

H.B. 1 & S.B. 1
A BILL PROPOSING A CONSTITUTIONAL AMENDMENT
THAT WOULD REVIVE TIME-BARRED CLAIMS

TESTIMONY OF CARY SILVERMAN
ON BEHALF OF THE AMERICAN TORT REFORM ASSOCIATION
BEFORE THE PENNSYLVANIA HOUSE JUDICIARY COMMITTEE
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Chairman Briggs and Members of the House Judiciary Committee, thank you for the opportunity to submit this written testimony on behalf of the American Tort Reform Association (ATRA) to express our concerns with H.B. 1 and S.B. 1. These bills propose a constitutional amendment that would permit the legislature to cast aside a statute of limitations during a two-year period and revive time-barred civil actions seeking damages for injuries stemming from alleged childhood sexual abuse.

I am an attorney in the Public Policy Group of Shook, Hardy & Bacon L.L.P.'s Washington, D.C. office. I have written extensively on liability law and civil justice issues. I am a graduate of George Washington University, where I received my law degree and a Master of Public Administration. I serve as co-counsel to ATRA, a broad-based coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

Sexual abuse against a child is intolerable and should be punished through both criminal prosecution and civil claims. ATRA respects the advocacy of the proponents of this legislation and the courage of survivors of abuse who support it. Our testimony is based on general principles underlying statutes of limitations and why reviving time-barred claims is often viewed as unsound policy by legislatures and unconstitutional by courts.

Discarding a statute of limitations is unprecedented in Pennsylvania law. While some may view statutes of limitations as arbitrary, they serve a critical purpose. They allow judges and juries to evaluate liability when the best evidence is available – before records are lost and witnesses disappear. No matter how serious the injury or appalling the conduct, Pennsylvania law requires a plaintiff to file a lawsuit within a certain time. It is never easy for a lawyer to tell a client that the time to sue has passed, but we have statutes of limitations so that the civil justice system works properly and safeguards due process. ATRA is concerned with the precedent this constitutional amendment and subsequent legislation will set for other types of claims.

When a statute of limitations is extended or even eliminated *prospectively*, organizations can make rational and appropriate decisions to reduce their liability exposure and to be prepared if some day they are sued. If a business or nonprofit organization knows that Pennsylvania has eliminated its statute of limitations for a particular claim going forward it can:

- Adopt a record retention policy that keeps employment or other relevant records forever rather than discard them after a certain number of years.
- Meticulously document steps it takes in the area in which it is subject to liability exposure, such as how it made hiring, disciplinary, and termination decisions, received and responded to reports of misconduct, any training it required employees or volunteers to undertake, and how it met the best practices at the time.
- Understanding the extraordinary liability exposure in a particular area, a person or organization can decide simply to not go into that line of business – not to offer a service or a product – because the risks are just too high. Or they may enter that line of

business, but do so only if they are able to purchase substantial additional insurance to provide some security from that risk.

- In a similar vein, when a statute of limitations is extended prospectively, a business that is considering acquiring another business can do due diligence to investigate whether the company it is considering acquiring ever operated in an area subject to such extraordinary liability exposure and go back as far as the statute of limitations allows.

When a legislature eliminates a statute of limitations *retroactively*, however, a person or organization does not have these choices. Consider, for example:

- An organization, such as a YMCA, is sued for abuse that an employee allegedly committed fifty years earlier when the perpetrator died one year before the lawsuit was filed, any employment records were discarded after seven years, and the few staff members of that time who are still alive have little memory of either of them.
- A dentist or doctor who took over the family medical practice is served with a revived lawsuit alleging that her father or grandfather abused a patient. This may have occurred even before the current owner of the practice was born or went to medical school.
- A small business that provided exercise or sports programs to elementary schools is sued because an employee, who worked at the organization for just a few months, is accused of abuse thirty years earlier. The person who founded, owned, and managed the business at that time has long retired and moved away and the current owners have no knowledge of what occurred.

Reviving time-barred claims is also likely to result in a sudden surge of unexpected litigation. If sued, there may be no doubt that the plaintiff experienced horrific abuse, but the question that will be difficult or impossible to fairly answer in many cases is whether forty or fifty years ago, a school, nonprofit organization, or business had sufficient policies and practices in place to prevent it—when the perpetrator is dead, the staff of that time is gone, and records have not been saved. Even if an organization has the records, witnesses, institutional knowledge available to defend itself, it will be challenging to respond to the litigation when facing multiple, decades-old cases at the same time. As a result, organizations, including public schools and other government entities, are likely to settle revived lawsuits even if they could not have prevented what occurred. The potential cost to the Commonwealth and others from decades-old claims is astronomical.¹

