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June 25, 2016

The Honorable Stewart J. Greenleaf, Majority Chairman
Pennsylvania Senate Judiciary Committee
Room 19 East Wing
Harrisburg, PA 17120-3012

The Honorable Daylin Leach, Minority Chairman
Pennsylvania Senate Judiciary Committee
Room 543 Main Capitol
Harrisburg, PA 17120-3017

Re: Pennsylvania House Bill 1947 as amended

Dear Senators Greenleaf and Leach:

As a constitutional attorney and president of The Rutherford Institute,[1] I have spent most of my life working to preserve the most basic freedoms of our Republic, including the limits placed on government power and safeguards to ensure that the rights of the citizenry are not abrogated.

Having been at the forefront of the evolving national debate over civil liberties, government transparency and accountability, and how to navigate the fine line between legislating justice and abiding by the rule of law, I offer the following legal opinion on the important constitutional question pending before you in Pennsylvania House Bill 1947 as amended: whether the revival of a claim subject to a lapsed civil statute of limitations would be constitutional.

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[1] The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed numerous amicus curiae briefs in the federal Courts of Appeals and Supreme Court. Constitutional attorney John W. Whitehead, president of The Rutherford Institute, has served as co-counsel in several landmark Supreme Court cases. Whitehead writes a weekly column for *The Huffington Post* and *The Blaze* and is the author of the award-winning book *A Government of Wolves: The Emerging American Police State* and its sequel, *Battlefield America: The War on the American People*, both of which address the dangers of government overreach and efforts to undermine the rule of law.

A. The Bill Passes Federal Constitutional Muster

Given the clear language of retroactive intent shown by the plain words of House Bill 1947 and that statutes of limitations are procedural, not substantive, mechanisms in Pennsylvania, *see, e.g. Seneca v. Yale & Towne Mfg. Co.*, 16 A.2d 754 (Pa. Super. 1941), the issue turns on whether retroactive civil laws violate constitutional protections.

For almost 150 years, the U.S. Supreme Court has had ample opportunity to address the issue and it has consistently held that "there is no constitutional inhibition against retrospective laws." *Blount v. Windley*, 95 U.S. 173, 180 (1877); *see Curtis v. Whitney*, 80 U.S. 68, 70 (1871) ("That a statute is not void because it is retrospective has been repeatedly held by this court."); *Campbell v. Holt*, 115 U.S. 620 (1885) (discussed *infra*); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945) (discussed *infra*); *Int'l Union of Elec., Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 244 (1976) ("we think that Congress might constitutionally provide for retroactive application of the extended limitations period which it enacted."); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (noting that a statute of limitations "can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired."); *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) ("it is beyond dispute that ... Congress has the power to enact laws with retrospective effect.").

Statutes of Limitations Serve Public Policy

Statutes of limitations are "a purely arbitrary creation of the law@ and Aare founded in public needs and public policy." *Campbell*, 115 U.S. at 628. They "find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles." *Chase*, 325 U.S. at 314.

> They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. (internal footnote omitted).[2]

[2] Accordingly, the U.S. Court of Appeals for the Third Circuit has held, "the nature of the right to assert a particular defense in a tort action is not among those characterized as 'fundamental.'" *In re Asbestos Litig.*, 829 F.2d 1233, 1239 (3d Cir. 1987). Removing the ability to assert such a defense does not violate due process. *Id.* at 1244.

> [A]s a matter of constitutional law ... statutes of limitation go to matters of remedy, not to destruction of fundamental rights.

Id.; *accord Campbell,* 115 U.S. at 628 ("no right is destroyed when the law restores a remedy which had been lost.")

> [W]here lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar.

Chase, 325 U.S. at 311-12.

B. Constitutions Are Living Documents Subject to Changing Interpretations Over Time

Just because a Court interpreted a Pennsylvania constitutional provision one way 108 years ago does not mean it will not be interpreted differently today.[3] Court interpretations of static language and provisions change over time. This can happen for a multitude of reasons, ranging from a better scholarly understanding of the language, to changing societal values or norms, to a simple decision by a Supreme Court to go in a different interpretational direction for public policy reasons. The case law is full of examples of this.

- In 1896, the U.S. Supreme Court interpreted Fourteenth Amendment equal protection in *Plessy v. Ferguson*, 163 U.S. 537 (1896), to allow separate but equal facilities based upon the race of citizens. But less than 60 years later it changed course in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and held separate can never be equal.

