S.B. 2282
REVIVING TIME-BARRED CIVIL CLAIMS

TESTIMONY OF CARY SILVERMAN
ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION

BEFORE THE NORTH DAKOTA
SENATE JUDICIARY COMMITTEE

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On behalf of the American Tort Reform Association (ATRA), thank you for the opportunity to express our concerns regarding S.B. 2282, which would revive time-barred civil claims.

I am a partner 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 received my law degree and a Master of Public Administration from George Washington University, where I serve as an adjunct law professor. I have testified across the country on bills similar to S.B. 2282. 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 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. I commend the Committee for considering steps to protect children and help survivors of abuse. My testimony today focuses on general principles underlying statutes of limitations, as well as the reasons why retroactive changes to these laws, and particularly reviving time-barred claims, are often viewed as unsound policy by legislatures and unconstitutional by courts.

Changes to any statute of limitations should be examined objectively based on core principles. 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. ATRA is concerned that the two-year reviver window contained in S.B. 2282 strays from these principles and sets a troubling precedent for other types of civil cases.

Statutes of Limitations: An Overview

Why do we have statutes of limitations? By encouraging claims to be filed promptly, statutes of limitations help judges and juries decide cases based on the best evidence available. They allow court to evaluate liability (in negligence cases, what a person or organization should have done to fulfill its duty of care) when witnesses can testify, when records and other evidence is available, and when memories are fresh. As the U.S. Supreme Court has recognized, "the search for truth may be seriously impaired

by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."[1]

Tort law, by its very nature, often deals with horrible situations that have a dramatic impact on a person's life and the lives of others. No matter how tragic or appalling the conduct, or serious injury, North Dakota law requires a plaintiff to file a lawsuit within a certain time. For example, in North Dakota:

- When a person is seriously injured due to a drunk driver, he or she must file a civil lawsuit within six years, which is the general period that applies to personal injury claims.[2]

- A lawsuit alleging that a parent or child died because of someone's careless or reckless conduct must be filed within two years of the person's death.[3]

- Lawsuits alleging harm due to a doctor's lack of due care must be filed within two years of the injury or discovery of the injury, but not more than six years from when treatment occurred.[4]

What these examples show is that the length of a statute of limitations is <u>not</u> typically based on the severity of the injury or the heinousness of the conduct at issue. The length of time to file a claim typically reflects the nature of the evidence. Claims involving hard evidence such as written contracts or land tend to have longer statutes of limitations. Cases involving standards of care and that rely on witness testimony to determine what was done or not done tend to have shorter periods to file a claim.

In addition to helping courts and juries reach accurate decisions, and safeguarding due process, statutes of limitations also allow businesses and nonprofit organizations to accurately gauge their potential liability and make financial, insurance coverage, and document retention decisions accordingly.

North Dakota's statutes of limitations reflect a legislative judgment that a two to six-year period typically provides claimants with adequate time to pursue a claim while giving defendants a fair opportunity to contest complaints made against them. In addition, North Dakota law recognizes that when the injury is to a child, he or she must have additional time to bring a claim. When a child is harmed, the clock generally does not begin until he or she becomes an adult (age 18).[5]

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[1] *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

[2] N.D. Cent. Code § 28-01-16(5).

[3] N.D. Cent. Code § 28-01-18(4).

[4] N.D. Cent. Code § 28-01-18(3), (4).

[5] *See, e.g.*, N.D. Cent. Code § 28-01-25.

North Dakota's Current Statute of Limitations for Lawsuits Alleging Injuries Resulting from Childhood Sexual Abuse

North Dakota has twice extended its statute of limitation for civil actions alleging injuries resulting from childhood sexual abuse. Before 2011, the general statute of limitations for personal injury claims applied, providing six years of turning 18 to file a claim. That year, the legislature enacted a statute of limitations specifically for childhood sexual abuse claims that provided survivors with significantly more time to file a claim. Rather than provide a hard number of years to file a claim from the abuse or turning 18, the legislature enacted a law that allows individuals to file lawsuits within seven years of discovery of the abuse and the resulting injury.[6] In 2015, the legislature further extended that law to provide ten years rather than seven years of knowing of the abuse to file a claim.[7] Those periods applied prospectively and did not open the door to claims alleging conduct that occurred decades ago.

