COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2022-SC-0308

RICK JACKMAN, LINDA THOMPSON, and LOUISVILLE/JEFFERSON COUNTY METROPOLITAN GOVERNMENT, APPELLANTS

v.

APPEAL FROM THE OPINION OF
THE KENTUCKY COURT OF APPEALS
CASE NO. 2020-CA-0194

SAMANTHA KILLARY, APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE

Joshua D. Hicks (KY 94358)
Attorney of Record
HICKS & FUNFSINN, PLLC
209 East High Street
Lexington, KY 40507
Telephone: (859) 777-7000
Email: josh@hfkylawyers.com

Robert Peck
CENTER FOR CONSTITUTIONAL LITIGATION
1901 Connecticut Ave. NW, Ste. 1008
Washington, DC 20009
Telephone: (202) 944-2874
Email: Robert.Peck@cclfirm.com

Counsel for Amicus Curiae

The undersigned hereby certifies that ten copies (1 unbound and 9 bound) of this brief were hand-delivered to Kelly Stephens, Clerk of the Supreme Court of Kentucky, 700 Capital Ave., Room 235, Frankfort, KY 40601 and to the Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and that true and accurate copies of same have been served via first-class U.S. Mail upon: Hon. McKay Chauvin, Jefferson Circuit Court, 700 W. Jefferson St., Louisville, KY 40202; Jonathan Dyar, 600 W. Main St., Ste. 500, Louisville, KY 40202; Kent Wicker, William H. Brammell, Jr., Kayla M. Campbell, Wicker Brammell PLLC, 323 W. Main St., 11th Floor, Louisville, KY 40202; Carol S. Petitt, Adam Fuller, Vaughn Petitt Legal Group PLLC, 7600 W. Hwy. 146, Ste. 100, Pewee Valley, KY 40056; Kristie B. Walker, Assistant Jefferson Co. Attorney, 200 S. Fifth St, Ste. 300N, Louisville, KY 40202, all on this 21st day of February, 2023.

Joshua D. Hicks

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2022-SC-0308

RICK JACKMAN, LINDA THOMPSON, and LOUISVILLE/JEFFERSON COUNTY METROPOLITAN GOVERNMENT, APPELLANTS

v.

APPEAL FROM THE OPINION OF
THE KENTUCKY COURT OF APPEALS
CASE NO. 2020-CA-0194

SAMANTHA KILLARY, APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE

Joshua D. Hicks (KY 94358)
Attorney of Record
HICKS & FUNFSINN, PLLC
209 East High Street
Lexington, KY 40507
Telephone: (859) 777-7000
Email: josh@hfkylawyers.com

Robert Peck
CENTER FOR CONSTITUTIONAL LITIGATION
1901 Connecticut Ave. NW, Ste. 1008
Washington, DC 20009
Telephone: (202) 944-2874
Email: Robert.Peck@cclfirm.com

Counsel for Amicus Curiae

The undersigned hereby certifies that ten copies (1 unbound and 9 bound) of this brief were hand-delivered to Kelly Stephens, Clerk of the Supreme Court of Kentucky, 700 Capital Ave., Room 235, Frankfort, KY 40601 and a copy hand-delivered to the Kate Morgan, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; with true and accurate copies of same being served via first-class U.S. Mail upon: Hon. McKay Chauvin, Jefferson Circuit Court, 700 W. Jefferson St., Louisville, KY 40202; Jonathan Dyar, 600 W. Main St., Ste. 500, Louisville, KY 40202; Kent Wicker, William H. Brammell, Jr., Kayla M. Campbell, Wicker Brammell PLLC, 323 W. Main St., 11th Floor, Louisville, KY 40202; Carol S. Petitt, Adam Fuller, Vaughn Petitt Legal Group PLLC, 7600 W. Hwy. 146, Ste. 100, Pewee Valley, KY 40056; Kristie B. Walker, Assistant Jefferson Co. Attorney, 200 S. Fifth St, Ste. 300N, Louisville, KY 40202, all on this 21st day of February, 2023.

