IN THE SUPREME COURT OF MARYLAND

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

THE KEY SCHOOL, INCORPORATED, et al.
Appellants
v.
VALERIE BUNKER,
Appellee

CERTIFIED QUESTION OF LAW from the United States District Court for the District of Maryland, Civil Case Number 1:23-cv-02662-MJM (The Honorable Matthew J. Maddox)

Reg. No. 10, September Term, 2024
SCM-REG-0002-2024

BOARD OF EDUCATION OF HARFORD COUNTY

Appellant
v.
JOHN DOE,

Appellee

ON PETITION FOR WRIT OF CERTIORARI from the Circuit Court for Harford County, Civil Case Number C-12-CV-23-767 (The Honorable Alex M. Allman)

APPELLANTS' REPLY BRIEF

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REPLY ARGUMENT

The question before this Court is whether the CVA is unconstitutional as applied to the School Defendants because it revives claims that the Courts & Judicial Proceedings Article ("CJ") Section 5-117(d) (West 2017) had already extinguished. This Court should hold that Maryland's Constitution bars the revival of such claims.

Plaintiffs' contrary arguments conflict with Maryland's statutory-interpretation and vested-rights jurisprudence. First, while the text and structure of the 2017 law unambiguously reflect the intent to alter the preexisting "statute of limitations" *and* establish a new "statute of repose" in CJ § 5-117(d), Plaintiffs argue (at 31-34) that the Legislature did not intend to establish a statute of repose. Second, while this Court has explained that statutes of repose are "special statute[s]" that "create a substantive right protecting a defendant from liability after a legislatively-determined period of time," *Anderson v. United States*, 427 Md. 99, 118, 120 (2012), Plaintiffs argue (at 60) that statutes of repose are incapable of conferring vested rights at the expiration of the designated period. Third, while this Court has recognized that even "remedial and procedural statute[s] may not be applied retroactively if it will interfere with vested or substantive rights," *Doe v. Roe*, 419 Md. 687, 707 n. 19 (2011) (quotations omitted), Plaintiffs argue (at 54-60) that such

statements amount to meaningless dicta and ask this Court to resolve this appeal with a holding that would directly contradict such statements.

On the whole, Plaintiffs seem prepared to throw Maryland's statutory-interpretation and vested-rights jurisprudence into disarray to clear a path for resolving the present appeal in their favor. This Court must be more circumspect, as the ramifications extend far beyond the present appeal. *See Jacome De Espina v. Jackson*, 442 Md. 311, 317 (2015) ("In deciding this case, we must not succumb to the allure of bad facts for their tendency to create bad law."); *accord Mayor of Baltimore v. Whalen*, 395 Md. 154, 317 (2006) (cautioning that "hard cases . . . almost always make bad law; and hence it is, in the end, far better that the established rules of law should be strictly applied" (citations omitted)). In accordance with Maryland's unbroken history of protecting vested rights against retrospective legislation, this Court should reject Plaintiffs' arguments and hold that the CVA is unconstitutional as applied to the School Defendants under Article III, Section 40 of the Maryland Constitution and Article 24 of the Maryland Declaration of Rights.[1]

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[1] The "as applied" nature of the constitutionality challenge was made clear in the School Defendants' opening brief. (SDOB at 21). However, Plaintiffs nonetheless set forth (at 17) the standard for facial constitutionality challenges. To reiterate, the School Defendants are not arguing that the CVA is unconstitutional under every set of circumstances, but only *as applied* to the School Defendants here.

I.

THE RETROACTIVE REVIVAL OF CLAIMS THAT WERE EXTINGUISHED BY THE 2017 STATUTE OF REPOSE IMPERMISSIBLY ABROGATES VESTED RIGHTS.

The CVA is unconstitutional as applied to the School Defendants because CJ § 5-117(d) is a statute of repose, which conferred a substantive vested right in non-perpetrators to be free of liability for claims relating to child sexual abuse after the expiration of the 20-year repose period. (SDOB at 40). The CVA cannot be applied retroactively to revive claims that were previously extinguished by CJ § 5-117(d) because "[t]he Constitution of Maryland prohibits legislation which retroactively abrogates vested rights." *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 623 (2002).

The Plaintiffs respond in two ways. First, they counter-textually argue that CJ § 5-117(d) was not, in fact, a "statute of repose," but was rather a "statute of limitations." Second, they argue that, even if CJ § 5-117(d) were a statute of repose, it did not confer any vested rights until the Plaintiffs filed their claims in late 2023. Both arguments lack merit and should be rejected.

A. The plain language of CJ § 5-117(d) and its legislative history compels the conclusion that CJ § 5-117(d) was a statute of repose.

A threshold point of dispute in this appeal is whether CJ § 5-117(d) was intended to be a "statute of repose" or a "statute of limitations." As this Court explained in *Anderson*, although these two categories of statutes have

"overlapping features," a statute of repose is a "special statute with a different purpose and implementation than a statute of limitation." *Anderson*, 427 Md. at 118, 123. "The purpose of a statute of repose is to provide an absolute bar to an action or to provide a grant of immunity to a class of potential defendants after a designated time-period." *Id*. Statutes of limitations focus on providing fairness to defendants and encouraging the prompt resolution of claims, whereas "[s]tatutes of repose, on the other hand, *create a substantive right* protecting a defendant from liability after a legislatively-determined period of time." *Id*. at 120 (emphasis added).

In their brief, Plaintiffs argue (at 25) that the Legislature did not intend for CJ § 5-117(d) to be a statute of repose. That counter-textual position is untenable under the "cardinal rule" of statutory interpretation— which is "to ascertain and effectuate the General Assembly's purpose and intent when it enacted [CJ § 5-117(d)]." *Elsberry v. Stanley Martin Cos., LLC*, 482 Md. 159, 178 (2022) (quotation omitted).

1. The plain statutory language establishes that CJ § 5-117(d) is a statute of repose.

As countless Maryland cases have explained, the process of statutory interpretation always begins by "turn[ing] first to the words used by the [General Assembly], giving them their ordinary meaning." *Howling v. State*, 478 Md. 472, 498 (2022) (citations omitted). Plaintiffs nevertheless (at 31)

relegate the clearest expressions of legislative intent on this threshold question to a subheading at the end of their argument.

The prescribed order of operations is not an accident, nor is it optional. This Court begins by giving the actual words used by the Legislature their plain meaning because this Court "presume[s] that the General Assembly *meant what it said and said what it meant*." *State v. Krikstan*, 483 Md. 43, 65 (2023) (emphasis added; quotation omitted); *accord Duffy v. CBS Corp.*, 458 Md. 206, 229 (2018) (reiterating that "the best source of legislative intent is the statute's plain language") (quotation omitted). Accordingly, "[t]his Court need not resort to other rules of statutory construction when the plain language of the statute unambiguously communicates the intent of the General Assembly." *Elsberry*, 482 Md. at 179.

To be sure, even if the statutory language is clear and unambiguous, this Court may examine legislative history "to *confirm* its interpretation or to rule out another version of legislative intent alleged to be latent in the language.'" *Spiegel v. Bd. of Educ.*, 480 Md. 631, 639 (2022) (emphasis added; quotation omitted)). But the "resort to legislative history is a *confirmatory process*; it is not undertaken to seek contradiction of the plain meaning of the statute." *Duffy*, 458 Md. at 230 (emphasis added; quotation omitted). That is why it is critical to adhere to the order of operations—legislative history cannot serve

its proper function of *confirming* the Legislature's intent, as expressed through the statute's plain language, unless that intent is first identified.

