No. 130509

IN THE
SUPREME COURT OF ILLINOIS

CANDICE MARTIN, Individually, and as Executrix of the Estate of Rodney Martin, Deceased, Plaintiff-Appellee, v. GOODRICH CORPORATION, formerly known as B.F. GOODRICH COMPANY, and POLYONE CORPORATION, individually and as successor-by consolidation to THE GEON COMPANY, now known as AVIENT CORPORATION, Defendants-Appellants, and KWAME RAOUL, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, Intervenor-Appellee.	Question of Law Certified by the United States Court of Appeals for the Seventh Circuit, No. 23-2343 There Heard on Appeal from the United States District Court for the Central District of Illinois, No. 1:21-cv-01323-JES-JEH The Honorable JAMES E. SHADID, Judge Presiding.

BRIEF OF INTERVENOR-APPELLEE ATTORNEY GENERAL KWAME RAOUL

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-3000

MEGAN L. BROWN
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois, 60603
(224) 204-9642 (office)
(312) 415-6318 (cell)
CivilAppeals@ilag.gov (primary)
Megan.Brown@ilag.gov (secondary)

Attorneys for Intervenor-Appellee Attorney General Kwame Raoul

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TABLE OF CONTENTS

Page(s)

NATURE OF THE ACTION

In this appeal, this Court agreed to answer three questions certified by the United States Court of Appeals for the Seventh Circuit that concern the meaning and constitutionality of two provisions of the Workers' Occupational Diseases Act, 820 ILCS 310/1 *et seq.* (2022).

In a complaint filed in the United States District Court for the Central District of Illinois, Plaintiff-Appellee Candice Martin alleged that her husband, during his employment at Goodrich Corporation, was exposed to a dangerous chemical: vinyl chloride monomer. Martin alleged that her husband's exposure to this chemical caused his death by angiosarcoma of the liver. All parties agree that Martin cannot apply for compensation under the Act. Her only possible recourse is a civil suit, which will be allowed only if section 1(f) of the Act, 820 ILCS 310/1(f) (2022), and Exception 1.1 of the Act, 820 ILCS 310/1.1 (2022), operate in tandem, and if the application of those provisions to Martin's case does not offend the Due Process Clause of the Illinois Constitution.

The certified questions that the Court accepted are: (1) whether section 1(f) is a "statute of repose or repose provision" within the meaning of Exception 1.1; (2) whether Exception 1.1 applies to Martin's claims; and (3) assuming that section 1(f) is a "statute of repose or repose provision" within the meaning of Exception 1.1 and that Exception 1.1 applies here, whether Exception 1.1 is constitutional when applied to past conduct. This Court

allowed the Attorney General's motion for leave to intervene to defend the constitutionality of Exception 1.1.

The issues presented are on the pleadings.

ISSUE PRESENTED FOR REVIEW

If this Court answers the first and second certified questions in the affirmative, and holds, as a matter of statutory interpretation, that (1) section 1(f) is a "statute of repose or repose provision" that falls within Exception 1, and (2) Exception 1.1 may be applied to Martin's claims, then at issue is whether the application of Exception 1.1 to past conduct does not offend the due process guarantee contained within the Illinois Constitution, Ill. Const. art. I, § 2.

JURISDICTION

In November 2021, Martin filed a complaint in federal district court, claiming that Goodrich and PolyOne Corporation negligently caused her husband's death, fraudulently concealed information that contributed to her husband's death, and caused her loss of consortium. Doc. 1 at 46-56.[1] The district court had subject-matter jurisdiction over Martin's action under 28 U.S.C. § 1332(a)(1) because Martin sought damages exceeding $75,000, Doc. 1 at 3, and because the parties are citizens of different States. Martin is and has been at all relevant times a resident and citizen of the State of Illinois. *Id.* at 2. Goodrich is incorporated in the State of New York and has its principal place of business in the State of North Carolina. *Id*. PolyOne is incorporated in the State of Ohio and has its principal place of business in the State of Ohio. *Id.* at 2-3. Martin filed a first amended complaint — the operative complaint in this case — in July 2022. A1-63. Because Martin maintained that she sought damages exceeding $75,000, A3, and because the diversity of the citizenship of the parties was preserved, A2, the district court continued to have subject-matter jurisdiction over Martin's action under 28 U.S.C. § 1332(a)(1).