The Proposed Legislation

S.B. 2282 does not alter the ten-year discovery period that has been in place since 2015. Rather, the bill proposes opening a two-year "window" during which any past statute of limitations is cast aside and expired claims seeking damages from sexual assault, sexual abuse, or gross sexual imposition can be filed. As drafted, the bill appears to apply not only to allegations of sexual abuse involving children, but also adults. These claims, whether they arose in 2009 or 1949, are "revived." To my knowledge, North Dakota has never taken such an extraordinary approach for any type of civil claim.

It is critical to recognize that S.B. 2282 does not distinguish between lawsuits filed against perpetrators and organizations. In addition to private entities, the bill specifically revives claims against public schools, though it does not appear to apply equally to those who allege that other public entities, such as a public recreational program, social service agency, or law enforcement, are responsible for abuse.

S.B. 2282 would allow claims against organizations based purely on negligence, meaning that a lawsuit only needs to assert that an organization should have taken additional steps to detect, avoid, or stop abuse many years ago, or should have had better practices for hiring or supervising employees or volunteers. These lawsuits do *not* need to show that an organization knew of the abuse and allowed, enabled, or concealed it. In many cases, the perpetrator will be dead. The lawsuits will claim that an organization failed to take adequate steps in the 1940, 1950s, or 1960s to protect the safety of the victim.

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[6] S.L. 2011, ch. 231, § 1 (eff. Aug. 1, 2011) (codified at N.D. Cent. Code § 28-01-25.1).

[7] S.L. 2015, ch. 234 (eff. Aug. 1, 2015) (S.B. 2331) (amending N.D. Cent. Code § 28-01-25.1).

Retroactively Discarding a Statute of Limitations is Particularly Problematic for Businesses and Nonprofit Organizations

The retroactivity of the legislation is particularly concerning. At least when a statute of limitations is extended 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 North Dakota 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 than then discard them after a certain number of years.

- Meticulously document steps it takes in the area in which it is subject to that liability exposure, such as how it made hiring, disciplinary, and termination decisions, received and responded to report 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 revived lawsuit alleging that his 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 during a "window" is also likely to result in a sudden surge of unexpected litigation. Even if an organization has the records, witnesses, institutional knowledge available to defend itself, it will be challenging to respond to the litigation when it faces multiple cases at the same time.

Reviving Time-Barred Claims Sets a Troubling Precedent

Discarding a statute of limitations and reviving-time barred claims, even temporarily, sets a troubling precedent. Over time, there will be many sympathetic plaintiffs, important causes, and unpopular industries and defendants. There are also other past injustices that have not been remedied. Allowing revival of time-barred claims here will inevitably lead to future calls to permit claims asserting injuries based on conduct that occurred decades ago to proceed in North Dakota's courts.

ATRA has already observed several such attempts in other states. For example, efforts are underway in states that have revived time-barred childhood sexual abuse claims to expand these provisions. Legislation recently took effect in New York that revives claims brought by those who allege injuries from sexual abuse as adults.[8] California enacted similar legislation reviving claims against entities alleging damages from sexual assault experienced as adults, adding related employment claims.[9] Vermont almost immediately expanded its 2019 childhood sexual abuse claims-revival law to apply to *physical* abuse claims.[10] Now, Vermont is considering legislation that would further extend this reviver to "emotional abuse" claims.[11]

Plaintiffs' lawyers and advocacy groups will also seek to revive other types of tort claims. For example, legislation proposed in Maine would have retroactively expanded the statute of limitations for product liability claims from six to fifteen years.[12] Oregon considered a bill that would have revived time-barred asbestos claims during a two-year window.[13] Last October, New York revived claims by water suppliers alleging injuries related to an "emerging contaminant."[14]

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[8] S. 66 (N.Y. 2022).

[9] A.B. 2777 (Cal. 2022). As introduced, the California legislation would have broadly revived claims seeking to recover damages for "inappropriate conduct, communication, or activity of a sexual nature." A.B. 2777 (Cal., introduced Feb. 18, 2022).

[10] *See* S. 99 (Vt. 2021).