As more fully set forth in School Defendants' opening brief, the Legislature was singularly direct in its intent that CJ § 5-117(d) operate as a statute of repose. It designated subsection (d) as a "statute of repose" explicitly, repeatedly, and consistently—and it expressly distinguished the statute of repose in subsection (d) from the "applicable period of limitations" under subsection (b). (SDOB at 23-29). Plaintiffs do not dispute that the 2017 law enumerated separate purposes of "altering the statute of limitations" and "establishing a statute of repose"—and, in fact, expanded the preexisting statute of limitations in CJ § 5-117(b) and created a wholly new CJ § 5-117(d). Nor do they dispute that the Legislature identified CJ § 5-117(d) as a "statute of repose," and directed that subsection (d) "shall be construed . . . to provide repose to defendants[.]" (E.075, 078, 083). The 2017 law's clear differentiation between statutes of repose and limitations reinforces that the Legislature understood the difference, and that it intended to "establish" a "statute of repose."

Instead, Plaintiffs (at 32) dismiss these clear expressions of legislative intent out of hand, declaring that the words amount to "a label, nothing more." That argument violates the "cardinal rule" of statutory interpretation. *Elsberry*, 482 Md. at 178. When the threshold question facing this Court is

whether CJ § 5-117(d) is a "statute of repose" or a "statute of limitations," the Legislature's explicit declaration of its intent that CJ § 5-117(d) is a statute of repose cannot be tossed aside just because the Plaintiffs wish it was otherwise.

Plaintiffs suggest that, in *Anderson*, this Court "cautioned against assigning too much significance to labeling, reminding readers that 'a rose by any other name' smells just as sweet." (Appellees' Br. at 32) (quoting *Anderson*, 427 Md. at 102)). But this Court was making precisely the opposite point and highlighting the importance of labels in this very context. This Court observed that, "for most plaintiffs . . . it would not matter whether we denominate [CJ § 5-109(a)(1)] a statute of limitation or a statute of repose," however, "*the label we shall place on the statute is more than an academic exercise*," because "if we declare § 5-109(a)(1) to be a statute of repose, application of its substantive provisions determine the timeliness of Anderson's action." *Anderson*, 427 Md. at 102-03 (emphasis added); *id.* at 103 (explaining that a statute of repose is substantive law for purposes of the Federal Tort Claims Act). This facet of *Anderson* only reinforces that the Legislature's designation of CJ § 5-117(d) as a "statute of repose" (five years after *Anderson* was issued) was a designation of substance and significance, and not just a meaningless label as Plaintiffs suggest.

The decision of the United States Supreme Court in *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014), which Plaintiffs cite numerous times (at 19, 27,

33), makes a similar point. There, the issue was whether a federal preemption statute that expressly applied to state statutes of limitations also preempted state statutes of repose. The Court observed that the preemption statute "uses the term 'statute of limitations' four times (not including the caption), but not the term 'statute of repose.'" *Waldburger*, 573 U.S. at 13. The Court deemed this "instructive" (*i.e.*, it indicated that state statutes of repose were not contemplated), but not "dispositive" because "Congress has used the term 'statute of limitations' when enacting statutes of repose," and indeed, "petitioner does not point out an example in which Congress has used the term 'statute of repose.'" *Id.*

The situation here is the reverse of the one in *Waldburger*. The Legislature not only designated CJ § 5-117(d) as a "statute of repose" (E.075), but also referred to the adjacent subsection as a "statute of limitations." (SDOB at 26; E.075). If subsection (d) were merely a non-perpetrator-only statute of limitations (Appellees' Br. at 35), the Legislature would not have designated subsection (d) "the statute of repose" or directed that it "provide[s] repose" as to claims already expired under the "applicable period of limitations." (E.78). Nor, as Plaintiffs suggest (at 31), was this merely an isolated "label appearing in the uncodified version of the law." The Legislature distinguished between limitations and repose in the purpose paragraph, altered the preexisting statute of limitations in subsection (b) and created the statute of repose under

new subsection (d), and provided instructions for applying those subsections in different sections of the law, §§ 2 and 3, respectively.

This distinct usage of "statute of repose" *and* "statute of limitations" leaves no room to reasonably argue that the designation of CJ § 5-117(d) as a statute of repose was "a label, nothing more." (Appellees' Br. at 32). Indeed, this legislation was enacted five years after this Court highlighted the distinct purposes of such statutes in *Anderson* and admonished they are not interchangeable. *See Park Plus, Inc. v. Palisades of Towson, LLC*, 478 Md. 35, 48 (2022) (the Legislature is presumed to have full knowledge of this Court's decisions). Plaintiffs' attempt to override the Legislature's clear expressions of intent should be rejected.

2. Section 5-117(d) contains structural features found in other statutes of repose, including statutes of repose for claims of childhood abuse.

Plaintiffs also argue (at 25-30), in effect, that even if the Legislature *did* intend for CJ § 5-117(d) to operate as a statute of repose, it should still be construed as statute of limitations because it does not exhibit various features commonly seen in statutes of repose. This argument is misguided for three reasons: (1) it misapprehends *Anderson*'s discussion of various features typical of statutes of repose; (2) it fails on its premise that CJ § 5-117(d) does not exhibit any such features; and (3) it would impose an unprecedented limit on the Legislature's basic lawmaking authority.

First, this Court's discussion of various features typical of statutes of repose was not a list of "necessary elements" (either individually or collectively) that an enacted law must exhibit before it will qualify as a statute of repose, especially where the Legislature has explicitly instructed that the law *is* a "statute of repose" and that it "shall be" construed to provide repose. (E.78, 83). Instead, that portion of the *Anderson* decision guides a court's holistic assessment of a statute when the legislative intent ("repose" or "limitation") is unclear—as was the case with CJ § 5-109(a)(1), the statute at issue in *Anderson*. That is not the situation here.

That said, and as more fully set forth in the School Defendants' opening brief, CJ § 5-117(d) does exhibit features typically seen in statutes of repose; namely: (1) it imposes an "absolute bar" by declaring that "in no event" may an action be filed against a non-perpetrator more than 20 years after the plaintiff reaches the age of majority; (2) the absolute bar only applies to a legislatively designated group, namely "a person or governmental entity that is not the alleged perpetrator"; (3) the statute reflects a legislative balancing of the interests of the general public against the rights of plaintiffs in that the statute of repose was enacted alongside a significant expansion of the previous limitations period; (4) the 20-year repose period is triggered by an event unrelated to the injury; and (5) once triggered, the statute does not indicate that the repose period is subject to tolling. (SDOB at 32-36).

a. CJ § 5-117(d) establishes an "absolute bar" to liability.

CJ § 5-117(d) creates an absolute bar to liability. That is evident for three reasons. First, unlike § 5-117(b), subsection (d) has no express tolling beyond the 20-year repose period. Second, § 5-117(b) is "subject to" § 5-117(d). And third, § 5-117(d) provides that "in no event" may an action be filed against a non-perpetrator defendant after the expiration of the repose period.

Plaintiffs assert that, "*Anderson*'s inquiry is not a magic-words exercise," and "*Anderson* [did not] mention the phrase 'in no event' as signifying anything one way or another." (Appellees' Br. at 34). School Defendants agree that this is not a "magic words" exercise. But under *Anderson*'s holistic inquiry, in which "the plain language of the statute controls," *Anderson*, 427 Md. at 125, the phrase "in no event" is indicative of an absolute bar. Indeed, the United States Supreme Court has held that a similar use of "in no event" language "admits of no exception and on its face creates a fixed bar against future liability," and thus is probative of a statute of repose. *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 505 (2017).

Although the Plaintiffs suggest (at 35) that there are other "plausible" interpretations, interpreting "in no event" as establishing an absolute bar is consistent with "'the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute.'" *State v. Johnson*, 415 Md. 413, 421 (2010). CJ § 5-117(b), including

its express tolling provision in cases of conviction, is "subject to" § 5-117(d). And when § 5-117(d) provides that "[i]n no event" shall an action be filed against a non-perpetrator after the 20-year period, it establishes an absolute bar beyond which no tolling may occur. That "outer bound of liability" is consistent with the core purpose of statutes of repose. And, of course, interpreting "in no event" as establishing an absolute bar is consistent with the Legislature's designation of CJ § 5-117(d) as a "statute of repose" that "shall be construed to provide repose[.]" (E.075, 078, 083).

b. CJ § 5-117(d)'s absolute bar to liability only applies to a legislatively-designated group.