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[1] The record on appeal consists of the docket in the United States District Court for the Central District of Illinois, cited as "Doc. __ at __," and the docket in the United States Circuit Court for the Seventh Circuit, cited as "7th Cir. Doc. __ at __." This Court can take judicial notice of those dockets. *See In re N.G.*, 2018 IL 121939, ¶ 32. The brief filed by Goodrich and PolyOne is cited as AT Br. __," and the corresponding appendix is cited as "A__."

Goodrich and PolyOne (together, "defendants") each filed a motion to dismiss Martin's action. Docs. 29-32. In April 2023, the district court denied defendants' motions to dismiss. A69-88. Defendants moved to certify the denial of their motion to dismiss for interlocutory review under 28 U.S.C. § 1292(b). Docs. 45-46. The district court granted the defendants' certification motion in May 2023. A89-94. The Seventh Circuit agreed to permit the interlocutory review in June 2023. A95. The Seventh Circuit therefore had jurisdiction under 28 U.S.C. § 1292(b) because the district court stated in a written order that "an immediate appeal" from the denial of defendants' motion to dismiss might "materially advance the ultimate termination of the litigation" and because the Seventh Circuit itself, in its discretion, "permit[ted] an appeal to be taken." *Id.*

Before the Seventh Circuit, Martin filed a motion for certification to this Court. 7th Cir. Doc. 13 at 22-26. Under 7th Cir. R. 52(a), the Seventh Circuit, either on its own motion or on a motion of a party, may certify a controlling question of state law "to the state court in accordance with the rules of that court." Certification occurs "after the briefs are filed" in the Seventh Circuit. *Id.*; *see also* Ill. Sup. Ct. R. 20(a) (this Court's rule authorizing Seventh Circuit to "certify" controlling questions of state law to this Court "for instructions concerning such questions of State law"). The Seventh Circuit granted Martin's certification motion in March 2024, certifying three questions for this Court's consideration. *Martin v. Goodrich Corp.*, 95 F.4th 475 (7th Cir. 2024).

This Court agreed to consider the three certified questions on March 21, 2024. Thus, this Court has jurisdiction over this case under Ill. Sup. Ct. R. 20(a).

STATEMENT OF FACTS

The Act

The Act "provides compensation for diseases arising out of, and in the course of, employment." *Folta v. Ferro Eng'g*, 2015 IL 118070, ¶ 11 (citing 820 ILCS 310/1(d) (2022)). The Act, along with its sister statute, the Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (2022), balances employees' interests in quick and efficient compensation for workplace illnesses and injuries against employers' interests in statutory limitations on damages. *See Folta*, 2015 IL 118070, ¶ 12. Typically, if an employee is diagnosed with an "occupational disease," the employee then petitions the Worker's Compensation Commission, which awards compensation benefits depending on "the facts and circumstances of each particular case." *Id.* at ¶ 40.

Relevant here, section 1(f) of the Act states that "[n]o compensation shall be payable for or on account of any occupational disease unless disablement . . . occurs within two years after the last day of the last exposure to the hazards of the disease . . . ." 820 ILCS 310/1(f) (2022).[2] Section 1(f) thus prevents employees from being compensated for a disease under the Act unless that employee is diagnosed within two years of the employee's last exposure to the allegedly dangerous material at work. *Id.*; *see also Martin*, 95 F.4th at 478-79.

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[2] If the employee's disease is caused by berylliosis, the inhalation of silica or asbestos dust, or exposure to radioactive materials, this time period is extended. *See* 820 ILCS 310/1(f) (2022).

The Act also states that

> unless application for compensation is filed with the [Workers' Compensation] Commission within 3 years after the date of the disablement, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred.