Joshua D. Hicks

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF BRIEF AND ISSUES ADDRESSED IN BRIEF

This case presents this Court with questions concerning whether a political subdivision can assert sovereign immunity despite the Kentucky Legislature's denial of that immunity and whether the State's interest in assuring that remedies are available to victims of childhood sexual assault or abuse permits retroactive extension of the statute of limitations. This brief will explain why a political subdivision is entirely subject to the General Assembly's determinations of its ability to claim sovereign immunity and lacks independent standing to challenge that determination and the applicable statute of limitations.

In addition, the 2021 Amendments to KRS 413.249 created a new cause of action that does not implicate any vested rights claimed by the other defendants. It further develops the nature of statutes of limitation, their treatment in federal caselaw, and why federal precedent does not subscribe to the vested rights regime and why due process does not stand as an obstacle to an extended limitations period. Federal precedent serves as guidance to understanding why a new cause of action based on an explicitly retroactive and remedial statute may apply to actions taken in the past that cannot have any reliance interests on a different even if related statute of limitations.

ARGUMENT

I. The General Assembly has waived Louisville/Jefferson County Metro Government's claim of sovereign immunity.

Sovereign immunity, as claimed by Louisville/Jefferson County Metro Government ("Metro"), is subject to waiver and retraction — and that is precisely what the General Assembly accomplished by enacting the 2021 Amendments to KRS 413.249.

a. **The General Assembly has plenary authority and complete discretion to waive sovereign immunity.**

Sovereign immunity exists as a common-law concept, *Yanero v. Davis*, 65 S.W.3d 510, 523–24 (Ky. 2001), brought to our nation from England. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009). Its origins reflected the idea that the king could not be sued without his consent. Charles H. Koch & Richard Murphy, 3 Admin. L. & Prac. § 8:31 (3d ed. 2017).

Reflecting on the Americanized version of sovereign immunity, the United States Supreme Court declared that "certain limits are implicit in the constitutional principle of state sovereign immunity." *Alden v. Maine*, 527 U.S. 706, 755 (1999). The first of these is waiver through consent, which the Court acknowledged many states had accomplished by "enact[ing] statutes consenting to a wide variety of suits." *Id.* It further noted that the "rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.'" *Id.* (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).

The Kentucky Constitution assigns authority to the General Assembly to "direct in what manner and in what courts suits may be brought against the

Commonwealth." Ky. Const. § 231. The legislature may exercise this constitutional authority through enactment of a law. *Id.*

This Court has recognized that sovereign immunity remains a "matter of grace," and "such a remedy may be granted, withdrawn or restricted at the will of the legislature." *Univ. of Ky. v. Guynn*, 372 S.W.2d 414, 416 (Ky. 1963) (citations omitted). Moreover, in its exercise of this authority, the General Assembly has broad "discretion" to "fix or alter the amount recoverable." *Id.* (citation omitted). The constitutional grant to the General Assembly to decide when sovereign immunity is withdrawn, then, is plenary.

b. **The 2021 Amendments to KRS 413.249 waived sovereign immunity.**

The 2021 Amendments to KRS 413.249 are unquestionably a qualifying law for the exercise of legislative authority to waive sovereign immunity for Metro. No one has even suggested otherwise. The enactment makes plain that its extension of the statute of limitations applies to any

> entity that owed a duty of care to the plaintiff, where a wrongful or negligent act by an employee, officer, director, official, volunteer, representative, or agent of the entity was a legal cause of the childhood sexual assault or abuse that resulted in the injury to the plaintiff.

KRS 413.249(3)(b).

If there were nothing more to the statute, one might logically question whether a waiver of sovereign immunity had occurred. But the General Assembly left no reason to engage in doubt or guesswork. It specifically defined "entity" as

> a firm, partnership, company, corporation, trustee, association, or any private or public entity, including the Commonwealth, a city, county, urban-county, consolidated local government, unified local government, or charter county government, or any of their agencies, departments, or any KRS 58.180 nonprofit nonstock corporation; . . .

KRS 413.249(1)(b).

Metro nevertheless seeks to negate the plain meaning of what the General Assembly enacted by denying that it constitutes a sufficiently *express* waiver of sovereign immunity. Br. for Appellant Louisville/Jefferson Cnty. Metro Gov't 14. Apparently, Metro would require the statutory text stating "sovereign immunity is hereby waived," or words very close to that. The argument, however, runs counter to this Court's consistent holdings.