Plaintiffs acknowledge that CJ § 5-117(d) applies only to a legislatively-designated group, which is a typical feature of statutes of repose. Because statutes of repose are "defendant-focused," *Duffy*, 458 Md. at 224, and confer substantive rights, it is important to designate the specific group of defendants who will receive those rights. Plaintiffs nevertheless argue (at 31) that this feature should be disregarded, asserting that the true "question is whether [the Legislature] intended for public policy reasons to permanently shelter those defendants from suit" after the expiration of the repose period. Plaintiffs suggest that the legislative history does not reflect discussion of any "supposed upside" of providing repose to non-perpetrator defendants. This argument should be rejected for three reasons.

First, the Legislature's designation of only *non*-perpetrators as entitled to repose at the expiration of the 20-year period shows it made a public-policy determination to provide a greater protection to entities that employed alleged abusers, such as public and private schools. This is a sharp distinction from CJ § 5-109(a), the statute at issue in *Anderson*, which establishes the statute of limitations period for the *entire universe* of potential defendants with respect to medical malpractice actions—not only individual providers such as physicians or nurses, but also the hospitals or other institutions that employ them.

Second, Plaintiffs cannot invoke legislative history as means of "seek[ing] contradiction of the plain meaning of the statute." *Duffy*, 458 Md. at 230. There is no requirement that the Legislature stage a discussion of the policy implications of a statute of repose—those implications are evident from the enacted text.

Third, legislative history materials confirm that the Legislature *did* balance the respective rights of plaintiffs and non-perpetrator defendants. Most changes favored plaintiffs: (1) the limitations period was nearly tripled in length, and (2) amendments to the bill *lowered* the evidentiary bar for plaintiffs by removing the need to show that non-perpetrator defendants had "actual knowledge" of abuse. (E.077, 082). But, given the significant expansion of the general limitations period, some legislators raised fairness concerns in

terms of confronting stale claims. *See* S. Jud. Proc. Comm. Hearing, 437th Gen. Assemb., 51:10-1:01:55 (Feb. 14, 2017). Ultimately, the bill's lead sponsor committed, as part of the legislative "give-and-take" over the amendments, that he "[would not] come back to the well" and "[would not] try and quote-unquote improve the bill, and I will take it as it is." *See* H. Jud. Comm. Hearing, 437 Gen. Assemb., Sess. 1, at 37:28-38:28 (Mar. 15, 2017). That commitment to finality was embodied in the statute of repose established by § 5-117(d).

c. CJ § 5-117(d) is triggered by an event unrelated to the injury, and once triggered, is not subject to tolling.

Plaintiffs also argue (at 25-30) that CJ § 5-117(d) is not a statute of repose because (1) its "trigger" runs from the date of the injury and (2) it is subject to minority tolling. Neither of these arguments withstands scrutiny.

By its plain terms, the 20-year repose period under CJ § 5-117(d) is triggered by the plaintiff reaching the age of majority, which is an event that is unrelated to an injury. And once triggered, subsection (d) does not indicate that the repose period is subject to tolling for any reason.

Moreover, Plaintiffs' argument that CJ § 5-117(d) is a statute of limitations because it is triggered when the plaintiff reaches the age of majority, if accepted, would place an unprecedented and substantial limit on the Legislature's law-making authority. In many contexts—construction defects, for example—the injury may be latent and manifest well after the date

of the defendant's last culpable act. In such cases, statutes of repose are commonly tied to the defendant's conduct to avoid extended exposure and to impose an exact cut-off to liability. *See Anderson*, 427 Md. at 125-26; *Waldburger*, 573 U.S. at 8. In sexual abuse cases, however, Plaintiffs concede (at 28) that the two dates are the same: the date of the injury is also the date of the defendant's last culpable act. *See also Doe v. Archdiocese of Wash*, 114 Md. App. 169, 180-81 (1997).

Under Plaintiffs' argument, it is unclear how the Legislature could *ever* enact a statute of repose for claims relating to injuries that occurred when the plaintiff was a minor. This Court should decline to hold, in effect, that it is impossible to enact such a statute—particularly when Illinois and South Dakota have enacted statutes of repose applicable to claims of childhood sexual abuse that similarly trigger the repose period on the plaintiff reaching a certain age. (SDOB at 35-36).

d. <u>The capacity to extinguish unaccrued claims is not dispositive as to whether CJ § 5-117(d) is a statute of repose.</u>

Finally, Plaintiffs argue (at 27-28) that CJ § 5-117(d) is not a statute of repose because CJ § 5-117(d) "could never operate to extinguish such a claim [*i.e.*, a claim relating to child sexual abuse] before it accrued[.]" This argument again fails to recognize that the various features discussed in *Anderson* were not identified as essential elements of a statute of repose—this Court noted

that statutes of limitations and repose have "overlapping" features, and gave an example of a North Dakota statute with an express tolling provision that was still a statute of repose. 427 Md. at 123. The absence of this, or any other feature discussed in *Anderson*, does not dictate that a court must construe the statute as a statute of limitations, especially when (as here) doing so would override an express legislative directive to the contrary.

In any event, CJ § 5-117(d) *would* extinguish a claim that had not yet accrued in some circumstances—for example, in a case of fraudulent concealment. While that doctrine is inapplicable in the present cases (*see* SDOB at 59), to the extent that fraudulent concealment would delay accrual of a claim relating to childhood sexual abuse in other circumstances, the statute of repose would still bar the claim once the plaintiff is 38 years old.

In sum, this Court should reject Plaintiffs' argument that the designation of CJ § 5-117(d) as a "statute of repose" was a meaningless label, or that CJ § 5-117(d) should be construed as a statute of limitations anyway because it does not exhibit some or all of the various features discussed in *Anderson*. Instead, this Court should adhere to the fundamental maxim that the Legislature "meant what it said and said what it meant," *Krikstan*, 483 Md. at 65 (quotation omitted), and hold that CJ § 5-117(d) was a statute of repose, as the plain statutory language and structure of the 2017 law unambiguously require.

3. The legislative history confirms that CJ § 5-117(d) was intended to be a statute of repose.

Plaintiffs suggest that legislative history associated with CJ § 5-117(d) leads to a contrary conclusion. They argue (at 9, 36-38) that the Legislature's intent when *introducing the original* 2017 bills was "to modify the prior statute of limitations to give survivors of child sexual abuse more time to pursue legal action." Plaintiffs acknowledge the later amendments to the 2017 law adding a "statute of repose" but brush them aside as changes that "slid into" the legislation at the "last-minute," which "many of the 2017 legislators" later claimed that they did not actually intend to enact. *Id.* This selective approach to reviewing legislative history is contrary to precedent—and, in any event, a more holistic view of the history tells a very different story.

a. First and foremost, Plaintiffs' impermissibly attempt to leverage legislative history "to seek contradiction of the plain meaning of the statute." *Duffy*, 458 Md. at 230 (quotation omitted). Indeed, if legislative history cannot be used to contradict a statute's plain meaning, *post*-passage commentary by individual legislators certainly cannot be used for that purpose. *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (observing "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage").

b. Moreover, the suggestion (at 9, 37) that the statute of repose provisions "slid into" the 2017 legislation at the "last-minute" is factually inaccurate. The amendments pertaining to the statute of repose were introduced on March 9, 2017. (Rep.App. 001-006). The final vote on the legislation did not take place until almost a month later, on April 4, 2017. *See* H. Floor Actions, S.B. 505, 437th Gen. Assemb., Reg. Sess., 1:25:29-1:25:54 (April 4, 2017). During that time, the amended bill, reflecting the statute of repose provisions, was the subject of multiple readings, discussions, or votes in the Senate on March 14, March 15, March 23, March 24,[2] and in the House on March 16, March 17, and April 4.[3] On March 24, Senator Miller thanked his chief of staff for her contributions to the language of the bill, including her having "looked at all fifty states." S. Floor Actions, H.B. 642, 437th Gen. Assemb., Reg. Sess., 1:01:18-1:03:00 (Mar. 24, 2017).[4]

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[2] *See* S. Floor Actions, S.B. 505, 437th Gen. Assemb., Reg. Sess., 15:55-17:31 (Mar. 14, 2017); *id*. 2:06:55-2:07:19 (Mar. 15, 2017); *id*. H.B. 642, 437th Gen. Assemb., Reg. Sess., 2:16:32-2:17:48 (Mar. 23, 2017); *id*. 1:01:18-1:03:00 (Mar. 24, 2017).