- In other contexts, Fourteenth Amendment equal protection originally protected African-Americans from discrimination because it arose out of the ashes of the Civil War. But since that time it has been interpreted to give protections to other racial and ethnic minorities, to women, gays and many others.

- In 1986, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court upheld criminal laws criminalizing homosexual sex. But less than 20 years later, in 2003, it changed course in *Lawrence v. Texas*, 539 U.S. 558 (2003),

[3] This is all the more true when the language cited is extraneous dictum rather than an essential part of the case holding.

and found that substantive due process protections of the Fourteenth Amendment protected it from state interference or criminalization.

- The free speech clause of the First Amendment originally applied only to the federal government and state governments remained free to punish people for their speech. More than 100 years later, it was applied to the states as well.

- Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the U.S. Supreme Court held that the fundamental right to marry under the Fourteenth Amendment no longer applies to strictly heterosexual marriages.

C. Many Sister States Have Had Their Retroactive Child Abuse Laws Upheld Under State and Federal Constitutional Attacks

At least ten states have enacted retroactive childhood sexual abuse legislation similar to House Bill 1947 and had them upheld by the courts over constitutional attacks.

1. Connecticut

Just last year, in *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462 (Conn. 2015), the Connecticut Supreme Court surveyed the varied approaches of the fifty states and found that "on balance, it ultimately favors the position" of retroactivity and upheld Connecticut's retroactive child sex abuse law as a rational response by the legislature to the exceptional circumstances and potential for injustice faced by those who fell victim to sexual abuse as children.

2. Massachusetts

Last year, in *Sliney v. Previte*, 41 N.E.3d 732 (Mass. 2015), the Massachusetts Supreme Court also was asked to address the constitutionality of a retroactive child sex abuse law. That Court balanced the interests involved and found a "compelling legislative purpose underlying the act ... the apparent recognition that in many cases, victims of child abuse are not able to appreciate the extent or the cause of harm they experience as a result of sexual abuse perpetrated on them for many years after the abuse has ended" and upheld its constitutionality. *Id.* at 742.

3. Hawaii

In *Roe v. Ram*, 2014 U.S. Dist. LEXIS 120830 *21 (D.Haw. Aug. 29, 2014), the District of Hawaii upheld Hawaii's retroactive civil window over federal and state

constitutional challenges, finding "the legislative revival of claims that are even decades old is not, of itself, unconstitutional per se."

4. Delaware

In *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) (*en banc*), the Delaware Supreme Court held that "statutes of limitation go to matters of remedy, not destruction of fundamental rights.... [and thus] can be applied retroactively because it affects matters of procedure and remedies, not substantive or vested rights" and upheld Delaware's retroactive two-year civil window which was under state and federal constitutional attack.

5. California

The federal and state courts of California also have repeatedly upheld various retroactive child sex abuse statutes over constitutional challenges.[4]

6. Minnesota

Similarly, the Court of Appeals of Minnesota has held that retroactive childhood sexual abuse provisions enacted by the Minnesota legislature did not violate the state or federal constitutions. *K.E. v. Hoffman*, 452 N.W.2d 509, 512-14 (Min.App. 1990). That court specifically held that "the legislature did not impair respondents' due process rights by enacting [the retroactive statute] which lifted the limitations bar and revived appellant's claim against them." *Id.* at 513. Thus, it "meets constitutional muster." *Id.* at 515.

7. South Dakota

In the same way, the Supreme Court of South Dakota has held that the South Dakota childhood sexual abuse statute was to be applied retroactively in accord with legislative intent. *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220, 222-224 (S.D. 1997). In doing so, the court noted that "the Legislature is the final arbiter of public policy, and it has clearly established South Dakota's public policy in these statutes," and this was

[4] *See Melanie H. v. Doe, et al.*, C.A.No. 04-1596-WGH-(WMc), at 16-20 (S.D.Cal. Dec. 21, 2005) (upholding California's one-year sex abuse window); *Liebig v. Super. Court*, 257 Cal.Rptr. 574, 578 (Cal. App. 1989) (holding that the Legislature had the power to expressly revive time-barred civil common law causes of action); *Lent v. Doe*, 47 Cal.Rptr.2d 389, 392-93 (Cal. App. 1995) (upholding the *Liebig* decision over a constitutional challenge); *Tietge v. W. Province of the Servites, Inc.*, 64 Cal.Rptr.2d 53, 56 (Cal. App. 1997) (holding that it is well within the legislature's "power to retroactively revive a cause of action for childhood sexual abuse time-barred under the prior statute of limitations.").

entitled to deference. *Id.* at 224. The South Dakota federal court subsequently also upheld the retroactive provisions of that state's statute over due process and other federal constitutional challenges. *Delonga v. Diocese of Sioux Falls*, 329 F.Supp.2d 1092, 1101-02 (D.S.D. 2004).