820 ILCS 310/6(c) (2022). This provision, described as a statute of repose by this Court, "creates an absolute bar on the right to bring a claim" within a certain amount of time after the employee learns that he is disabled. *See Folta*, 2015 IL 118070, ¶ 33.[3]

Finally, the Act contains two separate provisions that together establish that, in many circumstances, occupational disease disputes will be resolved before the Workers' Compensation Commission, not in civil court. First, the Act states that, in most cases, "there is no common law or statutory right to recover compensation or damages from the employer . . . other than for the compensation herein provided or for damages as provided . . . [in] this Act." 820 ILCS 310/5(a) (2022). In most cases, the compensation provided by the Commission will be "the full, complete and only measure of the liability of the employer [or related entities] . . . in place of any and all other civil liability whatsoever." *Id.* § 11. Together, these provisions make up the "exclusive-

[3] Section 6(c) contains a different timing scheme for occupational diseases resulting from exposure to asbestos or radiological material and equipment. 820 ILCS 310/6(c) (2022). In those cases, employees must become disabled or pass away within "25 years from the last *exposure*" to file an application with the Workers' Compensation Commission. *Id.* (emphasis added).

remedy provisions" of the Act. *Martin*, 95 F.4th at 479. The exclusive-remedy provisions contain exceptions: employees can bring civil suits if they can show "(1) that [their] injury was not accidental; (2) that [their] injury did not arise from [their] employment; (3) that [their] injury was not received during the course of employment; or (4) that [their] injury was not compensable under the Act." *Meerbrey v. Marshall Field & Co., Inc.*, 139 Ill. 2d 455, 463 (1990); *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980).

"Compensable" Injuries under the Act

In 2015, this Court decided *Folta v. Ferro Eng'g*, 2015 IL 118070, which clarified when injuries are "compensable" under the Act, and therefore not excepted from the Act's exclusive-remedy provisions. In *Folta*, an employee was exposed to asbestos during his employment. 2015 IL 118070, ¶ 3. Decades after he left his job, the employee was diagnosed with mesothelioma, a disease associated with asbestos exposure. *Id.* Because of section 6(c) of the Act, however, the employee was unable to bring a claim before the Commission. *Id.* at ¶ 4. The employee therefore sued in civil court. *Id.* at ¶ 3. He argued that because his claim was time-barred by the Act, it was not "compensable" under the Act, and his case was therefore exempted from the exclusive-remedy provisions. *Id.* at ¶ 4.

This Court clarified that only injuries that do not typically fall under the Act's coverage are not "compensable" under the Act and are thus the only injuries exempted from the exclusive-remedy provision. *See id.* at ¶ 23.

"Compensable" injuries under the Act, the Court explained, are *not* determined by whether there is "an ability to recover benefits for a particular injury sustained by an employee." *Id.* This Court then determined that because mesothelioma *was* the type of injury that typically fell under the Act's coverage, the exclusive-remedy provisions applied to the employee's claim. *Id.* at ¶¶ 24-25, 31-32. Thus, there could be no recovery for the employee either in civil court or before the Commission. *Id.* at ¶ 31.

This Court acknowledged that the Act's structure created a "harsh result." *Id.* at ¶ 43. But, the Court explained, "ultimately, whether a different balance should be struck under the acts given the nature of the injury and the current medical knowledge . . . is a question more appropriately addressed to the legislature." *Id.* The Court could only "interpret the acts as written." *Id.*

The General Assembly Responds with Exception 1.1

In May 2019, the General Assembly amended the Act to add Exception 1.1, which states that the exclusive-remedy provisions "do not apply to any injury or death resulting from an occupational disease as to which the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision." 820 ILCS 310/1.1 (2022). Thus, Exception 1.1 allows employees or their decedents "to bring a civil action at law" if their claims under the Act are barred by a "period of repose or repose provision." *Id.*

Floor debates show that Exception 1.1 was enacted in response to *Folta*. For example, Exception 1.1's sponsor in the Senate stated that the bill that would become Exception 1.1 "is in response to a request by the Illinois Supreme Court in its decision in *Folta v. Ferro Engineering* . . . ." A132 (cleaned up) (statement of Sen. Sims). Exception 1.1 became effective as soon as it was passed. Ill. Pub. Act. 101-006 (effective May 17, 2019).

