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WISCONSIN WINDOW LEGISLATION IS CONSTITUTIONAL

A White Paper
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Executive Summary

Wisconsin's proposed window legislation would eliminate the state's statute of limitation for claims of child sexual assault. Opponents of the bills argue that such laws, allowing any victim of child sexual assault to bring forward a previously time-barred civil action, would violate the Constitution's Ex Post Facto Clause and the Fourteenth Amendment's due process protections. Such criticisms are unfounded. This window legislation is in fact constitutional under both federal and Wisconsin state law. Because it concerns a civil, not criminal statute of limitation that affects court procedure rather than substantive due process rights, the U.S. Constitution permits it. In Wisconsin, retroactive legislation is presumed constitutional; in addition, any challenger would have to establish beyond a reasonable doubt that the statute would violate due process rights, and the public benefits of the statute far outweigh any private interests at stake. To defeat the legislation, fearing it unconstitutional, would be to weaken the fight against child predators out of deference to an illusion.

Wisconsin Window Legislation is Constitutional

Table of Contents

Introduction.....	1
I. Window Legislation Does Not Violate the U.S Constitution.....	1
a. The Ex Post Facto Clause does not apply to civil statutes of Limitation...	1
b. The Fourteenth Amendment’s Guarantee of equal protection does not apply to retroactive revision of a civil statute of limitation.....	2
c. The Supreme Court has ruled that retroactive application of <i>civil</i> statutes of limitation differs substantively from retroactive application of <i>criminal</i> statutes of limitation.....	2
II. Window Legislation Does Not Violate Wisconsin’s Constitution.....	3
a. Just as the U.S. Constitution does not restrict the proposed legislation, neither do Wisconsin’s State Constitution’s Due Process and Equal Protection Clauses.....	3
b. Retroactive legislation in Wisconsin is presumed constitutional.....	4
c. Wisconsin courts subject retroactive legislation to a rational basis test, which the proposed legislation would pass.....	4
d. Wisconsin courts also subject retroactive legislation to the <i>Martin</i> test, which requires the courts to weigh the public good against private interests.....	4
Conclusion.....	5

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Introduction

Statutes of limitation for crimes involving child sexual assault are at best arbitrary in length and at worst impede the protection of past victims and the deterrence of future crimes. Requiring persons sexually assaulted as children to step forward within a certain time period thwarts everyone – victims, advocates, law enforcement officers, and legislators – from stopping child sexual assault, with no clear corresponding benefit. The wrong of child molestation has no expiration date, and child molesters should not be able to rely on one. Victims often need ample time to overcome the emotional burden of the incident, come to terms with and admit the truth, and pursue their abusers in court. They should not face limits on their ability to speak out and hold their abusers accountable – not only out of fairness to them but to prevent future sex crimes, which offenders may deem too costly and too difficult to commit against a newly empowered and informed community.

In Wisconsin, Senate Bill 356 and the identical Assembly Bill 651 would eliminate the state’s statutes of limitation for claims of child sexual assault. This kind of “window legislation” is designed to open up a window into the legal system, a period of time for victims to file claims that had previously been barred by overly short statutes of limitation. Opponents of the bills argue that such laws are unconstitutional, and that allowing any victim of child sexual assault to bring forward a previously time-barred civil action would violate the Constitution’s Ex Post Facto Clause and the Fourteenth Amendment’s due process protections.

Such criticisms are unfounded. For the reasons detailed below, Wisconsin’s window legislation is in fact constitutional under both federal and Wisconsin state law. To defeat the legislation, fearing it unconstitutional, would be to weaken the fight against child predators out of deference to an illusion.

I. Window Legislation Does Not Violate the U.S. Constitution.

a. The Ex Post Facto Clause does not apply to civil statutes of limitation.

Article I, § 9, of the U.S. Constitution – known as the Ex Post Facto Clause – prohibits Congress from passing any ex post facto law, and § 10 prohibits states from passing any ex post facto law. But as discussed below, the Constitution is referring to ex post facto laws that retroactively proscribe *punishment* based on criminal wrongdoing. The Supreme Court’s interpretation of the Ex Post Facto Clause is rooted in the early case of *Calder v. Bull*, in which the Court found that “the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it.” *Calder v. Bull*, 3 U.S. 386, 390 (1798). In this seminal decision, the Court also enumerated four categories of unconstitutional ex post facto laws whose definitions have long been respected. All four

categories relate to the criminal rather than civil realm.¹ Thus the Ex Post Facto Clause applies only to criminal cases, and not to civil cases.