A court reads a statute in a manner that gives effect to the legislature's intent, the best evidence of which is the language the General Assembly chose. *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). The language added to KRS 413.249 unmistakably applies actions for childhood sexual abuse or assault and its extended statute of limitations "to the Commonwealth, a city, county, urban-county, consolidated local government, unified local government, or charter county government, or any of their agencies, departments . . ." KRS 413.249(1)(b).

To say as much and still believe that sovereign immunity prevents that very cause of action that the General Assembly approved against the Commonwealth and its political subdivisions is to argue that the legislature engaged in a meaningless act when it passed the 2021 Amendments. However,

a "statute should be construed so that no part of it is meaningless or ineffectual." *Gen. Motors Corp. v. Book Chevrolet, Inc.*, 979 S.W.2d 918, 919 (Ky. 1998) (citation omitted).

In 1932, this Court followed that teaching when it rejected an argument that the statutory language at issue had not expressly or impliedly waived the Commonwealth's immunity. *Pennington's Adm'r v. Commonwealth*, 46 S.W.2d 1079 (1932). This Court held:

> Such a construction of the resolution renders it a nullity. Plainly it was the intention of the Legislature by its adoption of the resolution to waive its immunity against suit in its entirety and to place its defense on the same plane as an ordinary defendant, in the absence of an express reservation to the contrary. The sole object and purpose of the resolution was to empower the appellant to bring an action against the state to recover damages for the death of his decedent. To construe the resolution to mean that the commonwealth retained its immunity from the suit by reason of the conduct of its agents or employees is equivalent to charging the General Assembly in engaging in an absurdity.

Id. at 1080.

More recently, this Court adhered to the same analysis in *Withers v. Univ. of Ky.*, 939 S.W.2d 340 (Ky. 1997), where a patient argued that a legislative grant of authority to purchase medical insurance constituted an implicit waiver of a state hospital's sovereign immunity. This Court rejected that argument because the connection between purchasing insurance and consent to suit was too attenuated. It held, instead, that the General Assembly's intention to waive sovereign immunity must be stated "'by the most express language ***or*** by such overwhelming implications from the text as [will]

leave no room for any other reasonable construction.'" *Id.* at 346 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909) (emphasis added). *Cf. Dep't of Corr. v. Furr*, 23 S.W.3d 615, 618 (Ky. 2000) (holding immunity waived "by overwhelming implication" through the provision of a remedy against state actors).

The same analysis applies here. The 2021 Amendments would be a nullity if it were not construed to waive sovereign immunity for it "leave[s] no room for any other reasonable construction." The amendments constitute a clear waiver of sovereign immunity.

II. Metro cannot otherwise complain about the liability imposed or the statute of limitations by the 2021 Amendments.

Metro is a political subdivision of the Commonwealth. *Jewish Hosp. Healthcare Servs., Inc. v. Louisville/Jefferson Cnty. Metro Gov't*, 270 S.W.3d 904, 907 (Ky. Ct. App. 2008). As such, Metro holds "no sovereignty distinct from the state and possess[es] only such powers as the state through its Legislature has expressly or impliedly conferred upon them." *City of Pineville v. Meeks*, 71 S.W.2d 33, 35 (1934). Settled law establishes that a political subdivision is "a creation of the Legislature," and its "continued existence and the purview of its authority are dependent upon the will and discretion of the Legislature." *Sanitation Dist. No. 1 of Shelby Cty. v. Shelby Cty.*, 964 S.W.2d 434, 437 (Ky. App. 1998).

The power of creation that the General Assembly holds "carries with it the right to amend, abridge, or repeal" the existence and scope of a political

subdivision's governmental powers. *Meeks*, 71 S.W.2d at 35; *see also* 1 Eugene McQuillin, The Law of Municipal Corporations § 1.21 (John H. Silvestri & Mark S. Nelson eds., 3d ed. 1999) ("Unless restricted by the state constitution, the state legislature has plenary power to create, alter, or abolish at pleasure any or all local government areas.").