8. Vermont

The federal court in Vermont also has upheld the Vermont legislature's retroactive statutory provisions over due process and other federal constitutional challenges. *Barquin v. Roman Catholic Diocese of Burlington, Vt., Inc.*, 839 F.Supp. 275, 280-81 (D.Vt. 1993). Thereafter, the Supreme Court of Vermont had no problem applying the retroactivity provisions of its sexual abuse laws. *See Earle v. State*, 743 A.2d 1101 (Vt. 1999).

9. Kansas

The Supreme Court of Kansas similarly has held that the legislature may retroactively revive childhood sexual abuse claims without violating due process because "a procedural statute of limitations [ ] may be amended at any time by the legislature." *Shirley v. Reif*, 920 P.2d 405, 412-13 (Kan. 1996). Thus, a plaintiff's "once-dead claim" is properly revived as long as it is filed within the parameters set by the legislature. *Id.* at 413.

10. Montana

Additionally, the Supreme Court of Montana has rejected claims that a retroactive child sex abuse statute violates due process, explaining that "such legislation does not take away any defenses which would have been a vested right in the defendant in the case." *Cosgriffe v. Cosgriffe*, 864 P.2d 776, 778 (Mont. 1993).

D. A Brief Survey Also Places the Weight of Sister State Legal Authority on the Side of H.B. 1947

Importantly, numerous states have enacted retroactive legislation in contexts beyond childhood sexual abuse, in circumstances as varied as exposure by military veterans to Agent Orange, medical malpractice, civil rights, asbestos and other toxic torts, insurance, products liability, student loans, paternity, wrongful death and other personal injuries.

Due to the press of limited time, it may be helpful to examine here the recent decision of the Connecticut Supreme Court in *Doe v. Hartford, supra*. It held that application of a retroactive

law to revive a time barred cause of action does not violate a defendant's substantive due process rights under the Connecticut Constitution because it is a rational response by the legislature to the exceptional circumstances and potential for injustice faced by adults who fell victim to sexual abuse as a child. Therein a survey was made of the position of various states at that time.

Due to this lack of time, I cannot confirm the complete accuracy of that survey. Although I have found it to have missed several states (including some listed above) which have specifically upheld retroactive child sex abuse legislation, it is instructional and helpful in analyzing the many varied ways states address retroactivity.

It notes that at least 19 states follow the federal approach embodied in *Campbell* and *Chase* and allow the retroactive expansion of the statute of limitations to revive otherwise time-lapsed claims in varied circumstances. Three of those states (Iowa, West Virginia, and New Mexico) do not squarely ground their decisions in any particular state or federal constitutional provision.

One state (Georgia) grounds its leading decision in an interpretation of that state's constitutional provision prohibiting retroactive legislation. Fifteen (Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Dakota, Washington, and Wyoming) hold that the retroactive expansion of the statute of limitations to revive time barred claims is not a violation of a defendant's substantive due process rights because there is no vested right to such a defense as a matter of state constitutional law.[5] As noted, the list omitted Vermont and South Dakota which have enacted similar retroactive legislation in the past.

It is also important to analyze the text of each state's relevant constitutional provision.

Does the state have a vague phrase such as "due process of law," "due course of law" or "law of the land" under which the courts then must analyze, drawing upon the aforementioned scholarly understanding of the language, historical analysis, changing societal values or norms and public policy rationales to determine its meaning in our modern society? Pennsylvania, many

