of limitations under eminent domain, the Court held that a retroactive change in the limitations period from five years to one did not violate the plaintiffs' due process rights.").

[14] *Agostin, 354 Pa.* At 549 (citations omitted & emphasis added) (*quoted in Bible*, 548 Pa. at 252).

[15]See Hamilton Letter, *supra* note 13, at 2 ("In *Bible*, the Court found that a retroactive application to workers' compensation claims did not violate due process.").

[16] *Id.* At 6.

Law Associates, Limited, [17]and *Ieropoli v. AC&S Corporation,* [18]the Hamilton Letter nowhere mentions that both cases reaffirm that part of the Supreme Court's holding[19] in *Lewis v. Pennsylvania Railroad Company,*[20] protecting exemptions and defenses under that provision as well.[21] The Letter, however, suggests that the relevant language in Lewis, quoted above,[22] refers to due process, rather than the Remedies Clause;[23] but the immediately preceding text makes plain the Court's intent to construe the latter: "[T]he law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the **due course of law** is violated."[24]

I should add that the Hamilton Letter's reliance on the U.S. Supreme Court's decision in Landgraf v. USI Film Products[25] is altogether misplaced.[26] The Court's dictum,[27] that, given clear intent, Congress had a relatively free hand under the Fifth Amendment Due Process Clause to apply procedures retroactively in civil cases, did not disturb the settled law that "every State had the sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the [F]ederal Constitution."[28] This is precisely what Pennsylvania has done in adopting the Remedies Clause as part of the Commonwealth Constitution.

As for the Hamilton Letter's argument that fairness demands revival of time-barred civil claims for childhood sexual abuse,[29] the U.S. Supreme Court answered a similar contention in rejecting California's attempt to revive time-barred criminal prosecutions for such abuse: [30]

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[17] 598 Pa. 55.
[18] 577 Pa. 138.
[19] Since the issue in *Lewis* was whether a subsequent statute could revive the defendant's liability, the Court's acknowledgement that exemptions and defenses, as well as causes of action, were protected under the Remedies Clause was part of the Court's holding, not dictum as the Hamilton Letter claimed. *See* Letter, *supra* note 13, at 7.
[20] 220 Pa. 317.
[21] *See supra* note 8 & accompanying text.
[22] *See id.*
[23] *See* Hamilton Letter, *supra* note 13, at 7.
[24] *Lewis*, 220 Pa. at 324. As the Hamilton Letter observes, supra note 13, at 7, *Lewis* was distinguished in *Konidaris,* 598 *Pa. at 76, but because appellants had failed to demonstrate "how* their ... [claim was] the same as *an affirmative* defense against an accrued cause of action [.]" *See id. at 75 (emphasis added).*
[25] 511 U.S. 244 (1994) (holding that, absent clear, contrary Congressional intent, retroactive application of amendment to Title VII allowing claims for money damages would violate the Fifth Amendment Due Process Clause).
[26] See Hamilton Letter, *supra* note 13, at 7.
[27] Since there was no clear congressional intent, the Court decided independently whether the presumption against retroactive legislation should apply. See Landgraf, 511 U.S. at 280. Thus, any discussion regarding the extent of Congress' power was dictum. Further, since the Court considered application of the amendment only to a case on appeal, it did not address the constitutionality of legislation, like H.B. 1942, reviving time-barred claims finally adjudicated.
[28] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (citation omitted). *See Commonwealth v. Molina,* 628 Pa. 465, 484 (Pa. 2014) ("[E]ach state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution."(citation and internal quotations omitted)).
[29] *See* Hamilton Letter, *supra note 13, at 5-6.*
[30] *Stogner v. California,* 539 U.S. 607 (2003) (holding revival of time-barred prosecution for childhood sexual abuse violated the state Ex Post Facto Clause of the U.S. Constitution).

[In arguing the fairness of reviving the time-barred prosecution against the accused for childhood sexual abuse,] the dissent ignores the potentially lengthy period of time (in this case, 22 years) during which the accused lacked notice that he might be prosecuted [for such abuse] and during which he was unaware, for example, of any need to preserve evidence of innocence. Memories fade, and witnesses can die or disappear. Such problems can plague child abuse cases, where recollection after so many years may be uncertain, and "recovered" memories faulty, but may nonetheless lead to prosecutions that destroy families.[31]

Such concerns increase for defendants in civil litigation where plaintiffs' burden of proof is merely preponderance of the evidence rather than proof beyond a reasonable doubt.

In closing, I agree that remedying the harm suffered by victims of childhood sexual abuse is an exceptionally laudable objective. But even the most compelling end cannot be furthered by an unconstitutional means. To the extent H.B. 1947 would revive time-barred civil claims for such abuse, it would, in my opinion, violate the Remedies Clause of the Commonwealth Constitution.

Respectfully submitted,

Stephen L. Mikochik

Stephen L. Mikochik
1025 Commons Circle
Naples, FL 34119
(239) 687-5395
Stephen.mikochik@temple.edu

cc. Members of the Senate Judiciary Committee.

[31] *Id.* At 631 (citations omitted).