Finally, it is important to recognize that while just under half of states have revived sexual abuse claims to some degree over the past twenty years, most of these laws contained significant constraints on the type of claims they revived that are not included in this constitutional amendment. Some limited the reviver to claims against perpetrators (Massachusetts, Georgia, and Rhode Island). Others allowed claims against organizations only if there is evidence that they knew of the abuse or committed criminal misconduct (Oregon, Arizona, West Virginia, and Utah, which has since been found unconstitutional). Three states required at least evidence of gross negligence (Delaware, Vermont, and Hawaii). Several states revived only those claims that fell within an extended, but finite, statute of limitations. They did not go back indefinitely.²

¹ See Susquehanna Valley Center for Public Policy, *The Economic Impact of a Constitutional Amendment to Implement Pennsylvania House Bill 14 of the 2021-22 Session* (Jan. 10, 2023) (predicting at least \$5 billion in state liability for claims against public schools).

² You may also be misled to believe that Congress enacted, and President Biden signed, legislation similar to H.B. 1 and S.B. 1. They did not. The Eliminating Limits to Justice for Child Sex Abuse Victims Act of 2022, S. 3103 (Pub. L. 117-176), specifically indicates that the elimination of federal statute of limitations for civil actions stemming from specific sex crimes against
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Years ago, after the Virginia Supreme Court found that a state law extending the statute of limitations to ten years of majority for childhood sexual abuse claims could not revive time-barred claims,³ that state amended its constitution. Unlike H.B. 1 and S.B. 1, however, Virginia's constitutional amendment applies to a civil action "based on an intentional tort committed by a natural person."⁴ It did not permit revival of time-barred negligence claims, which heavily rely on records and witness testimony, and an evaluation of what safeguards were expected at that time. This session, the Utah legislature considered, but did not enact, a bill proposing a constitutional amendment that would have taken a similar approach,⁵ after its state supreme court invalidated a reviver of time-barred claims against perpetrators.⁶ The proposed Pennsylvania Constitutional amendment, however, would revive time-barred negligence claims against third parties.

In sum, ATRA believes that for statutes of limitations to serve their purpose of encouraging prompt and accurate resolution of lawsuits and to provide the predictability and certainty for which they are intended, they must be, at minimum: (1) finite; and (2) any changes must be prospective. It is important that Pennsylvania's civil justice system maintain the predictability and certainty of having a finite statute of limitations for any type of civil claim. Pennsylvania's constitutional law prohibiting revival of time-barred claims reflects the majority approach among the states.⁷ If the Committee finds that Pennsylvania's current statute of limitations for civil childhood sexual abuse claims does not provide sufficient time to sue, it should explore alternatives that would not violate core principles of the civil justice system or due process.

Thank you for considering ATRA's concerns as you address this difficult and important issue.

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minors applies to "any claim or action that . . . would not have been barred . . . on the day before the date of enactment" and "any claim or action arising after the date of enactment of this Act." This law prospectively eliminated the statute of limitations under a federal statute giving sex crime victims a civil action against those who committed a predicate criminal offense – the perpetrator. The federal law does not apply to negligence claims against third parties.

³ *Starnes v. Cayouette*, 419 S.E.2d 669 (Va. 1992).

⁴ Va. Const., Art. IV, sec. 14.

⁵ H.J.R. 7 (Utah 2023) (providing the legislature with authority to "provide for the revival of a civil cause of action against an individual for child sexual abuse, as defined by statute, after the cause of action has expired due to an applicable statute of limitations") (emphasis added).

⁶ *Mitchell v. Roberts*, 469 P.3d 901, 903, 913 (Utah 2020). In that case, while the Court "appreciated the moral impulse and substantial public policy justifications" for the reviver, the court unanimously held that the principle that the legislature violates due process by retroactively reviving a time-barred claim is "well-rooted in our precedent," "confirmed by the extensive historical material," and has been repeatedly reaffirmed for "over a century." It continued to follow the "majority approach."

⁷ See, e.g., *Johnson v. Garlock, Inc.*, 682 So.2d 25, 27-28 (Ala. 1996) ("The weight of American authority holds that the [statute of limitations] bar does create a vested right in the defense" that does not allow the legislature to revive a time-barred claim); *Johnson v. Lilly*, 823 S.W.2d 883, 885 (Ark. 1992) ("[W]e have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred."); *Frideres v. Schiltz*, 540 N.W.2d 261, 266-67 (Iowa 1995) ("[I]n the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute of limitations had run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action."); *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816-17 (Me. 1980) ("The authorities from other jurisdictions are generally in accord with our conclusion" that running of the statute of limitations creates a vested right); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341-42 (Mo. 1993) (recognizing constitutional prohibition of legislative revival of a time-barred claim "appears to be the majority view among jurisdictions with constitutional provisions" similar to Missouri); *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-71 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and this violates due process.").