The proposed window legislation in Wisconsin is irrelevant to Article I, §§ 9-10, because it does not involve punishment in any criminal case; rather, it abolishes the time limits previously imposed upon child victims of sexual assault to seek *penalties* in civil lawsuits. The window does not create a punishment but rather expands victims' access to the civil penalties to which they are entitled. The scope of the Ex Post Facto Clause and Article I, § 10, of the U.S. Constitution therefore does not extend to this kind of retroactive legislation.

b. The Fourteenth Amendment's guarantee of equal protection does not apply to retroactive revision of a civil statute of limitation.

The Fourteenth Amendment of the Constitution – the Equal Protection Clause – provides that “no State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const., Amend. XIV, § 1. The Supreme Court has ruled that “[t]he *Fourteenth Amendment* does not make an act of state legislation void merely because it has some retrospective operation.” *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315 (1945). Rather, the Fourteenth Amendment protects due process rights, which retrospective provisions do not necessarily threaten. A retrospective civil statute of limitation is one such provision; its revision by the window legislation in Wisconsin would in no way reduce due process rights.

c. The Supreme Court has ruled that retroactive application of *civil* statutes of limitation differs substantively from retroactive application of *criminal* statutes of limitation.

Indeed, when the Supreme Court has ruled specifically on retrospective statutes of limitation, the Court has found the constitutionality of criminal statutes of limitation to be different from that of civil statutes of limitation. Criminal statutes of limitation affect fundamental rights, but civil statutes of limitation affect mere procedure.

In *Stogner v. California*, which dealt with window legislation enacted in California to permit the resurrection of previously time-barred prosecutions of sex-related child assault, the U.S. Supreme Court found unconstitutional the retroactive application of a new criminal statute of limitation. Because the California statute in question (1) extended the criminal statutes of limitation; (2) authorized the resurrection of previously

¹ Writing for the Court, Justice Chase stated clearly what laws should be considered unconstitutional *ex post facto* provisions rather than merely laws with retroactive application: “1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.” *Calder v. Bull*, 3 U.S. 390.

time-barred criminal prosecutions; *and* (3) affected the plaintiff Stogner in particular by being enacted after the expiration of previous statutes of limitation for his alleged offenses, the Court found that the law represented “the kind of retroactivity that the Constitution forbids” under the Fourteenth Amendment. *Stogner v. California*, 539 U.S. 607, 610 (2003).

By contrast, the Supreme Court has found the Constitution to allow retroactive application of *civil* penalties. In *Chase Securities Corporation v. Donaldson*, for example, the Court held that civil “statutes of limitation go to matters of remedy, not to destruction of fundamental rights.” *Chase Sec. Corp. v. Donaldson*, 325 U.S. at 314. Civil statutes of limitation affect procedure, not substantive or fundamental rights. They are “practical and pragmatic devices to spare the courts from litigation of stale claims[.]” *Chase Sec. Corp. v. Donaldson*, 325 U.S. at 314. As such, neither the Ex Post Facto Clause nor the Equal Protection Clause relates to civil statutes of limitation.

For these reasons, legislation that effects the retroactive implementation of the abolition of a civil statute of limitation for child sexual assault is not unconstitutional. It does not criminally punish offenders and cannot lead to criminal punishment. Rather, it changes pragmatic procedures so as to allow victims of child sexual assault to come forward at any time – both for their own sake and for the information they may offer about offenders who may go on to commit repeat offenses. There is no corresponding cost, in that there is no infringement of a fundamental right afforded to offenders. Eliminating the civil statute of limitation in these cases simply eliminates a procedural legal hurdle that may silence victims of child sexual assault.

II. Window Legislation Does Not Violate Wisconsin’s Constitution.

a. Just as the U.S. Constitution does not restrict the proposed legislation, neither do Wisconsin’s State Constitution’s Due Process and Equal Protection Clauses.