[11] H. 8 (Vt., introduced Jan. 5, 2023).

[12] LD 250 (Maine 2019) (reported "ought not to pass").

[13] S.B. 623 (Or. 2011) (died in committee).

[14] S. 8763A (N.Y. 2022).

States have also considered proposals to retroactively allow lawsuits alleging novel theories of liability. Bills have attempted to allow claims addressing social and political causes by applying today's moral values to conduct that occurred long ago. For example, legislation has been introduced to revive lawsuits alleging that businesses are responsible for climate change[15] or to address human rights abuses of the past.[16]

ATRA's concern is that opening the door here sets a precedent that will be used in other areas. If the legislature is willing to discard statutes of limitations, individuals and businesses in North Dakota will face a risk of indefinite liability for any type of claim. As discussed earlier, taking this approach makes the civil justice system unpredictable, unreliable, and unfair.

Most States Have Not Taken the Extreme Approach Proposed in S.B. 2282

Over the past two decades or so, state legislatures have considered hundreds of bills to lengthen the statute of limitations for civil claims alleging injuries from childhood sexual abuse. Most legislatures have, like North Dakota, responded by prospectively increasing the statute of limitations, even if a bill started out with a more extreme approach. They have retained finite limits and decided not to revive time barred claims. Here are some recent examples:

- Alabama, one of the few states that had no special statute of limitations for childhood sexual abuse claims, prospectively established a statute of limitation for childhood sexual abuse requiring claims to be filed by age 25.[17]

- Tennessee prospectively changed its law from requiring an action to be filed within 3 years of discovery to 15 years of turning 18 (age 33) or 3 years of discovery of the abuse.[18]

- Texas prospectively extended the statute of limitations from 15 years to 30 years of majority (age 48).[19]

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[15] *See* S.B. 1161 (Cal. 2016) (proposing to revive actions under the state's unfair competition law alleging that businesses deceived, confused, or misled the public on the risks of climate change or financially supported activities that did so) (reported favorably from committee, but died without floor vote).

[16] *See* A.B. 15 (Cal., as amended Mar. 26, 2015) (proposing a ten-year statute of limitations for torts involving certain human rights abuses that would have applied retroactively to revive time-barred claims for events that occurred up to 115 years earlier) (claims-revival provision removed and legislation made prospective before enactment).

[17] S.B. 11 (Ala. 2019) (to be codified at Ala. Code Ann. § 6-2-8(b)).

[18] H.B. 565 (Tenn. 2019).

[19] H.B. 3809 (Tex. 2019).

By our count, 24 states and the District of Columbia have revived childhood sexual abuse claims in some form since California did so in 2002. It is important for the Committee to recognize, however, that very few of these states adopted the broad, open ended type of reviver contained in S.B. 2282. Most other states placed significant constraints the claims that they revived.

Some states limited revivers to the perpetrator of the abuse, recognizing the problems with evaluating negligence after decades have passed. By contrast, intentional tort claims involve crimes with the simple question of whether the defendant committed the abuse or not.

- Massachusetts extended its statute of limitations from 3 years of becoming an adult (the general period for personal injury claims) to 35 years of age 18 or 7 years of discovery of the injury in 2014. The new period applied retroactively to revive time-barred claims against perpetrators only.[20] Massachusetts also has a low cap on damages in civil claims against charitable organizations.

- Georgia extended its statute of limitation to age 23 or 2 years of discovery and enacted a 2-year window reviving time-barred claims against perpetrators only in 2015.[21]

- Rhode Island extended its statute of limitations for childhood sexual abuse cases from 7 years to 35 years of turning 18, and provided a 7-year period to bring a claim from when a victim discovers or reasonably should have discovered the injury caused by the abuse. Before enacting this law, the General Assembly removed a 3-year window that would have permitted time-barred claims. Instead, the enacted legislation applies the extended period retroactively for claims brought against perpetrators only and explicitly does not revive time-barred claims against entities.[22]

Other states have required revived claims against an entity to show the entity had actual knowledge or committed criminal misconduct.