The Factual and Procedural Background of this Case

Rodney Martin ("decedent") handled vinyl chloride monomer while working for Goodrich. A89. Vinyl chloride monomer is an allegedly dangerous material linked to angiosarcoma of the liver. A89-90. The decedent worked at Goodrich between 1966 and 2012. A89. He was exposed to vinyl chloride monomer at Goodrich between 1966 and 1974, after which time Goodrich reduced its use of the chemical. A89-90. In December 2019, about seven months after the effective date of Exception 1.1, doctors diagnosed the decedent with angiosarcoma of the liver. A90. He died in 2020. *Id.*

In November 2021, Martin, the decedent's widow, filed a complaint in federal district court against defendants. Doc. 1. In her first amended complaint — the operative complaint — Martin brought claims asserting negligence, fraudulent concealment, and loss of consortium. A49-63. She alleged that her claims were barred by section 1(f) of the Act, and, because of Exception 1.1, the Act's exclusive-remedy provisions did not apply. A6-8.

Goodrich moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that Martin had failed to state a claim because Exception 1.1 did not apply to her claims. Doc. 30. First, Goodrich argued that Martin's claims under the Act were barred by section 1(f). *Id.* at 7-8. Goodrich maintained that section 1(f) is a "condition precedent" and not a "statute of repose." *Id.* Thus, Martin's claims could not be barred by a "period of repose or repose provision" as required to fall within Exception 1.1. *Id.* at 3. Second, Goodrich argued that the Illinois Constitution prevented the "retroactive application" of Exception 1.1 to Martin's case. Doc. 30 at 8-15.[4]

The district court denied Goodrich's motion to dismiss, A69, holding that while section 1(f) continued to preclude recovery under the Act itself, it "no longer precludes tort recovery" because of the General Assembly's addition of Exception 1.1, A80. The court also found that allowing Martin to proceed with her claim would not offend state due process. A80-81.

Defendants moved the district court to certify certain questions of law for interlocutory appeal under 28 U.S.C. § 1292(b). Doc. 45. The district court did so. A89-94. The Seventh Circuit, likewise, granted defendants' petition for interlocutory appeal. A95. On appeal, Martin moved the Seventh Circuit to certify those same legal questions to this Court. 7th Cir. Doc. 13 at 22-25.

[4] PolyOne, which filed a separate motion to dismiss, Docs. 31-32, argued that the district court lacked personal jurisdiction, Doc. 32 at 3, 5-8. PolyOne also argued that it could not be liable for conduct that occurred before it existed. *Id.* at 8-10. Neither argument is at issue here.

After briefing and argument, the Seventh Circuit granted Martin's motion. A96-110. The Seventh Circuit certified the following three questions to this Court for its review:

> (1) Is 1(f) a "period of repose or repose provision" for 310/1.1 purposes?
>
> (2) If 1(f) falls within Exception 1.1, what is its temporal reach — either by its own terms, or through [section 4 of the Illinois Statute on Statutes, 5 ILCS 70/4 (2022)]?
>
> (3) Would the application of Exception 1.1 to past conduct offend Illinois's due process guarantee?

A106, A108, A109.

This Court agreed to answer these questions of law in March 2024.

ARGUMENT

The Attorney General intervened in this case under Ill. Sup. Ct. R. 19(c) to address the third question, concerning the constitutionality of Exception 1.1, certified to this Court from the Seventh Circuit: "Would the application of Exception 1.1 to past conduct offend Illinois's due process guarantee." *Martin*, 95 F.4th at 484; *see also* Ill. Sup. Ct. R. 19 (providing that the State shall be afforded an opportunity to intervene to defend a statutes' constitutionality). The Attorney General takes no position on the statutory construction questions presented. Throughout this brief, the Attorney General will assume for the sake of argument that section 1(f) is a repose provision, and that Exception 1.1 can be applied to Martin's case.