For that reason, Metro cannot resist the General Assembly's abrogation of sovereign immunity regardless of whether it is deemed concurrent or retrospective. As sister states have put it, a political subdivision "may not assert any constitutional protections regarding due course of law or due process of law against the state, its creator." *Avon Lake City Sch. Dist. v. Limbach*, 518 N.E.2d 1190, 1193 (Ohio 1988) (per curiam); *see also Kent Cty. v. Dep't of Soc. Servs.,* 386 N.W.2d 663, 666 (Mich. Ct. App. 1986) ("Local units of government are creatures of legislation [and,] have no due process rights to invoke against the will of their creator."); *City of Atlanta v. Spence*, 249 S.E.2d 554, 556 (Ga. 1978) ("A county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection and due process clauses of the state or federal Constitution in opposition to the will of its creator.").

This Court should hold that Metro is not immune and has no statute of limitations defense, rather than remand the issue as the Court of Appeals did.

III. The other defendants cannot avoid application of the revised statute of limitations.

Writing for four justices in dissent about the invalidation of an extension of a *criminal* statute of limitations, Justice Kennedy expressed the same concerns that undoubtedly motivated the General Assembly in enacting the 2021 Amendments:

> When a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime. The victims whose interests [the new law] takes into consideration have been subjected to sexual abuse within the confines of their own homes and by people they trusted and relied upon for protection. A familial figure of authority can use a confidential relation to conceal a crime. The violation of this trust inflicts deep and lasting hurt. Its only poor remedy is that the law will show its compassion and concern when the victim at last can find the strength, and know the necessity, to come forward. When the criminal has taken distinct advantage of the tender years and perilous position of a fearful victim, it is the victim's lasting hurt, not the perpetrator's fictional reliance, that the law should count the higher. The victims whose cause is now before the Court have at last overcome shame and the desire to repress these painful memories.

Stogner v. California, 539 U.S. 607, 651-52 (2003) (Kennedy, J., dissenting) (internal citations omitted).

a. The 2021 Amendments create a new cause of action with a permissible statute of limitations that covers this action.

The 2021 Amendments created liability and a remedy for third parties who owe a duty of care to a child who suffers sexual abuse or assault through a "wrongful or negligent act by an employee, officer, director, official, volunteer, representative, or agent of the entity," which was a "legal cause" of the injury. KRS 413.249(3)(b). No statute previously provided this liability and thus, as the court below recognized, the 2021 Amendments established "new causes of

action against third parties and 'entities.'" *Killary v. Thompson*, 2022 WL 2279865, at *8 (Ky. Ct. App. 2022).

Previously, liability in Kentucky was limited to those who committed certain childhood sexual abuses or assaults defined as a felony or a form of commercial exploitation. *See B.L. v. Schuhmann*, 380 F. Supp. 3d 614, 637 (W.D. Ky. 2019) (examining the statute as it existed before the 2021 Amendments). By creating liability on the part of third parties for a failure to discharge a preexisting duty without a remedy, the General Assembly plainly created a new cause of action.

Because it established a new liability as a remedial statute, the concerns that limit retroactive application of a new law do not apply. Just two years ago, this Court reiterated that the "general rule" permits retroactive application of a new version of a statute when "'*the amendment expressly provides for retroactive application.*'" *Martin v. Warrior Coal LLC*, 617 S.W.3d 391, 394 (Ky. 2021) (quoting *Commonwealth Dep't of Agric. v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000) (emphasis added)). The 2021 Amendments satisfy that criterion because it is explicit about the General Assembly's intention to have the amendments apply retroactively. *See* KRS 413.249(7).

The text also expressly establishes the remedial nature of the 2021 Amendments. *See* KRS 413.249(7)(a) ("This section is a remedial statute which is to be given the most liberal interpretation to provide remedies for victims of childhood sexual assault or abuse."). Remedial statutes relate to remedies or

modes of procedure. *Peabody Coal Co. v. Gossett*, 819 S.W.2d 33, 36 (Ky. 1991) (citations omitted). Put another way, "the term remedial applies to statutes which give a party a remedy where he previously had none." *Virgil v. Com.*, 403 S.W.3d 577, 580 (Ky. Ct. App. 2013) (citations omitted).