The argument for the constitutionality of the proposed window legislation on federal grounds is clear: the statute of limitation in question is civil, and it affects litigation procedure rather than substantive due process rights. In addition to rights guaranteed by the U.S. Constitution, however, the Wisconsin State Constitution contains a provision in Article I, § 1, guaranteeing “life, liberty and the pursuit of happiness,” language that state courts have deemed functionally equivalent to the Fourteenth Amendment. Both clauses protect due process rights for citizens. Thus the same arguments for the window legislation’s constitutionality at the federal level also hold at the state level. *Criminal* penalties may not be applied retroactively, but *civil* penalties may be, and the legislation in question is constitutional because it concerns statutes of limitation affecting only procedural legal rules and not fundamental rights. In addition, the Supreme Court has ruled that state legislatures have a measure of latitude in establishing statutes of limitation. As long as due process rights are preserved, states may enact statutes of limitation as “a public policy about the privilege to litigate . . . subject to

a relatively large degree of legislative control.” *Chase Sec. Corp. v. Donaldson*, 325 U.S. at 314.

b. Retroactive legislation in Wisconsin is presumed constitutional.

The proposed window legislation enjoys further protection in Wisconsin because in Wisconsin retroactive laws are presumed constitutionally viable. *Martin v. Richards*, 531 N.W.2d 70 (1995). In case of any question on the constitutionality of such laws, state courts must determine whether the retroactive legislation concerns matters of procedural rather than substantive rights. In the words of the Wisconsin State Supreme Court, “Statutes that are remedial or procedural are generally given retroactive application.” *Neiman v. Am. Nat’l Property & Casualty Co.*, 613 N.W.2d 160, 164 (2000) (citing *Guter v. Seamandel*, 103 Wis. 2d 1, 17, 308 N.W.2d 403 (1981)). Because the elimination of the civil statute of limitation for child sexual assault is a “remedial or procedural” measure, the proposed legislation is constitutional.

c. Wisconsin courts subject retroactive legislation to a rational basis test, which the proposed legislation would pass.

To test the constitutionality of retroactive legislation, Wisconsin courts must use a rational basis test. Because retroactive laws are presumed constitutional, the burden falls upon the challenger of the law’s constitutionality to establish beyond a reasonable doubt that the retroactive application of the statute would violate due process. *Neiman v. Am. Nat’l Property & Casualty Co.*, 613 N.W.2d at 167. Again, the proposed window legislation imposes no violation of due process rights. Accused sex offenders against children continue to have all the protections of the legal system.

d. Wisconsin courts also subject retroactive legislation to the *Martin* test, which requires the courts to weigh the public good against private interests.

The “*Martin* test,” named after the case of its origin (*Martin v. Richards*, 192 Wis.2d 156, 531 N.W.2d 70 (1995)), supplements the rational basis test to determine the constitutionality of expressly retroactive laws. Under this test, Wisconsin courts must weigh the balance struck by any retroactive legislation between public interest and any private interests affected by the retroactive application of the statute.

In the case of the proposed window legislation, there can be little question that the benefit to the public interest far outweighs any private interests at stake. Eliminating the civil statute of limitation for cases of child sexual assault has the potential to allow victims – previously silenced by the arbitrary time-expiration of the statute of limitation – to come forward and identify sexual offenders. If even one such offender is prevented from harming another child, the benefit to the public will be enormous. Furthermore, the private interests at stake will not be inexcusably harmed; the legal system should give no accommodations to those who sexually assault children. The proposed window

legislation would therefore pass the *Martin* test for the constitutionality of retroactive legislation.

Conclusion

The proposed window legislation should be presumed constitutional under both federal and Wisconsin state frameworks. Because the legislation concerns a civil, not criminal statute of limitation that affects court procedure rather than substantive due process rights, the U.S. Constitution permits it. In Wisconsin, the legislation passes all of the necessary tests:

- 1) As an expressly retroactive statute, even if challenged, the legislation will enjoy a presumption of constitutionality;
- 2) Any challenger would have to establish beyond a reasonable doubt the dubious proposition that the statute would violate due process rights;
- 3) Because the law concerns procedural rather than substantive or fundamental rights, it will enjoy an additional likelihood of being found constitutional;
- 4) The law passes the “*Martin* test” because the benefits to the public – including the elimination of any time limits on victims to file suit, the prevention of recidivism, and the protection of children against repeat offenders – far outweigh the private interests (which would belong to the sex offenders).

Statutes of limitation have two main purposes: (1) to ensure that evidence in court will be reliable and (2) to free potential defendants from an enduring fear that their crimes could come back to haunt them at any time. Neither of these purposes is persuasive regarding civil actions against child predators. Courts have other, far more important mechanisms for protecting due process. And sex offenders who assault children should never enjoy “peace of mind” after an arbitrary statute of limitation takes effect. Victims of child sexual assault deserve as much time as they need to come forward to accuse their abusers in the context of civil litigation.