[3] *See* H. Floor Actions, H.B. 642, 437th Gen. Assemb., Reg. Sess., 57:10-58:41 (Mar. 16, 2017); *id*. 7:07-9:12 (Mar. 17, 2017); *id.* S.B. 505, 437th Gen. Assemb., Reg. Sess., 1:25:30 – 1:25:55 (Apr. 4, 2017).

[4] This reference to a fifty-state survey undercuts Plaintiffs' suggestion (at 39-40 n.10) that the Legislature failed to consider statutes of repose from other states (Illinois and South Dakota) that are similar to CJ § 5-117(d).

c. Nor can it be said, as Plaintiffs contend (at 9, 38), that the amendment adding the statute of repose was merely "technical." Floor readings distinguished between "amendment one . . . [which] makes technical changes" and "amendment two [which] [ ] prohibits filing an action against [ ] [non-perpetrators] more than twenty years after the victim reaches the age of majority." S. Floor Actions, S.B. 505, 437th Gen. Assemb., Reg. Sess., 15:20-17:05 (March 14, 2017); H. Floor Actions, H.B. 642, 437th Gen. Assem., Reg. Sess. 57:10-58:41 (Mar. 16, 2017). The dual purpose of the 2017 legislation was also set out in the House and Senate floor reports, as well as the Fiscal and Policy Note, all of which stated the legislation "creates" and/or "establishes" a statute of repose, and presented the creation of the statute of repose as distinct from the expansion of the statute of limitations. (E.131-32, 136-7, 141-42).

d. The bill file reflects additional consideration of the effect of repose. Contrary to Plaintiffs' suggestion (at 40-41), *Discussion of certain amendments in SB0505* (E.149-50), is wholly consistent with the text, legislative record, and the clear description of a statute of repose given in *Anderson*. SDOB 13, 31-32. If (as this Court has recognized), an undated document of unknown authorship in a bill file can be used to supply an element of a criminal offense, *see Warfield v. State*, 315 Md. 474, 497 (1989), then *Discussion of certain amendments in SB0505* in this bill file is just as useful to *confirm* legislative intent for CJ § 5-117(d).

e. The Court should also reject Plaintiffs' suggestion (at 8) that the "compromise" underlying the 2017 legislation consisted only of (1) expanding the limitations period from seven years to twenty years while also (2) "raising the bar" for damages. That suggestion is belied by the evolution of the language in the 2017 legislation. As originally proposed, the 2017 legislation would have required plaintiffs to show that a non-perpetrator defendant had "actual knowledge of a previous incident or incidents of sexual abuse" *and* "negligently failed to prevent the . . . sexual abuse that form[ed] the basis of the action." (Archdiocese of Washington Br., App. 32, 36). The enacted version of the 2017 legislation *lowered* the scienter requirement from "actual knowledge" to "gross negligence," thus making it easier for plaintiffs to prevail, but *added* subsection (d) to provide repose to non-perpetrator defendants after the expiration of a 20-year repose period. (E.109). This evolution is consistent with a balancing of the interests at stake, by expanding plaintiffs' ability to pursue their claims, while eventually granting repose to non-perpetrators after a legislatively determined period of time.

The legislative history of CJ § 5-117(d) confirms, consistent with the statute's plain meaning, that it is a statute of repose. This Court should reject Plaintiffs' effort to leverage the legislative history to contradict the plain meaning of the statutory language.

B. Statutes of repose confer a substantive right to be free from liability which vests at the expiration of the repose period and cannot be retroactively abrogated.

Plaintiffs contend that, even if CJ § 5-117(d) is a statute of repose, it was incapable of conferring vested rights protected by Maryland's Constitution. None of the arguments advanced in support of this contention have merit, and endorsing the Plaintiffs' position would sow significant confusion into Maryland's vested-rights jurisprudence.

1. The substantive right of repose vested in School Defendants upon the expiration of the repose period, before suit was filed, and cannot be retroactively abrogated.

Plaintiffs' primary argument in support of this contention is that "an *inchoate* substantive right cannot vest when it *remains contingent on the filing of a subsequent suit*." (Appellees' Br. at 60-61) (Emphasis added). This argument misapprehends the quintessential function of a statute of repose, which is to provide "an absolute time bar" and "a substantive right protecting a defendant from liability after a legislatively-determined period of time." *Anderson*, 427 Md. at 118, 121. If the expiration of the repose period did not confer a vested right to be free from liability, it would negate the fundamental purpose of a statute of repose.

Plaintiffs' position in this regard is contrary to well-established law. It is widely held that the substantive right conferred by a statute of repose does not vest with, and is not contingent on, the filing of a lawsuit; rather, it vests at

the expiration of the repose period. *See SEPTA v. Orrstown Fin. Servs.*, 12 F.4th 337, 351 (3rd Cir. 2021) (statutes of repose "creat[e] a vested right to repose" on "expiration of the repose period"); *Fencorp v. Ohio Ky. Oil Corp.*, 675 F.3d 933, 940 (6th Cir. 2012) (holding similarly and collecting cases). Indeed, Plaintiffs cite no authority for their contrary position.

As it is undisputed that the 20-year repose period of CJ § 5-117(d) expired as to each Plaintiff's claim before the enactment of the CVA, the School Defendants had a vested right to be free of liability well before the filing of the present lawsuits. Applying the holding in *Dua*, that right to repose, once vested, cannot be retroactively abrogated. 370 Md.at 625.

Abundant authority supports this conclusion. This Court's recognition that statutes of repose "create a substantive right protecting a defendant from liability after a legislatively-determined period of time," *Anderson*, 427 Md. at 121, comports with how statutes of repose are understood in other jurisdictions that, like Maryland, have maintained a strict prohibition against legislation that retroactively abrogates vested rights. *Dua*, 370 Md. at 625. School Defendants cited several decisions illustrating this common understanding in their opening brief, including decisions that involved legislative attempts to revive abuse claims extinguished by statutes of repose (SDOB at 46-47), as well

as statutes of repose in other contexts. (*Id.* at 46-52).[5] All reached the same conclusion: the legislative revival of claims previously extinguished by a statute of repose impermissibly abrogates vested rights as a matter of state constitutional law.

Plaintiffs provide no sound reason for ignoring these decisions. They dismiss (at 66-67) the decisions as out-of-state, and thus non-binding. But these cases were cited as persuasive authority to illustrate how other states, with similarly protective stances on vested rights, have consistently resolved the same question that confronts this Court in this case. *See Huffman v. State*, 356 Md. 622, 633 (1999) ("Undoubtedly, in the past, we have used the reasoning of out-of-state cases interpreting similarly worded statutes as persuasive authority."). That is consistent with the approach in *Anderson*, where this Court carefully parsed the law of other jurisdictions to identify common features of a statute of repose. *Anderson*, 427 Md. at 118-22.