- In 2009, Oregon extended its statute of limitation to permit claims until age 40 against perpetrators or claims alleging that an entity knowingly allowed,

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[20] Mass. Act ch. 145, § 8 (2014) (codified at Mass. Gen. Laws ch. 260, § 4C, 4C 1/2). The Massachusetts law's 35-year period for filing a claim is "limited to all claims arising out of or based upon acts alleged to have caused an injury or condition to a minor which first occurred after the effective date of this act" and did not revive time-barred claims. The Massachusetts law's seven-year discovery period, however, applied retroactively.

[21] Ga. Code Ann. § 9-3-33.1(d)(1) ("The revival of claim…shall not apply to [a]ny claim against an entity.").

[22] S.B. 315 Sub. A (R.I. 2019).

permitted, or encouraged child abuse, and applied that new period retroactively.

- Utah adopted a statute of limitation that allows claims to be filed within 35 years of turning 18 and enacted a 3-year window for claims against perpetrators and those who would be criminally responsible in 2016.[23] As discussed early, the Utah Supreme Court found that reviver unconstitutional in 2020.

- Michigan prospectively extended its statute of limitations to age 28 or 3 years of discovery, and adopted a 90-day reviver window tailored for victims of a convicted criminal, Dr. Larry Nasser in 2018.[24]

- Arizona extended its statute of limitations to 12 years of age 18 in 2019. It adopted a window that is about 1 1/2 years long that revives claims only where there is clear and convincing evidence that an entity knew an employee or volunteer engaged in sexual abuse.[25]

- West Virginia adopted a statute of limitations of 18 years of becoming an adult or four years of discovery of the abuse, for claims against perpetrators, in 2020. For claims against entities, it adopted an 18-year period (age 36) without the potential to expand that period for later discovery of the injury. It revived claims against perpetrators or a person or entity that aided, abetted, or concealed the abuse.[26]

Three states did not revive claims alleging bare negligence, but required evidence of gross negligence to support a time-barred claim. These states include Delaware (2007), Hawaii (2012-2020), and Vermont. [27]

In addition, several states revived only those claims falling within a new or extended, but finite, statute of limitations by applying the new period retroactively. These states include Connecticut, Kentucky, Montana, Nevada, Oregon, and West

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[23] Utah Code Ann. § 78B-2-308(7) (reviving a civil action against an individual who "(a) intentionally perpetrated the sexual abuse;" or "(b) would be criminally responsible for the sexual abuse").

[24] Mich. Public Act 183 (S.B. 872) (signed June 12, 2018) (amending Mich. Comp. Laws § 600.5805 and adding § 600.5851b). The Michigan law revived claims revived claims filed by an individual who, while a minor, was a victim of criminal sexual conduct after December 31, 1996 when the person alleged to have committed the criminal sexual conduct was convicted of criminal sexual conduct and that defendant was (a) in a position of authority over the victim as the victim's physician and used that authority to coerce the victim to submit, or (b) engaged in purported medical treatment or examination of the victim in a manner that is, or for purposes that are, medically recognized as unethical or unacceptable.

[25] H.B. 2466 (Ariz. 2019).

[26] H.B. 4559 (2020) (amending W. Va. Code Ann. § 55-2-15).

[27] Del. Code tit. 10, § 8145(b); Haw. Rev. Stat. § 657-1.8(b); Vt. Stat. Ann. tit. 12, § 522.

Virginia, as well as the District of Columbia. They did not revive claims going back indefinitely.

Finally, Colorado's 2021 law retroactively authorized a cause of action involving conduct that occurred after 1960 and capped damages in otherwise time-barred negligence claims against organizations and public entities.[28]

In sum, while you may hear that many states have revived time-barred childhood sexual claims, relatively few states, such as California, New York, New Jersey, and Minnesota have broadly done so. When you look more closely at what other states actually did, about two thirds of those 24 states included significant constraints on what claims are revived that are not found in S.B. 2282.

Questionable Constitutionality

In addition to the public policy reasons that support maintaining finite statutes of limitations and not making changes retroactively, states have also avoided reviving time-barred claims due to constitutional concerns.