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[5] *See, e.g. Chevron Chemical Co. v. Superior Ct.*, 641 P.2d 1275 (Ariz. 1982); *20th Century Ins. Co. v. Superior Ct.*, 109 Cal. Rptr. 2d 611 (Cal. Ct. App. 2001), *cert. denied* 535 U.S. 1033 (2002); *Doe v. Hartford Roman Catholic Diocesan Corporation*, 119 A.3d 462 (Conn. 2015); *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011) (*en banc*); *Roe v. Doe*, 581 P.2d 310 (Haw. 1978); *Peterson v. Peterson*, 320 P.3d 1244 (Idaho 2014); *Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958 (Kan. 1992); *Boston v. Keene Corp.*, 547 N.E. 2d 328 (Mass. 1989); *Pryber v. Marriott Corp.*, 296 N.W. 2d 597 (Mich. Ct. App. 1980), aff'd 307 N.W. 2d 333 (Mich. 1981); *In re Individual 35W Bridge Litigation*, 806 N.W. 2d 820 (Minn. 2011); *Cosgriffe v. Cosgriffe*, 864 P.2d 776 (Mont. 1993); *Panzino v. Continental Can Co.*, 364 A.2d 1043 (N.J. 1976); *In re Interest of W.M.V.*, 268 N.W. 2d 781 (N.D. 1978); *Lane v. Dept. of Labor & Industries*, 151 P.2d 440 (Wash. 1944); *Vigil v. Tafoya*, 600 P.2d 721 (Wyo. 1979).

of its sister states and the United States all fall into this category.

Or does the state have an explicit ban written into its constitution which explicitly bars any and all retroactive legislation? A significant number of states which have come down against retroactive legislation have such explicit bars in their state constitutions. These include Alabama, Mississippi, Texas, New Hampshire, Missouri and Oklahoma. Because of these explicit bans, they are not true comparators to Pennsylvania which does not have such a constitutional ban but instead has chosen the same phrase of many of its sister states, "due course of law."[6]

E. Retroactive Application of Statutes of Limitations Does Not Disturb Vested Rights Under Pennsylvania Law

In *McDonald v. Redevelopment Auth.*, 952 A.2d 713 (Pa. Commw. 2008), *app. denied* 968 A.2d 234 (Pa. 2009), the Court found that the shortening of a statute of limitations for a plaintiff was permissible, because it was merely a procedural change, not a substantive one. The court explained that no one has a vested right in a statute of limitations or other procedural matters and instead the legislature may at any time alter, amend, or repeal such provisions without offending constitutional restraints

Reliance on *Lewis v. Pennsylvania R. Co.*, 69 A. 821 (Pa. 1908), for a contrary position is misplaced. The facts of the case addressed the retroactive expansion of negligence liability—the statute at issue created a new category of liability and thus could not be applied retroactively. It was not addressing something which was illegal at the time it previously had occurred. The decision did not specifically endorse the characterization of expired limitations periods as vested rights and it did not concern revival of a civil claim at all. Only pure dictum speaks to the contrary.

Lewis also was distinguished by *Konidaris v. Portnoff Law Associates, Ltd.*, 953 A.2d 1231 (Pa. 2008), which held that a retroactive amendment to the Municipal Claims and Tax Liens Act to provide for recovery of attorney fees did not violate the Remedies Clause of the Pennsylvania Constitution because the constitutional protection contained in the Remedies Clause is for a remedy for an injury done.

Another supportive case is *Bible v. Depart. of Labor & Indus.*, 696 A.2d 1149, 1156 (Pa. 1997), which held that "traditionally, retrospective laws which have been deemed reasonable are those which impair no contract and disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair and do not vary existing obligations contrary to their situation when entered into and when prosecuted."

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[6] Notably however, both Georgia and Tennessee have similar constitutional bans but the case law of each state nevertheless allows retroactive civil legislation following an appropriate balancing of interests and similar analysis.

Perhaps the most persuasive legal principle found in Pennsylvania cases is that there is no vested right to do wrong in Pennsylvania. *Kiskaddon v. Dodds*, 21 Pa. Super. 351 (Pa. Super. 1902). Certainly denying survivors of childhood sexual abuse the opportunity to try to prove their case in court with persuasive evidence, and instead allow the perpetrators of that abuse and the institutions which enabled them to hide behind the statute of limitations is to enable wrongdoing.

The simple fact that a cover up of a crime was successful for so long does not mean that the wrongdoer's success should be grounds to deny justice to the innocent victim.

F. The Pennsylvania Remedies Clause

The Remedies Clause of the Pennsylvania Constitution is not distinctive, 39 other states contain similar clauses, and it thus does not require a unique constitutional interpretation.

The purpose of the Clause is to prevent the legislature from changing the legal significance of past events that took place outside of Court. If someone has a substantive legal claim for a wrong done, it bars the legislature from reaching back after the fact and taking it away. Similarly, if someone acted in a way that was legal and innocent at the time it was done, it bars the legislature from making it illegal after the fact.