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[5] *See e.g. Anderson v. Catholic Bishop of Chi.*, 759 F.3d 645, 648 (7th Cir. 2014); *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997); *Doe v. Propravak*, 421 P.3d 760, 766-67 (Kan. Ct. App. 2017); *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 968 (Kan. 1992); *Firestone Tire & Rubber Co. v. Acosta Walker v. Miller Elec. Mfg. Co.*, 591 So.2d 242, 243 (Fla. Dist. Ct. App. 1991); *S. States Chem. v. Tampa Tank & Welding, Inc.*, 888 S.E.2d 553, 564 (Ga. 2023); *Colony Hill Condo. I Asso. v. Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984); *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 773 (Neb. 1991); *City of Warren v. Workers' Comp. Appeal Bd.*, 156 A.3d 371, 379 (Pa. Commw. Ct. 2017).

Second, Plaintiffs' suggestion (at 66) that those cases hinged on a "legal tradition in those States finding that the retroactive revival of a time-barred claim violated vested rights," but "Maryland lacks any such tradition," is flawed because Maryland cases *have* recognized a constitutional barrier to legislatively reviving time-barred claims. *See e.g.*, *Dua*, 370 Md. at 633 ("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."); *Doe*, 419 Md. at 705 n.18 ("In the present case, we hold the extended limitations period does not interfere with vested or substantive rights, as it is well established that an individual does not have a vested right to be free from suit . . . until the statute of limitations for that violation has expired." (cleaned up)). This is consistent with Maryland's well-established tradition of going further than most states in recognizing and strictly protecting vested rights. *See* 2 Norman Singer & Shambie Singer, Sutherland Statutory Construction § 41:4 (8th ed. 2023 update) (contrasting Maryland's firm standard for vested rights with the "more flexible approach" taken in Texas and some other states).

It is true that Maryland case law addressing legislative attempts to revive claims extinguished by a statute of repose is very limited. But the *only* Maryland decision to do so held that retroactively applying the asbestos exception to Maryland's real property improvement statute of repose (CJ § 5-

108), so as to revive claims that were extinguished prior to the effective date of the exception, impermissibly abrogated vested rights in violation of the Maryland Constitution. *Duffy v. CBS Corp*., 232 Md. App. 602, 622-23 (2017), *rev'd on other grounds*, 458 Md. 206 (2018).

Plaintiffs assert (at 66) that the Appellate Court's decision in *Duffy* "carries no precedential value, as this Court reversed," and cite *Balducci v. Eberly*, 304 Md. 664, 671 n.8 (1985) for the proposition that "a general and unqualified reversal" leaves the case as if the judgment was never rendered. But this Court did not issue a "general and unqualified reversal" in *Duffy*. This Court reversed only as to its conclusion that the date of the "injury" was the date of the diagnosis in 2013; this Court held that the operative date of the "injury" was the date of the last possible exposure to asbestos on June 28, 1970. *Duffy*, 458 Md. at 222, 236. Accordingly, this Court held that because the "injury" occurred before the effective date of the statute of repose (June 30, 1970), the statute of repose did not apply at all. *Id*. at 236. This Court confirmed that it was not addressing the other questions presented—including the question whether the amendment retroactively abrogated a vested right. *Id*. at 217. Lest there be any doubt, this Court did not hold that the 1991

asbestos exception could apply retroactively to revive extinguished claims without abrogating vested rights in violation of the Maryland Constitution.[6]

The Appellate Court's decision in *Duffy* thus retains its status as persuasive Maryland authority for the proposition that reviving claims that have been extinguished by a statute of repose constitutes an impermissible abrogation of vested rights. *West v. State*, 369 Md. 150, 157 (2002) (a decision of the Appellate Court "which is reversed or vacated in its entirety by this Court on another ground, may, depending on the strength of its reasoning, constitute some persuasive authority in the same sense as other dicta may constitute persuasive authority").

The Appellate Court's analysis in *Duffy* is persuasive, and should be followed here. The court relied on and applied *Dua*'s holding that retroactive legislative that impairs vested rights is unconstitutional, and its statement

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[6] Plaintiffs cite a 1990 letter written by Assistant Attorney General Kathryn Rowe regarding the asbestos exception, which stated that "'[t]he statute of repose may be altered retroactively without violating due process[.]'" (Appellees' Br. at 65). In 2023, the same Assistant Attorney General concluded that because CJ § 5-117(d) is a statute of repose legislation reviving extinguished claims "would most likely be found unconstitutional as interfering with vested rights as applied to cases that were covered by CJ § 5-117(d)[.]" (E.156-57; emphasis added). *See also* Letter from Anthony G. Brown, Att'y Gen., to Hon. William C. Smith, Jr. (Feb. 22, 2023), at 3 (E.170) (acknowledging that, "[i]n the 23 [sic] years since [the 1990] letter was written," "Maryland case law on vested rights has developed," and "retrospective application of a limitations period may impair a vested right in some circumstances").

that "[o]ne such vested right is the right not to be sued on 'a cause of action that was otherwise barred.'" *Duffy*, 232 Md. App. at 623 (quoting *Dua*, 370 Md. at 627). Plaintiffs attack that as mere *dicta* with no viable supporting Maryland authority. (Appellees' Br. at 56-59). Not so. *Dua*'s ban on the retroactive revival of claims was central to the reasoning in the case. "[W]hen a question of law is raised properly by the issues in a case and the Court supplies a deliberate expression of its opinion upon that question, such opinion is not to be regarded as *obiter dictum*, although the final judgment may be rooted in another point in the record." *Schmidt v. Prince George's Hosp.*, 366 Md. 535, 551 (2001). *Dua* plainly furnishes such a "deliberate expression" of this Court's opinion.

Further, *Dua* relied on *Smith v. Westinghouse*, 266 Md. 52 (1972), where this Court refused to revive a time-barred claim on due-process grounds. *Dua* read *Smith* this way: a "statute, which retroactively created a cause of action, *resulting in reviving a cause of action that was otherwise barred*, was held to deprive the defendant of property rights in violation of Article 24 of the Declaration of Rights." *Dua*, 370 Md. at 627 (emphasis added).

Thus, while *Smith* involved the wrongful death statute, for which the statute of limitations is a condition precedent, *Dua* read the case as applying more broadly. But even if Plaintiffs were correct in arguing (at 56-57) that *Smith's* reasoning only extends to conditions precedent, *Smith* would still

require § 5-117(d) be read as conferring vested rights to School Defendants. Conditions precedent are "substantive"—just like statutes of repose. *Compare Univ. of Md. Med. Sys. Corp. v. Muti*, 424 Md. 674, 686 (2012) (a condition precedent is a "substantive provision") with *Anderson*, 427 Md. at 120 (statute of repose creates a "substantive right"). And courts have recognized that a "statute of repose . . . acts as a condition precedent to the action itself." *Bryant v. United States*, 768 F.3d 1378, 1383 (11th Cir. 2014).

The persuasive value of the Appellate Court's decision in *Duffy* (*i.e.*, that reviving claims extinguished by a statute of repose is an abrogation of vested rights impermissible under the Maryland Constitution) is further reinforced by the same conclusions in other jurisdictions that adhere to a similarly protective stance on vested rights. *See supra* at 23, n.5. Plaintiffs do not cite any decision from Maryland, or any jurisdiction with a similarly protective stance on vested rights, holding that a statute of repose *does not* confer a substantive vested right to be free from liability at the expiration of the repose period. The one case they do cite, *Dekker/Perich/Sabatini Ltd. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 495 P.3d 519 (Nev. 2021), upheld retroactive abrogation of a statute of repose under a rational-basis standard, *id.* at 525-26, a standard that this Court expressly rejected in *Dua*. 370 Md. at 623 ("The state constitutional standard for determining the validity of retroactive civil

legislation is whether vested rights are impaired and *not* whether the statute has a rational basis.") (emphasis in *Dua*).