I. The *de novo* standard of review applies to the third question presented.

The "constitutionality of a statute and whether a party's constitutional rights have been violated" are questions of law that "are reviewed *de novo.*" *Hayashi v. Ill. Dep't of Fin. & Pro. Regul.*, 2014 IL 116023, ¶ 22. Thus, this Court's standard of review for the third question — whether the application of Exception 1.1 to past conduct does not offend Illinois's due process guarantee — is *de novo*.

II. Assuming this Court answers the first two certified questions in Martin's favor, Exception 1.1 is constitutional as applied to this case.

If section 1(f) is a repose provision, and if Exception 1.1 applies to this case, this Court must determine whether applying Exception 1.1 here would

violate the Due Process Clause of the Illinois Constitution. Statutes are "presumed to be constitutional, and the party challenging the constitutionality of a statute carries the burden of proving that the statute is unconstitutional." *Folta*, 2015 IL 118070, ¶ 44. Thus, defendants have the burden of proving that the application of Exception 1.1 would unconstitutionally interfere with Illinois's due process guarantee.

The Due Process Clause guarantees that "[n]o person shall be deprived of life, liberty, or property without due process of law." Ill. Const. art. I, § 2. Defendants do not argue that Exception 1.1 deprives them of life or liberty. *See generally* AT Br. 30-44. Thus, defendants can prevail only if they can establish that the application of Exception 1.1 to Martin's claims would deprive them of a property interest. A plaintiff's interest in a cause of action or a defendant's interest in a particular defense can become perfected, and thus rise to the level of a property interest. *See Dardeen v. Heartland Manor, Inc.*, 186 Ill. 2d 291, 296 (1999); *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 404-05 (1999). Such a perfected interest is known as a "vested right." *Dardeen*, 186 Ill. 2d at 296. Defendants argue that they have a vested right in the exclusive-remedy provisions of the Act as they existed before the enactment of Exception 1.1. *See* AT Br. 30-37.

Defendants are incorrect. Insofar as Martin's claims are concerned, defendants do not have a vested right to the exclusive-remedy provisions of the Act because Exception 1.1 was added after Martin's claims accrued and

therefore before any potential right to a defense based on the exclusive-remedy provisions could have vested. Defendants' arguments conflate their vested right to a defense under a repose provision with their interest in the exclusive-remedy provisions. But defendants have no authority for the proposition that a repose provision and the exclusive-remedy provisions should be treated identically for purposes of due process. And they should not be so treated because statutes of repose and exclusive-remedy provisions operate distinctly and serve different statutory purposes. Additionally, because Exception 1.1 does not violate the Illinois Constitution's Due Process Clause, or any other constitutional right, the General Assembly's broad authority to calibrate existing legislation by adjusting a statute's benefits and burdens should be respected.

A. Defendants do not have a vested right to the exclusive-remedy provisions of the Act.

Assuming section 1(f) is a repose provision, defendants' right to repose under the Act vested when the repose period ran, which was two years after the decedent's last exposure to vinyl chloride monomer. *See* 820 ILCS 310/1(f) (2022) ("No compensation shall be payable for or on account of any occupational disease unless disablement . . . occurs within two years after the last day of the last exposure to the hazards of the disease . . . ."). But the right to other defenses vests when the corresponding cause of action accrues. *Henrich*, 186 Ill. 2d at 405. And Martin's cause of action accrued when the decedent was diagnosed with angiosarcoma of the liver, *see* A90, by which time

the Act had already been amended to add Exception 1.1. *See Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 169 (1981). Thus, defendants do not have a vested right to an exclusive-remedy defense. Because the General Assembly "has an ongoing right to amend [statutory schemes] when it sees fit to do so," *Big Sky Excavating, Inc. v. Ill. Bell. Tel. Co.*, 217 Ill. 2d 221, 242 (2005), and because defendants' vested property rights were not affected, there is no due process problem in applying Exception 1.1 to this case.