Statutes of limitations are different. They are procedural mechanisms which affect remedy, not the existence of a right. The running of a limitations period does not mean the defendant's conduct was not wrongful at the time it was done.

Injuring children has always been wrong. Thus a defendant's interest in the statute of limitations bar is different than a defendant's interest in a substantive defense.

G. Public Policy Is Served by House Bill 1947

As the U.S. Supreme Court has explained, the "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft. v. Free Speech Coal.*, 535 U.S. 234, 244-45 (2002).[7]

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[7] *See Coy. v. Iowa*, 487 U.S. 1012, 1022 (1988) (AChild abuse is a problem of disturbing proportions in today's society.@); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1230 (Me. 2005) ("In matters concerning the protection of children from physical and sexual abuse, societal interests are at their zenith."); *J.S. v. R.T.H.*, 714 A.2d 924, 931 (N.J. 1998) (noting Athe enormous public interest in protecting society from the threat of potential molestation, rape, or murder of women and children.@).

House Bill 1947 squarely presents Pennsylvania with the opportunity to right such a repugnant wrong done to so many young children who were unable to defend themselves when their lives were upended and innocence stripped away. As one state Supreme Court explained:

> Imagine being pricked on the arm with a pin. At first, such an intrusion would be disturbing, but with time might seem uneventful. Now imagine the pin carried a dreaded affliction, only discoverable after years of incubation. Such is often the nature of childhood sexual abuse. Many children only realize years later the true significance of the abuse they endured, especially in cases where the molestation occurred at the hands of family members or other trusted individuals. For some children, sexual violation is so traumatic it becomes psychologically self-concealing, if only to preserve sanity.

Stratmeyer v. Stratmeyer, 567 N.W.2d 220, 222-23 (S.D. 1997).

Those children deserve a chance to seek justice.

House Bill 1947 would give them that chance.

It would allow victims of childhood sexual abuse to seek justice and would assist in removing known predators from positions where they continue to have access to unsuspecting children.

To paraphrase the U.S. Supreme Court and Justice Brandeis, "sunlight is the best disinfectant." *See Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.") (quoting L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933).

The strong public policy of the Commonwealth of Pennsylvania should be to effectuate the purposes underlying House Bill 1947 through public exposure of the local facts of a nationwide scandal, with the purpose of the bright light of public scrutiny acting as a disinfectant to prevent such crimes on children from ever occurring again. *See, e.g. Rosado v. Bridgeport Roman Catholic Diocese*, 2006 WL 3756521, *10 (Conn.Super. Dec. 6, 2006) (noting the "extraordinary public interest in knowing whether minors ... were sexually abused by priests").

Because of the inability of the criminal authorities to intervene, absent civil legal proceedings abusers will remain hidden and protected by their institutions and the children of today will remain endangered by the cover-ups of yesterday.

Our society should be focused on protecting the rights of innocent victims, not on furthering the cover up by their abusers and any institution which enabled such abuse or knowingly allowed the abuse to happen.

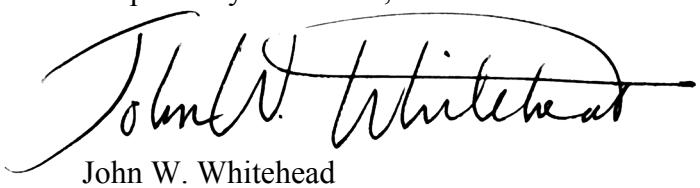
As Martin Luther King Jr. pointed out in his powerful "Letter from Birmingham City Jail," "justice too long delayed is justice denied."

King revisited this idea of the "urgency of now" in a speech delivered at Riverside Church in New York City a year before he was assassinated:

> We are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history there is such a thing as being too late. Procrastination is still the thief of time. Life often leaves us standing bare, naked and dejected with a lost opportunity. The "tide in the affairs of men" does not remain at the flood; it ebbs. We may cry out desperately for time to pause in her passage, but time is deaf to every plea and rushes on. Over the bleached bones and jumbled residue of numerous civilizations are written the pathetic words: "Too late." There is an invisible book of life that faithfully records our vigilance or our neglect. "The moving finger writes, and having writ moves on..." We still have a choice today… We must move past indecision to action… If we do not act we shall surely be dragged down the long dark and shameful corridors of time reserved for those who possess power without compassion, might without morality, and strength without sight.

For the sake of those for whom justice has already been too long delayed, I urge you to ensure that justice is not denied.

Respectfully Submitted,



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President

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