Instead, Plaintiffs rely primarily on *Allstate Ins. Co. v. Kim*, 376 Md. 276 (2003), which did not involve a statute of repose or statute of limitations. Rather, *Allstate* concerned the abrogation of a common-law immunity that this Court adopted in 1930, precluding lawsuits between parents and their children in connection with an automobile accident. *Id.* at 281. This Court held that retroactively abrogating that immunity did not violate any vested rights held by the automobile insurer, citing two out-of-state cases upholding legislation that retroactively abrogated the common law defense of contributory negligence. *Id.* at 297-98 (citing *Hall v. A.N.R. Freight Sys.*, 717 P.2d 434 (Ariz. 1986), and *Godfrey v. State*, 530 P.2d 630, 632 (Wash. 1975)).

In *Allstate*, this Court did not articulate a broad rule applicable to all assertions of immunities, and did not say *anything* about statutes of repose, let alone that they "are not favored in the law." (Appellees' Br. at 62). To the contrary, *Allstate* reiterated this Court's holding in *Dua* that the retroactive revival of barred claims would "violat[e] the vested right of the defendant." 376 Md. at 296.

Thus, *Allstate* is readily distinguishable from this case, which involves a duly enacted statute of repose. *Anderson* held that a statute of repose creates an "absolute time bar, after which liability no longer exists." 427 Md. at 121,

125-26; *cf.* Appellees' Br. at 63 (erroneously arguing statutes of repose do not create an "absolute" right). The right conferred on a defendant at the expiration of the time period set by a statute of repose is thus "something more than a mere expectation"—a trait that was not shared by the common-law immunity addressed in *Allstate*. This Court should reject the invitation to eviscerate the meaning of statutes of repose in Maryland.[7]

2. The Court cannot nullify the vested right conferred by § 5-117(d) based on notions of "law and justice."

Aside from their categorical attack on statutes of repose generally, Plaintiffs argue (at 47, 51-52, 61), that CJ § 5-117(d) cannot confer any substantive vested right because immunizing non-perpetrator defendants from liability after the expiration of the 20-year repose period "would be contrary to law and justice." This theory is unavailing, as this Court squarely held in *Dua* that "the General Assembly's view 'of right or justice' will not validate retroactive abrogations of vested rights." *Dua*, 370 Md. at 624.

The cases Plaintiffs raise (at 47, 61) do not support a contrary conclusion. Those cases either involved the narrow holding that a party that repudiates a contract and refuses to repay money already received under the contract

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[7] Even were this Court to construe *Allstate* (contrary to its express terms) to mean that affirmative defenses do not vest until the time of suit, there is substantial authority that a statute of repose is "not an affirmative defense." *See, e.g., Chang-Williams v. United States*, 965 F.Supp.2d 673, 694 n.9 (D. Md. 2013); *AFT v. Bullock*, 605 F. Supp. 2d 251, 260 (D.D.C. 2009).

cannot claim a vested right to its ill-gotten gains, *see Grinder v. Nelson*, 9 Gill 299, 309 (1850); *Landsman v. Md. Home Improvement Comm'n*, 154 Md. App. 241, 260 (2003), or else found that retroactive abrogation of a vested right was unconstitutional, *Dryfoos v. Hostetter*, 268 Md. 397 (1973); *Grove v.* Todd, 41 Md. 633, 636 (1875)). Notably, the *Grove* Court admonished that the power to retroactively abrogate vested rights, "upon any notion of right or justice," is "a concession that can never be made"—language that this Court quoted in *Dua*, 370 Md. at 624 (citing *Grove*, 41 Md. at 642).

3. Vested rights are not confined to property and contract rights.

Plaintiffs also argue (at 49-54, 61) that a statute of repose does not confer "nearly" the same protection as property and contract rights. But this argument cannot sway the Court's analysis, as *Dua* and other decisions have held that the legislature may not entirely abrogate a vested right to a cause of action or defense. 370 Md. at 633.

In sum, the right to be free from liability conferred by a statute of repose does not vest with the filing of a lawsuit—it vests with the expiration of the repose period. This Court should therefore hold that the CVA is unconstitutional as applied to the School Defendants in these cases.[8]

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[8] In its amicus brief, the Attorney General suggests that CJ § 5-117(d) itself was unconstitutional to the extent it applied to any claims that accrued prior to its effective date. (Attorney General Br. at 11-12). Plaintiffs do not make this argument, and amici "ordinarily cannot raise an issue which is not raised by

II.

EVEN IF CJ § 5-117(d) WERE A STATUTE OF LIMITATIONS THE RETROACTIVE REVIVAL OF TIME-BARRED CLAIMS WOULD VIOLATE MARYLAND'S CONSTITUTION.

Even if CJ § 5-117(d) were construed as a statute of limitations, the retroactive application of the CVA to revive time-barred claims would still abrogate vested rights in violation of the Maryland Constitution. (SDOB at 53-58). Plaintiffs argue (at 46) that statutes of limitations (unlike statutes of repose) are generally regarded as procedural and/or remedial and, they argue, "an interest in a procedural or remedial law is not the type of right capable of vesting." This Court has said otherwise, repeatedly.

This Court has observed that "'generally, a remedial or procedural statute may not be applied retroactively if it will interfere with vested or substantive rights.'" *Rawlings v. Rawlings*, 362 Md. 535, 559 (2001) (quoting *Langston v. Riffe*, 359 Md. 396, 419 (2000)). It has also observed that "the Maryland Constitution ordinarily precludes the Legislature . . . from

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the parties." *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 382 Md. 689, 694 n.3 (2004). In any event, the argument is without merit. The Attorney General glosses over the fact that CJ § 5-117(d)'s retroactive application was limited to "actions that were barred by the application of the period of limitations applicable before October 1, 2017." (E.78, 83). The application of CJ § 5-117(d) to claims that were already, and independently, barred by the expiration of the previous statute of limitations does not abrogate "an accrued cause of action which, under prior law, *was viable on the date the new statute was enacted*." *Dua*, 370 Md. at 633 (emphasis added).

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.

Further, in *Doe v. Roe*, this Court found no constitutional barrier to retroactively applying an expanded limitations period "when applied to claims not-yet-barred by the previous limitations period," but declared, in no uncertain terms, "[w]e would be faced with *a different situation entirely* had [the] claim been barred under the three-year limitations period . . . as of the effective date of § 5-117." *Doe v. Roe*, 419 Md. at 707 (emphasis added). In a footnote, this Court elaborated that, "it is well established that '[a]n individual does not have a vested right to be free from suit or sanction for a legal violation until the statute of limitations for that violation has expired.'" *Id.* at n.18 (quoting *Crum v. Vincent*, 493 F.3d 988, 997 (8th Cir. 1997)).

Now that this Court is facing revival of *expired* claims, Plaintiffs ask (at 49) for this Court to reverse course, declare that it is *no different at all*, and hold that there is no constitutional impediment to retroactively applying an expanded limitations period to revive claims that had been barred under the previous limitations period. This Court should reject that invitation and, in accordance with this Court's consistent reasoning in multiple prior decisions, hold that even if CJ § 5-117(d) is construed to operate as a statute of limitations the CVA cannot be retroactively applied to School Defendants because it would impermissibly abrogate vested rights.

Plaintiffs attempt (at 54-58) to dismiss all of this Court's statements quoted above as meaningless, and legally incorrect, dicta. As noted above, *Dua's* statement that retroactive revival of a time-barred claim violates the vested rights of a defendant and is unconstitutional was not dicta, but rather "a deliberate expression of its opinion" on an issue of law (retrospective legislative enactments) that was squarely before the Court. *See Schmidt*, 366 Md. at 551 (2001). But even assuming, without conceding, that any of the Court's other statements are "dicta," dicta is not meaningless—especially when it is consistent in its core message, and emanates from this Court across multiple decisions.