As several state supreme courts have observed, "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.[29] States reach this result through applying due process safeguards, a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, or another state constitutional provision. These cases generally recognize that a legislature cannot take away vested rights. It is a principle that is equally important to plaintiffs and defendants. These courts generally find that the legislature cannot retroactively shorten a statute of limitations and take away an accrued claim (such as by reducing a three-year period to one year, when a plaintiff is two years from accrual of the claim). Nor can it

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[28] S.B. 88 (Colo. 2021) (codified at Colo. Rev. Stat. § 13-20-1201 et seq.) (generally limiting damages to $350,000 against public entities and $500,0000 against private entities).

[29] *Johnson v. Garlock, Inc.*, 682 So.2d 25, 27-28 (Ala. 1996); *see also 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"); *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.").

extend a statute of limitations after the claim has expired. Courts have applied these constitutional principles to not allow revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others.

A minority of states find that reviving time-barred claims is permissible or appear likely to reach that result. These states generally follow the approach taken under the U.S. Constitution, which contains an "Ex Post Facto" clause that prohibits retroactive *criminal* laws,[30] including retroactive revival of time-barred criminal prosecutions,[31] but does not provide a similar prohibition against retroactive laws affecting *civil* claims.[32] For that reason, under federal constitutional law, there is no vested right in a statute of limitations defense that prohibits reviving an otherwise time-barred claim.[33] The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution.[34]

Last summer, the Utah Supreme Court was the latest to find reviver legislation (a three-year window that revived claims only against perpetrators) unconstitutional. While the court "appreciated the moral impulse and substantial public policy justifications" for the reviver, the court unanimous 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."[35]

By our count, 15 of the 24 states that have revived time-barred childhood sexual abuse claims did so between 2019 and 2021. Litigation stemming from these recent enactments is now reaching state appellate courts. ATRA is aware constitutional challenges to revivers in five states: Colorado, Louisiana, North Carolina, New York, and

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[30] U.S. Const. art. I, § 9, cl. 3 ("No bill of attainder or ex post facto Law shall be passed.").

[31] *See Stogner v. California*, 539 U.S. 607 (2003) (holding that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution").

[32] While the U.S. Supreme Court has provided Congress with more of a free hand to enact retroactive legislation, it has also expressed strong concern with this long "disfavored" approach. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("[R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

[33] *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Campbell v. Holt*, 115 U.S. 620, 628 (1885).

[34] *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

[35] *Mitchell v. Roberts*, 469 P.3d 901, 903, 913 (Utah 2020).

Rhode Island. We anticipate that courts will ultimately invalidate some, if not all, of the reviver provisions in these laws.[36]

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In conclusion, it is important that North Dakota's civil justice system maintain the predictability and certainty of having a finite statute of limitations for any type of civil claim. Legislation that opens a window during which decades-old claims are revived sets a troubling precedent, allowing decades-old claims where witnesses, records, and other evidence upon which judges and juries can evaluate liability are no longer available. North Dakota's statute of limitations, in providing ten-years to bring a claim from discovery of the abuse, is more open ended than many states, but if the Committee feels that more time is needed, there are alternatives that would provide survivors of sexual abuse with more time to sue without violating core principles of the civil justice system. Thank you again for the opportunity to testify today and considering ATRA's concerns as you address this difficult and important issue.

[36] *Lousteau v. Congregation of Holy Cross Southern Province, Inc.*, No. 22-30407 (5th Cir.) (considering appeal of ruling finding Louisiana's reviver unconstitutional); *Doe v. Society of the Roman Catholic Church of the Diocese of Lafayette*, No. 2022-CC-00829, 347 So.3d 148 (Mem) (La. Oct. 4, 2022) (remanding to Court of Appeals with instruction to consider whether reviving a time-barred claim would "unconstitutionally impair relator's vested right in the defense of liberative prescription"); *PB-36 Doe v. Niagara Falls City Sch. Dist.*, CA 21-01223 (N.Y. App. Div., 4th Dep't) (briefing complete)*; McKinney v. Goins*, No. 109PA22 (N.C.) (considering appeal of ruling finding reviver unconstitutional); *Houllahan v. Gelineau*, SU-2021-0032-A, SU-2021-0033-A, SU-2021-0041-A (R.I.) (oral argument scheduled for Feb. 1, 2023, in case in which trial court did not reach constitutional issue).