The legislature's designation of the 2021 Amendments as remedial has significant legal import as well for the propriety of retroactive application. Remedial statutes "do[] not come within the legal conception of a retrospective law nor the general rule against the retrospective operation of statutes." *Martin*, 617 S.W.3d at 395. Explicitly remedial statutes may extend to past transactions. *Newberg v. Davis*, 867 S.W.2d 193 (Ky. 1993). The 2021 Amendments plainly qualify for that treatment.

This Court should accept the General Assembly's designation of the 2021 Amendments as remedial. Legislation is remedial if it seeks to reform or extend existing rights aimed at the "promotion of justice and the advancement of the public welfare and of important and beneficial public objects." *Ky. Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000) (quoting 73 Am. Jur. 2d Statutes § 11 (1974)). There can be no doubt that the 2021 Amendments meet this standard.

b. The federal Constitution provides no bar to application of the 2021 Amendments and provides useful guidance.

Although the parties have not raised any federal issue with the 2021 Amendments' retroactive application, federal caselaw provides useful guidance. *See, e.g., Commonwealth v. Reed*, 647 S.W.3d 237, 243 (Ky. 2022)

(describing circumstances where "this Court looks to the United States Supreme Court's interpretation and application" for guidance).

Stogner, the case quoted at the outset of this section of this brief, in which Justice Kennedy explained concerns that the Kentucky General Assembly likely shared in enacting the 2021 Amendments, concerned application of the U.S. Constitution's federal *ex post facto* prohibition, U.S. Const. art 1, § 9,[1] and thus applied only to criminal prosecutions.[2] *Id.* at 612 (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798)). Still, Justice Kennedy's *Stogner* dissent pointed out that, under the federal Constitution, "expired statutes of limitations can be repealed to revive a civil action," while advocating for similar treatment of some criminal laws. *Id.* at 651 (Kennedy, J., dissenting).

Among the cases on which Justice Kennedy relied in the civil arena was *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945). There, the U.S. Supreme Court found no constitutional objection existed to an extended statute of limitations because 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." *Id.* at 314. While a statutory limitation period exists, a civil

---

[1] The U.S. Constitution also forbids states from enacting *ex post facto* laws. U.S. Const. art. I, § 10.

[2] *See also Collins v. Youngblood*, 497 U.S. 37, 42 n.2 (1990). The Commonwealth also has a constitutional prohibition against *ex post facto* laws, Ky. Const. art. I, § 19(1), which it applies solely to criminal matters. *See Buck v. Commonwealth*, 308 S.W.3d 661, 664 (Ky. 2010). The law must be punitive to qualify as *ex post facto*. *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003).

defendant may benefit from its protection, however, "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.* That means that they may be revived even after their expiration. Justice Kennedy noted that the issues in *Chase Sec.* were decided in the context of "contacts and investments where reliance does exist and does matter," but "[w]e allow the civil wrong to be vindicated nonetheless." *Stogner*, 539 U.S. at 651 (Kennedy, J., dissenting).

The *Chase Sec.* Court held that, after the expiration of a statute of limitations, the revival of a cause of action — or the enactment of a new cause of action, as here — will not deprive a civil defendant of a protected liberty or property interest. Unlike a cause of action itself, which is a form of property recognized as a chose in action, *see Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 688 (Ky. 2012), relief from liability does not implicate interests protected by the Due Process Clause, *see, e.g.*, *Lee v. Spellings*, 447 F.3d 1087, 1089 (8th Cir. 2006) (denying a due process violation by a statute that eliminated the statute of limitations to collect on defaulted student loans years after the original six-year limitations period expired).

Justice Scalia, speaking for the Court in another case, explained why no bar existed to a legislative renewal of an expired civil cause of action. Congress, he wrote, "can eliminate, for example, a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often excluded essential testimony; or a rule of offsetting wrong (such as

contributory negligence) that has often prevented recovery." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228-29 (1995). He further stated that "[r]ules of pleading and proof can similarly be altered after the cause of action arises, and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered." *Id.* at 229 (citing *Landgraf v. USI Film Prod.*, 511 U.S. 244, 275, n.29 (1994)).