Moreover, this Court's consistent statements in *Doe, Dua, Rawlings*, and *Langston* comport with decisions from jurisdictions which adhere to a similarly protective stance on vested rights. (SDOB at 56-57). Plaintiffs do not attempt to distinguish those decisions or challenge their legal reasoning, but merely state the obvious (at 59): that they "have no binding effect here." However, in the next breath, Plaintiffs suggest that this Court "should also consider the many other States that have reached the opposite conclusion, holding that the running of the statute of limitations *does not* create a vested right to be free from suit." (*Id*. at 59) (Appellees' Emphasis). But none of Plaintiffs' out-of-state cases applied Maryland's categorical ban on vested rights—and they should therefore be disregarded.

Plaintiffs go so far as to assert (at 49) that "Maryland law is clear: 'the legislature has the power to alter . . . statutes of limitations without impermissibly abrogating a vested right.'" Given the Plaintiffs' dim view of dicta, it is ironic that *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544 (2011) is the best case that they can cite for that assertion because *Muskin* did not involve a statute of limitations. Indeed, within the string of cases this Court cited in *Muskin* for the general observation that "the Legislature has the power to alter rules of evidence and remedies," 422 Md. at 561, only one case—*Allen v. Dovell*, 193 Md. 359 (1949)—involved amending a statute of limitations. And even *Allen* did not involve retroactive application of an expanded limitations period to revive claims barred by the previous limitations period.

Consistent with this Court's reasoning in *Doe v. Roe*, this Court should hold that this appeal *does* present "a different situation entirely" from that case, 419 Md. at 707, and that the retroactive application of the CVA to revive claims already barred by CJ § 5-117(d) is an impermissible abrogation of vested rights in violation of the Maryland Constitution. *See Dua*, 370 Md. at 633. Accordingly, this Court should hold that the CVA is unconstitutional as applied to the School Defendants.

III.

THE PRESUMPTION OF CONSTITUTIONALITY DOES NOT SUPPLANT THIS COURT'S DUTY TO PRESERVE THE INTEGRITY OF THE MARYLAND CONSTITUTION.

Plaintiffs observe (at 16) that the challenging party bears the burden of overcoming the presumption that a statute is constitutional, and they rely heavily on that burden throughout their brief. *Id*. at 17, 66, 70. However, while this Court typically (and rightly) defers to the Legislature on matters of policy, this Court's "sacred duty" is to preserve the integrity of the Maryland Constitution itself. *Beauchamp v. Somerset*, 256 Md. 541, 547-48 (1970). Accordingly, "[where] a statute violates a 'mandatory provision' of the Constitution, '[this court is] required to declare such an act unconstitutional and void.'" *Galloway v. State*, 365 Md. 599, 611 (2001) (quoting *Beauchamp*, 256 Md. at 547).

Plaintiffs identify no case in which the presumption of constitutionality has ever been applied to rescue a statute that abrogates vested rights from an as-applied challenge, and the School Defendants are aware of no such case. By contrast, *Dua* cited case after case where this Court has struck down laws that retroactively impaired or abrogated vested rights in violation of the Maryland Constitution. *Dua*, 370 Md. at 625-29.

It bears emphasizing that holding the CVA unconstitutional as applied to School Defendants does not render the CVA unconstitutional in all cases. There is a strong presumption that a legislative body intends its enactments to be severable, *Muskin*, 422 Md. at 554 n.5, and the CVA contains an express severability clause. *See* 2023 Md. Laws ch. 5, § 4 (E.094); 2023 Md. Laws ch. 6, § 4 (E.106). School Defendants take no issue with the CVA's prospective application, and take no issue with its retrospective application to claims that were *not* already extinguished as of the date the CVA went into effect.

CONCLUSION

School Defendants respectfully ask this Court to hold that the retroactive application of the CVA to revive claims that were already extinguished under CJ § 5-117(d), impermissibly abrogates vested rights and is therefore unconstitutional as applied to the School Defendants.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT
AND COMPLIANCE WITH RULE 8-112

1. This brief contains 8,985 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Sean L. Gugerty
Sean L. Gugerty, AIS # 1512150280

RULE 8-504(A)(8) STATEMENT OF FONTS

This brief was printed utilizing proportionally spaced font. The body and footnotes are printed in Century Schoolbook, 13 Point.

CERTIFICATE OF SERVICE

I CERTIFY that, on this 26th day of August, 2024, the foregoing Reply Brief of Appellants was filed and served electronically via MDEC upon all counsel of record.

/s/ Sean L. Gugerty
Sean L. Gugerty, AIS # 1512150280

SUPPLEMENTAL APPENDIX

Excerpt from Bill file of S.B. 505, 437th Gen. Assemb, Reg. Sess. (Md. 2017)

SB0505/818470/2 **APRM**

BY: Senator Zirkin
(To be offered in the Judicial Proceedings Committee)

AMENDMENTS TO SENATE BILL 505
(First Reading File Bill)

AMENDMENT NO. 1

On page 1, in line 5, after the semicolon insert "establishing a statute of repose for certain civil actions relating to child sexual abuse;"; and in the same line, after "action" insert "filed more than a certain number of years after the victim reaches the age of majority".

AMENDMENT NO. 2

On page 2, in line 10, after "(a)" insert "**(1)**"; in the same line, strike the comma and substitute "**THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.**

(2) "ALLEGED PERPETRATOR" MEANS THE INDIVIDUAL ALLEGED TO HAVE COMMITTED THE SPECIFIC INCIDENT OR INCIDENTS OF SEXUAL ABUSE THAT SERVE AS THE BASIS OF AN ACTION UNDER THIS SECTION.

(3)";

in the same line, strike "sexual" and substitute "**SEXUAL**"; strike beginning with "**AGAINST**" in line 13 down through "**ABUSE**" in line 14; and in line 17, strike "**WITHIN**" and substitute "**SUBJECT TO SUBSECTIONS (C) AND (D) OF THIS SECTION, WITHIN**".

On pages 2 and 3, strike in their entirety the lines beginning with line 26 on page 2 through line 11 on page 3, inclusive, and substitute:

"**(C) IN AN ACTION BROUGHT UNDER THIS SECTION MORE THAN 7 YEARS AFTER THE VICTIM REACHES THE AGE OF MAJORITY, DAMAGES MAY BE AWARDED**

(Over)

AGAINST A PERSON OR GOVERNMENTAL ENTITY THAT IS NOT THE ALLEGED PERPETRATOR OF THE SEXUAL ABUSE ONLY IF:

(1) THE PERSON OR GOVERNMENTAL ENTITY OWED A DUTY OF CARE TO THE VICTIM;

(2) THE PERSON OR GOVERNMENTAL ENTITY EMPLOYED THE ALLEGED PERPETRATOR OR EXERCISED SOME DEGREE OF RESPONSIBILITY OR CONTROL OVER THE ALLEGED PERPETRATOR; AND

(3) THERE IS A FINDING OF GROSS NEGLIGENCE ON THE PART OF THE PERSON OR GOVERNMENTAL ENTITY.

(D) IN NO EVENT MAY AN ACTION FOR DAMAGES ARISING OUT OF AN ALLEGED INCIDENT OR INCIDENTS OF SEXUAL ABUSE THAT OCCURRED WHILE THE VICTIM WAS A MINOR BE FILED AGAINST A PERSON OR GOVERNMENTAL ENTITY THAT IS NOT THE ALLEGED PERPETRATOR MORE THAN 20 YEARS AFTER THE DATE ON WHICH THE VICTIM REACHES THE AGE OF MAJORITY.".

AMENDMENT NO. 3

On page 4, strike beginning with "That" in line 6 down through "Act" in line 8 and substitute "That this Act may not be construed to apply retroactively to revive any action that was barred by the application of the period of limitations applicable before October 1, 2017"; and in line 9, after "That" insert "the statute of repose established in § 5-117(d) of the Courts Article shall be construed to apply both prospectively and retroactively to provide repose to defendants regarding actions that were barred by the application of the period of limitations applicable before October 1, 2017.

