

September 30, 2019

The Hon. Lisa Baker  
Senate Committee on the Judiciary  
Pennsylvania General Assembly  
19 East Wing Main Capital  
Harrisburg, Pa. 17120

Re: The constitutionality of H.B. 963, opening a 2-year window for claims of childhood sexual abuse.

Dear Chairwomen Baker:

My name is Stephen L. Mikochik. I am a professor emeritus of Constitutional Law at Temple University in Philadelphia; a visiting professor of Jurisprudence at Ave Maria Law School in Naples, Florida; and a resident of Lancaster County, Pennsylvania.

The Senate Judiciary Committee has invited me to testify about the constitutionality of pending legislation regarding the statute of limitations for claims of childhood sexual abuse. I was asked to comment specifically on Section 1 of H.B. 963 that would add a new subsection to the Remedies Clause, Article I, Section 11, of the Commonwealth Constitution, providing that “[a]n individual for whom a statutory limitations period has already expired shall have a period of two years from the time that this subsection becomes effective to commence an action arising from childhood sexual abuse[.]” To the extent H.B. 963 would revive time-barred claims against private parties, it could violate the Takings Clause of the Fifth Amendment to the Federal Constitution.

The Fifth Amendment provides in part that “private property [shall not] be taken for public use, without just compensation.” The Takings Clause is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

As a general matter, “state law defines property interests [protected under the Takings Clause.]” *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 707 (2010). Such property includes not only interests in real estate, but personal and intangible property as well. See *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2426-28 (2015). As the Supreme Court recognized in *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994), “[t]he Fifth Amendment’s Takings Clause prevents the Legislature ... from depriving private persons of vested property rights except for a ‘public use’ and upon payment of ‘just compensation.’”

As elaborated in the 2016 testimony I submitted to the Senate Judiciary Committee, the Remedies Clause prevents revival of time-barred civil claims and vests defendants with a property interest in the corresponding defense:

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."

Lewis v. Pennsylvania Railroad Co., 220 Pa. 317, 324 (Pa. 1908) (quoted in Konidaris v. Portnoj Law Associates, 598 Pa. 55, 74 (Pa. 2008)).

the Remedies Clause protects defenses as well as causes of action. In that regard, our 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 [.]" Konidaris, 598 Pa. At 73. 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? Lewis, 220 Pa. at 324.

Notably, a "vested right with respect to an exemption or defense" can exist "even in the statute of limitations when the bar has attached [.] *Id.* at 324. See Dalrymple v. Brown, 549 P. 217, 221 & n. 2 (Pa. 1997).

To trigger Fifth Amendment protection, a "taking" must also occur." It is a taking per se when the property owner "lose[s] the entire 'bundle' of property rights" associated with the property, as with a direct physical appropriation. See *Horne*, 135 S. Ct. at 2428. A "taking" Can also occur when government regulation places a restriction on the use of property that goes "too far." See *id.* at 2427. House Bill 963 would affect a per se taking as it would remove from defendants the entire bundle of rights, they have in their vested statute of limitations defense.

As for "public use," the Supreme Court has interpreted the condition as requiring some "public purpose," defining that term broadly to reflect the "longstanding policy of deference to legislative judgments in this field." *Kelo v. City of New London*, 545 U.S. 469, 480 (2005). That said, the Court is far more likely to decide, not that H.B. 963 would constitute a purely private taking "to benefit a particular class of identifiable individuals [.]" *id.* At 477, but rather has the compelling public purpose of providing remedies for victims of childhood sexual abuse. In the former case, the Fifth Amendment would prohibit the taking outright; in the latter, it would require compensation.

All victims of childhood sexual abuse deserve relief; but H.B. 963 is obviously not the way.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen L. Mikochik". The signature is written in a cursive, slightly slanted style.

Stephen L. Mikochik