No different rule applies to statutes of limitation, which often have a lesser impact on a cause of action than the examples *Plaut* cataloged. Referencing *Chase Sec.*, the *Plaut* Court held that the "distinguishing characteristic of a statute of limitations is that it can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired." *Id.* Thus, as the California Supreme Court noted, "Federal law has long held that unless the passage of the statute of limitations creates a prescriptive property right, such as title in adverse possession, the Legislature is free to revive a cause of action after the statute of limitation has expired." *Liebig v. Superior Ct.*, 257 Cal. Rptr. 574, 576 (Ct. App. 1989) (citing *Campbell v. Holt*, 115 U.S. 620 (1885)).

Even though Kentucky follows a different rule and has declined to adopt the federal approach to statutes of limitation, the unvarying federal approach suggests that due process, as the only constitutional guarantee implicated, provides little ballast to judicial invalidation of a statute of limitations

intended to assure sufficient time to a plaintiff to bring an action to vindicate rights that continue to exist, regardless of whether a remedy still exists.

c. Even if a revived but expired statute of limitations applied, which amicus denies, it provides a weak basis for dismissal of the underlying cause of action.

Because the 2021 Amendments established a new cause of action, no expired statute of limitation is at issue in this matter. Still, this case presents an opportunity for this Court to clarify some of the legal issues concerning legislative revival in the context of childhood sexual assault, where the injury committed is concededly both catastrophic and permanent.

The "main purpose of statutes of limitation is to 'encourage the plaintiff to pursue his rights diligently, and when an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by the statute of limitations does not further the statute's purpose.'" *Williams v. Hawkins*, 594 S.W.3d 189, 195 (Ky. 2020) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014)).

The selected limitation periods "represent expedients, rather than principles." *Chase Sec.*, 325 U.S. at 315. Importantly, "[t]hey are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay." *Id.* As creatures of legislative prerogative, "[t]hey represent a public policy about the privilege to litigate." *Id.*

Laws extending them do not impose "special hardships or oppressive effects" by "lifting the bar . . . with retrospective force," because the defendant's conduct would be no different if the revised limitations period "had been known and the change foreseen." *Id.* at 316. Thus, the conduct that admits of liability would have remained the same regardless of the period chosen by the legislature, either initially or more recently. *Cf. id.*

For these reasons, the General Assembly largely has substantial discretion to set the limitations period and determine what constitutes diligent pursuit of a claim, as long as the period selected is not too abbreviated. *Cf. Clark v. Jeter*, 486 U.S. 456, 463, 464 (1988) (finding a six-year statute of limitations "does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child" because the difficulties of the circumstances are not likely to abate in that period, and holding the period "not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims").

In *Clark*, the U.S. Supreme Court invalidated a "too-short" statute of limitations because it failed to vindicate a right to proceed. In contrast, *amicus* has found no case that invalidated a "too-long" limitations period, demonstrating that there is no countervailing right.

In this case, the General Assembly made a legislative judgment similar to the *Clark* Court, that the previously existing statute of limitations was too abbreviated and did not provide a fair opportunity for plaintiffs sexually

abused or assaulted in childhood a reasonable opportunity to pursue their claims.

It is also critical to understand that a limitations period "does not extinguish a legal right but merely affects the remedy." *Seat v. E. Greyhound Lines, Inc.*, 389 S.W.2d 908, 909 (Ky. 1965). *See also Barnes v. Louisville & N.R. Co.*, 140 S.W.2d 1041, 1044 (1940) ("[A] statute of limitations operates generally only on the remedy a party may have and does not extinguish his right."). It is a foundational precept that our American legal systems that government has an obligation to provide remedies for the violations of rights. In no lesser case than *Marbury v. Madison*, Chief Justice Marshall described the American idea of justice in these terms: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." 5 U.S. (1 Cranch) 137, 163 (1803). Citing Blackstone, he added, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Id.* (quoting 3 William Blackstone, Commentaries on the Law of England 23 (1765)).

Legislatively approved extended limitation periods are remedial because they give a party a remedy to an existing right where none currently exists. *Cf. Seat*, 389 S.W.2d at 909. Using that rationale, federal caselaw denominates statutes of limitation as remedial, rather than substantive. *Chase*

Sec., 325 U.S. at 314. Kentucky, though not always inconsistently, has taken a different view. *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 736 (Ky. 2000) ("statute of limitations issues are substantive rather than procedural.") (citation omitted).