SECTION 4. AND BE IT FURTHER ENACTED, That".

UNOFFICIAL COPY OF SENATE BILL 505

SENATE BILL 505

D3 7lr2557
CF HB 642

By: **Senators Kelley, Benson, Brochin, Conway, Currie, Feldman, Ferguson, Guzzone, Kagan, Kasemeyer, Lee, Madaleno, Manno, McFadden, Middleton, Miller, Muse, Nathan-Pulliam, Peters, Robinson, Smith, and Zucker**
Introduced and read first time: February 1, 2017
Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

Civil Actions - Child Sexual Abuse - Statute of Limitations and Required Findings

FOR the purpose of altering the statute of limitations in certain civil actions relating to child sexual abuse; establishing a statute of repose for certain civil actions relating to child sexual abuse; providing that, in a certain action filed more than a certain number of years after the victim reaches the age of majority, damages may be awarded against a person or governmental entity that is not an alleged perpetrator only under certain circumstances; providing that a certain action is exempt from certain provisions of the Local Government Torts Claims Act; providing that a certain action is exempt from certain provisions of the Maryland Torts Claims Act; providing for the application of this Act; and generally relating to child sexual abuse.

BY repealing and reenacting, with amendments,
Article - Courts and Judicial Proceedings
Section 5-117 and 5-304(a)
Annotated Code of Maryland
(2013 Replacement Volume and 2016 Supplement)

BY repealing and reenacting, without amendments,
Article - Courts and Judicial Proceedings
Section 5-304(b)
Annotated Code of Maryland
(2013 Replacement Volume and 2016 Supplement)

BY repealing and reenacting, with amendments,
Article - State Government
Section 12-106(a)
Annotated Code of Maryland
(2014 Replacement Volume and 2016 Supplement)

UNOFFICIAL COPY OF SENATE BILL 505

BY repealing and reenacting, without amendments,
Article - State Government
Section 12-106(b)
Annotated Code of Maryland
(2014 Replacement Volume and 2016 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - Courts and Judicial Proceedings

5-117.

(a) (1) In this section, THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(2) "ALLEGED PERPETRATOR" MEANS THE INDIVIDUAL ALLEGED TO HAVE COMMITTED THE SPECIFIC INCIDENT OR INCIDENTS OF SEXUAL ABUSE THAT SERVE AS THE BASIS OF AN ACTION UNDER THIS SECTION.

(3) "~~sexual~~ SEXUAL abuse" has the meaning stated in § 5-701 of the Family Law Article.

(b) An action for damages arising out of an alleged incident or incidents of sexual abuse that occurred while the victim was a minor shall be filed [within] ~~AGAINST THE ALLEGED PERPETRATOR OF THE SEXUAL ABUSE~~:

(1) AT ANY TIME BEFORE THE VICTIM REACHES THE AGE OF MAJORITY; OR

(2) ~~WITHIN~~ SUBJECT TO SUBSECTIONS (C) AND (D) OF THIS SECTION, WITHIN THE LATER OF:

(I) [7] 20 years [of] AFTER the date that the victim [attains] REACHES the age of majority; OR

(II) 3 YEARS AFTER THE DATE THAT THE DEFENDANT IS CONVICTED OF A CRIME RELATING TO THE ALLEGED INCIDENT OR INCIDENTS UNDER:

1. § 3-602 OF THE CRIMINAL LAW ARTICLE; OR

2. THE LAWS OF ANOTHER STATE OR THE UNITED STATES THAT WOULD BE A CRIME UNDER § 3-602 OF THE CRIMINAL LAW ARTICLE.

~~(C) (1) AN ACTION FOR DAMAGES ARISING OUT OF AN ALLEGED INCIDENT OR INCIDENTS OF SEXUAL ABUSE THAT OCCURRED WHILE THE VICTIM WAS A MINOR SHALL BE FILED AGAINST A PERSON OR GOVERNMENTAL ENTITY THAT IS NOT AN ALLEGED PERPETRATOR OF THE SEXUAL ABUSE:~~

~~(I) AT ANY TIME BEFORE THE VICTIM REACHES THE AGE OF MAJORITY; OR~~

~~(II) WITHIN 20 YEARS AFTER THE DATE THAT THE VICTIM REACHES THE AGE OF MAJORITY.~~

~~(2) IN AN ACTION BROUGHT UNDER THIS SUBSECTION, DAMAGES MAY BE AWARDED AGAINST A PERSON OR GOVERNMENTAL ENTITY ONLY ON A DETERMINATION BY THE FINDER OF FACT THAT THE PERSON OR GOVERNMENTAL ENTITY:~~

~~(I) PRIOR TO THE INCIDENT OR INCIDENTS OF SEXUAL ABUSE THAT FORM THE BASIS OF THE ACTION, HAD ACTUAL KNOWLEDGE OF A PREVIOUS INCIDENT OR INCIDENTS OF SEXUAL ABUSE; AND~~

~~(II) NEGLIGENTLY FAILED TO PREVENT THE INCIDENT OR INCIDENTS OF SEXUAL ABUSE THAT FORM THE BASIS OF THE ACTION.~~

(C) IN AN ACTION BROUGHT UNDER THIS SECTION MORE THAN 7 YEARS AFTER THE VICTIM REACHES THE AGE OF MAJORITY, DAMAGES MAY BE AWARDED AGAINST A PERSON OR GOVERNMENTAL ENTITY THAT IS NOT THE ALLEGED PERPETRATOR OF THE SEXUAL ABUSE ONLY IF:

(1) THE PERSON OR GOVERNMENTAL ENTITY OWED A DUTY OF CARE TO THE VICTIM;

(2) THE PERSON OR GOVERNMENTAL ENTITY EMPLOYED THE ALLEGED PERPETRATOR OR EXERCISED SOME DEGREE OF RESPONSIBILITY OR CONTROL OVER THE ALLEGED PERPETRATOR; AND

(3) THERE IS A FINDING OF GROSS NEGLIGENCE ON THE PART OF THE PERSON OR GOVERNMENTAL ENTITY.

(D) IN NO EVENT MAY AN ACTION FOR DAMAGES ARISING OUT OF AN ALLEGED INCIDENT OR INCIDENTS OF SEXUAL ABUSE THAT OCCURRED WHILE THE VICTIM WAS A MINOR BE FILED AGAINST A PERSON OR GOVERNMENTAL ENTITY THAT IS NOT THE ALLEGED PERPETRATOR MORE THAN 20 YEARS AFTER THE DATE ON WHICH THE VICTIM REACHES THE AGE OF MAJORITY.

5-304.

(a) This section does not apply to an action **[**against**]:**

(1) AGAINST a nonprofit corporation described in § 5-301(d)(23), (24), (25), (26), (28), or (29) of this subtitle or its employees**;** OR

(2) BROUGHT UNDER § 5-117 OF THIS TITLE.

(b) (1) Except as provided in subsections (a) and (d) of this section, an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 1 year after the injury.

(2) The notice shall be in writing and shall state the time, place, and cause of the injury.

Article - State Government

12-106.

(a) This section does not apply to a claim that is**:**

(1) asserted by cross-claim, counterclaim, or third-party claim**;** OR

(2) BROUGHT UNDER § 5-117 OF THE COURTS ARTICLE.

(1) the claimant submits a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim;

(2) the Treasurer or designee denies the claim finally; and

(3) the action is filed within 3 years after the cause of action arises.

SECTION 2. AND BE IT FURTHER ENACTED, ~~That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before the effective date of this Act~~ That this Act may not be construed to apply retroactively to revive any action that was barred by the application of the period of limitations applicable before October 1, 2017.

SECTION 3. AND BE IT FURTHER ENACTED, That the statute of repose established in § 5-117(d) of the Courts Article shall be construed to apply both prospectively and retroactively to provide repose to defendants regarding actions that were barred by the application of the period of limitations applicable before October 1, 2017.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2017.