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FACSIMILE NO.

WRITER'S DIRECT DIAL NO.

February 22, 2023

The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee
2 East Miller Senate Office Bldg.
Annapolis, Maryland 21401

Re: Senate Bill 686 – Civil Actions – Child Sexual Abuse – Definition, Damages, and Statute of Limitations (The Child Victims Act of 2023)

Dear Chair Smith:

Considering the number of times the Office of the Attorney General has weighed in on the constitutionality of previous legislation intended to provide victims of child sexual abuse a meaningful opportunity to hold wrongdoers accountable, I send this letter to confirm our view that Senate Bill 686, The Child Victims Act of 2023, is not clearly unconstitutional. If the General Assembly chooses to pass this legislation and it is enacted, I am comfortable defending the legislation should it be challenged in court.

No Maryland case is directly on point about the constitutional issue Senate Bill 686 raises. A law review article could be written evaluating the facets of the issue. As intellectually interesting as the debate is, however, the victims of childhood sexual abuse are forefront in my mind, along with my constitutional obligations to provide sound legal advice to State officials and to defend State laws. I have reviewed the various past letters of advice from the Office of the Attorney General as well as legal evaluations from others. The materials contain well-researched analyses and reach a reasonable difference of prediction as to how the Maryland Supreme Court would decide the issue. Accordingly, I conclude that, as Attorney General, I can make a good faith defense of the constitutionality of Senate Bill 686.

Several aspects of the issue are worth summarizing here. The primary issue is whether allowing a victim of child sexual abuse to file a civil action for sexual abuse at any time without limitation and without regard to previous time limitations, including any previously barred action, impairs a vested right. The answer turns in large part on whether Chapter 12, 2017 Laws of Maryland extended the statute of limitations for such claims or, alternatively, enacted a statute of repose.

The State’s highest court has explained that a statute of limitations is “‘a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).” *Anderson v. United States*, 427 Md. 99, 117 (2012) (quoting Black’s Law Dictionary 1546 (9th ed. 2009)). Statutes of limitations are not substantive and can be tolled for reasons such as fraudulent concealment. *Id.* On the other hand, a statute of repose is a “‘statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury.” *Id.* “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.* at 119. *See also Craven v. Hickman*, 135 Md. App. 645, 653 (2000) (noting that a statute of repose “is a substantive grant of immunity derived from a legislative balance of economic considerations affecting the general public and the respective rights of potential plaintiffs and defendants”).

Before Courts and Judicial Proceedings Article (“CJP”), § 5-117 was amended by Chapter 12 (House Bill 642) in 2017, there was no question it was a statute of limitations. *See Doe v. Roe*, 419 Md. 687, 703 (2011) (confirming that the statute was procedural and remedial). Moreover, as introduced, there is little doubt that the legislative intent of House Bill 642 was to extend the limitations to allow victims more time to bring civil claims. Thus, if the bill was intentionally changed during the legislative process to become a statute of repose, we would have to conclude that the General Assembly intended to immunize from liability, solely by the passage of time, persons who owed a duty of care to the victims and were grossly negligent, even if those persons concealed their negligence.

On the contrary, a concealment would likely toll a statute of limitations. *See Poffenberger v. Risser*, 290 Md. 631, 637 (1981) (holding that to “activate the running of limitations [it must be proven that the plaintiff had] actual knowledge—that is express cognition, or awareness implied from ‘knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry’”). Moreover, the legislature can extend statutes of limitations without concern about impacting substantive rights, and usually apply it retroactively. *Doe*, 419 Md. at 703.

While there is reason to doubt that the legislature intended to give any class of persons immunity from liability for their culpability in child sexual abuse after a certain time, we cannot ignore the arguments there was such intent. First, CJP § 5-117(d) states that “in no event” may an action be filed more than twenty years after the victim reaches the age of majority, which is the wording that is often used to establish the type of absolute bar to an action provided by a statute of repose. In addition, Section 3 of Chapter 12 refers to the subsection as providing “repose to defendants regarding actions that were barred by the period of limitations applicable before October 1, 2017.”

Even if the 2017 enactment was intended to create a statute of repose, an elimination of a statute of repose may not impair a vested right in all cases. In 1991, the General Assembly amended CJP § 5-108, which is clearly a statute of repose, to add exceptions for asbestos claims. Citing to a 1990 letter of advice, the Attorney General’s bill review letter for the 1991 legislation (Senate Bill 335) stated that “[w]e have previously advised that the statute of repose may be altered retroactively without violating due process.” The 1990 letter noted that Maryland’s highest court

would analyze whether the retroactive application would “divest or adversely affect vested rights.” See Letter to the Honorable David B. Shapiro from Asst. Att’y Gen. Kathryn M. Rowe, Feb. 15, 1990. Because the Maryland case law on vested rights was scant at the time, the letter cited cases from other jurisdictions that looked at, among other things, the public interest served by the statute. The letter concluded CJP § 5-108 created no vested rights. The asbestos carve outs are still good law today.

In the 23 years since that letter was written, however, Maryland case law on vested rights has developed. A retrospective application of a limitations period may impair a vested right in some circumstances. The Maryland Supreme Court has pointed out that it “consistently held that the Maryland Constitution ordinarily precludes the Legislature (1) from retroactively abolishing an accrued cause of action, thereby depriving the plaintiff of a vested right, and (2) from retroactively creating a cause of action, *or reviving a barred cause of action, thereby violating the vested right of the defendant.*” *Dua v. Comcast Cable*, 370 Md. 604, 833 (2002) (emphasis added). See also *Muskin v. State Dept. of Assessments & Taxation*, 422 Md. 544, 556-57 (2011) (announcing that “[i]t has been firmly settled by this Court’s opinions that the Constitution of Maryland prohibits legislation which retroactively abrogates vested rights. No matter how ‘rational’ under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking of a person’s property and giving it to someone else.”).

The *Dua* and *Muskin* cases, however, did not involve the revival of a cause of action. And courts in other states have upheld retroactive extensions of the statute of limitations for child sexual abuse, largely relying on the compelling public interest. See, e.g., *Sliney v. Previte*, 41 N.E.3d 732 (Mass. Sup. 2015) and *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462 (Conn. 2015). Moreover, in *Doe v. Roe*, the Maryland Supreme Court recognized that “an extended period of time during which alleged victims of child sexual abuse may seek redress in the courts ‘improves’ the child’s right to seek compensation for the alleged wrongs committed against him or her.” 419 Md. at 703. Consequently, while it is possible that Senate Bill 686’s retrospective reach to time barred actions would be found to be unconstitutional, it is not a given that would be the outcome. It is an open question. *Id.* at 707 (making clear that the case at hand addressing retroactivity did not involve time barred claims and thus, “[b]ecause we are not presented with that scenario, we express no holding regarding the applicability of § 5-117 to child sexual abuse claims barred under the three-year statute as of 1 October 2003, the effective date of the new statute”).

In summary, it is our view that Senate Bill 686 is not clearly unconstitutional. If the General Assembly chooses to provide victims of child sexual abuse an expanded chance for justice, I can in good faith defend the legislation should it be challenged in court.

Sincerely,

A handwritten signature in black ink, appearing to read "AG Brown". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Anthony G. Brown