That different view perhaps explains why Kentucky, unlike federal caselaw or some other states, deems an expired statute of limitations to establish a vested right so that the legislature may not revive an expired cause of action. *See Beth–Elkhorn v. Thomas*, 404 S.W.2d 16 (1966). Yet, the nature of the statute does not change whether the limitations period has run. Its language, whether establishing a new statute of limitations that did not previously exist, extending an existing statute of limitations that has not run, or reviving an expired cause of action by extending an expired statute of limitations does not change and cannot be classified as remedial or not based on its language. The vested right premise depends on the statute's application, not its text. Thus, even if KRS 413.249 did not establish a new cause of action, its extension of the limitations period should be deemed remedial in nature. After all, this Court recognizes that an amendment that leaves a reasonable amount of time in which to assert a claim does not impair a vested right. *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W.3d 850, 854-55 (Ky. 2003).

That conclusion also follows from a due-process analysis, which provides the only basis for the vested-right analysis. *Lawrence v. City of Louisville*, 29 S.W. 450, 452 (1895) (basing the vested right on due process and the notion

that the "right of defense [being] just as important as the right to bring an action"). Yet, due process is not violated "unless a protected interest is at stake." *TECO Mech. Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386, 393 n.11 (Ky. 2012). Thus, the question becomes whether these defendants relying on a revived statute of limitations can claim a "protected property or liberty interest." *Id.* at 396. As *Plaut* answers that question, there is none until there is a final "judgment on the merits." 514 U.S. at 228.

As a matter of procedural due process, nothing about an extended statute of limitations denies a defendant the "fundamental requirement" of "'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Hilltop Basic Res., Inc. v. Cty. of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). These defendants will still have their day in court, and nothing suggests that the timing of that hearing is not meaningful. Tolling statutes extend the timing of hearings substantially longer than the 2021 Amendments do and are not deemed defective for that reason. *See, e.g.*, KRS § 413.170 (tolling statute of limitations while "an infant or of unsound mind" until removal of the disability or death); *see also Williams v. Hawkins*, 594 S.W.3d 189, 193 (Ky. 2020) (describing equitable tolling when plaintiff cannot obtain vital information bearing on the existence of a claim and equitable estoppel against use of a statute of limitations as a defense where the defendant has acted wrongfully).

Moreover, even if regarded as a matter of substantive due process, no fundamental right is at issue. Substantive due process "is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all, such as the right to free speech or to vote." *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397 (Ky. 2009). It covers "'governmental deprivations of life, liberty, or property'" irrespective of their procedural fairness. *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007) (quoting *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003)). Self-evidently, there is no right to be free from litigation seeking compensation for the violation of a duty to protect a child from sexual abuse. Fear of an adverse result that will result in compensation to the plaintiff — and deprivation of property to the defendant — does not portend a property interest that advises against a hearing, so there is no deprivation of life, liberty, or property in an unlitigated claim due to an extended statute of limitations. For that reason, the rational-basis test applies.

Under the rational-basis test, "a law must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 624 (Ky. 2005). The test is highly deferential to legislative choices. *Id.*

In the 2021 Amendments, the General Assembly engaged in the type of line-drawing that is generally beyond question and certainly satisfies

rationality. Defendants have no basis to argue that it transgresses any of their rights.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed with respect to those defendants asserting that the 2021 Amendments cannot authorize an extended statute of limitations applicable to this case and that this Court should hold that Metro is not entitled to sovereign immunity, rather than remand that question as the Court of Appeals did.

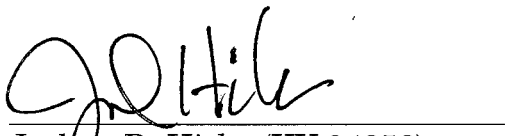
Respectfully submitted,

Joshua D. Hicks (KY 94358)
Attorney of Record
HICKS & FUNFSINN, PLLC
209 East High Street
Lexington, KY 40507
Telephone: (859) 777-7000
Email: josh@hfkylawyers.com

Counsel for Amicus Curiae
American Association for Justice

WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 34(B)(4) because, excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this document contains 4,955 words.



Joshua D. Hicks (KY 94358)
Counsel for Amicus Curiae
American Association for Justice