1. A defendant's right to a defense generally vests when the plaintiff's cause of action accrues.

A defendant's right to an affirmative defense generally vests when the plaintiff's cause of action accrues. In *Henrich*, for example, a high school student injured at school sued his school district, but his complaint was dismissed because the school district was immune from liability under the Tort Immunity Act. 186 Ill. 2d. at 384-85. The General Assembly then amended the Tort Immunity Act so that claims like the ones raised by the plaintiff could proceed, *id.* at 402-03, but this Court held that the legislative amendment did not save the plaintiff's claims, *id.* at 405. As the Court explained, when the student was injured and his cause of action arose, "the school district's immunity under the unamended section [of the Tort Immunity Act] was 'unconditional,' and 'immediate, fixed and determinate[.]'" *Id.* (quoting *First of Am. Tr. Co v. Armstead*, 171 Ill. 2d 282, 291 (1996)). In other words, the school district's immunity defense provided by the Tort Immunity Act "vested when the cause of action accrued." *Id.* In *Commonwealth Edison Co. v. Will*

Cnty. Collector, 196 Ill 2d 27 (2001), this Court confirmed *Henrich*'s holding. *See id.* at 48 ("In *Henrich*, the school district's defense accrued on . . . the date the plaintiff's cause of action arose.").

Even before *Henrich*, the appellate court had applied the same rule. As one example, in *Zielnik v. Loyal Order of Moose, Lodge No. 265*, 174 Ill. App. 3d 409, 409-10 (1st Dist. 1988), a plaintiff was injured on the defendant's premises. The defendant was a "voluntary unincorporated association," and at the time of the plaintiff's injury, the defendant did not have the legal capacity to be sued. *Id.* The General Assembly amended the Code of Civil Procedure to allow such associations to sue and be sued in their own name, but the effective date of the amendment was *after* the plaintiff's injury. *Id.* at 410. The appellate court thus held that the plaintiff could not sue the defendant because the defendant's "rights and obligations became vested as of the date of the occurrence," which was at "a time at which [the defendant] did not have the legal capacity to sue or be sued." *Id.* at 411.

Moreover, it makes sense that a defendant's right to a defense would vest at the same time that the plaintiff's right to a cause of action vests because these rights are considered similar under Illinois Law. *See Henrich*, 186 Ill. 2d at 404-05 ("[I]t has long been recognized that 'a vested ground of defense is as fully protected from being cut off or destroyed by an act of the legislature as a vested cause of action.'" (quoting 16A C.J.S. Constitutional Law § 486 (2024) (cleaned up)). Thus, in *Harraz v. Snyder*, 283 Ill. App. 3d

254, 263 (2d Dist. 1996), the appellate court stated that the rights and obligations of the parties to a case become vested at the time at which the defendant "had the capacity to be sued." Accordingly, the court held, "[t]he crucial date for determining the applicability of a statute is . . .when the cause of action accrue[s]." *Id.* In the majority of cases, then, a plaintiff's right to a cause of action and a defendant's right to a defense vest at the same time.

2. Statutes of repose and limitations are exceptions to the general rule about when defenses vest.

Statutes of repose and limitations are exceptions to the general principle that a defendant's right to an affirmative defense vests when the plaintiff's cause of action accrues. For example, in *M.E.H. v. L.H.*, 177 Ill. 2d 207 (1997), a statute of repose operated to bar the plaintiffs' claims even though those plaintiffs did not know they had a cause of action when the repose period expired. Specifically, under the applicable repose statute, the plaintiffs had until age 30 to commence an action for personal injuries based on childhood sexual abuse, but they did not sue within this timeframe. *Id.* at 212. Under these circumstances, this Court explained, the legislature could not alter or remove the defendant's right to a defense based on the repose statute. *Id.* at 214-15. The Court noted that Illinois courts had long held that "once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action," and the Court found that there was "no basis for applying a different rule" to periods of repose. *Id.*; *see also Galloway v. Diocese of Springfield*, 367 Ill. App. 3d 997, 1000 (5th Dist.

2006) (defendants' vested right to repose could not be affected without offending Illinois Constitution's Due Process Clause).

Defendants' observation that Illinois courts have held for "more than a century" that it is unconstitutional for the legislature to interfere with a time-barred claim is thus correct, but it is also irrelevant. *See* AT Br. 32. Cases addressing statutes of repose and limitations do not resolve the third question certified here, which asks whether defendants had a vested right to the Act's exclusive-remedy provisions.[5] The parties agree that, consistent with due process, the General Assembly could not revive any potential claims that Martin might have had under Act but were already barred by a statute of limitations or repose defense. *See M.E.H.*, 177 Ill. 2d at 215. Indeed, Martin consistently acknowledged that her claims under the Act "are barred" by section 1(f). 7th Cir. Doc. 13 at 14; *see also* A07-08 (Martin's complaint). Thus, the General Assembly could not amend the Act's limitations or repose periods to grant her a right to seek relief against defendants under no-fault liability provisions. *See Folta*, 2015 IL 118070, ¶ 12 (under the Act, an employee must show only that his disease arose "out of and in the course of"

[5] Each of defendants' cited cases addresses a statute of repose or a statute of limitations. *See* AT Br. 31-37 (relying on *Doe A. v. Diocese of Dall.*, 234 Ill. 2d 393, 409 (2009) (statute of limitations); *Sepmeyer v. Holman*, 162 Ill. 2d 249, 254 (1994) (statute of limitations); *M.E.H.*, 177 Ill. 2d at 215(statute of repose); *Galloway*, 367 Ill. App. 3d at 1000 (statute of repose)). As noted, statutes of limitations and repose operate similarly regarding the creation of a vested right by an expiration date. *See M.E.H.*, 177 Ill. 2d at 218 (treating a defense based on the expiration of a statute of repose "the same" as a defense based on the expiration of a limitations period).

his employment). But Exception 1.1, which alters the Act's exclusive-remedy provisions and authorizes plaintiffs to obtain relief in court, if they can satisfy the requirements of a tort claim, *see, e.g.*, *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 14 (plaintiff suing in tort must establish a duty of care, breach of that duty, and injury proximately caused by that breach), violates due process only if defendants had a vested right to the exclusive-remedy provisions.

3. Exclusive-remedy provisions and statutes of repose differ.

Defendants' argument thus requires this Court to extend its decisions holding that repose provisions are an exception to the general rule that a defendant's right to a defense does not vest before the plaintiff's cause of action accrues to the Act's exclusive-remedy provisions. The Court should not do so: defendants cite no authority for their proposed extension, which ignores the material differences between a defense based on the expiration of a repose period and one based on an exclusive-remedy provision.

A statute of repose extinguishes a plaintiff's possible cause of action after a fixed time, regardless of whether the cause of action accrued. *Folta*, 2015 IL 118070, ¶ 33; *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001). And unlike a statute of limitations, a repose period begins running not when a cause of action accrues, but when a statutorily prescribed event occurs, "regardless of whether an action has accrued or whether any injury has resulted." *Ferguson*, 202 Ill. 2d at 311. If section 1(f) is a statute of repose, that statutorily prescribed event would be the date of an employee's "last

exposure to the hazards" that allegedly caused his disablement. 820 ILCS 310/1(f) (2022).

Because a statute of repose "extinguishes" a plaintiff's cause of action before it has a chance to accrue, the general rule — that a defendant's right to a defense vests at the time the plaintiff's cause of action accrues — cannot hold true for a repose defense. *See Ferguson*, 202 Ill. 2d at 311. This is exactly what occurred in *Folta*: "After the expiration of the repose period, there [was] no longer a recognized right of action." 2015 IL 118070, ¶ 33. Thus, it would be impossible for a defendant's right to a repose defense to vest when the plaintiff's cause of action accrued because the repose period has the effect of preventing the cause of action from accruing in the first place.[6]

A defense based on an exclusive-remedy provision operates differently. A defendant may rely on an exclusive-remedy defense only after a cause of action accrues because only then is the plaintiff potentially entitled to some type of remedy. And an exclusive-remedy provision does not "extinguish[ ]" other causes of action. *See Ferguson*, 202 Ill. 2d at 311. On the contrary,

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[6] Statutes of limitations defenses, like those discussed in *Sepmeyer*, 162 Ill. 2d at 254, and *Doe A.,* 234 Ill. 2d at 393, also do not vest when a cause of action accrues, but for a separate reason. A statute of limitations "determines the time within which a lawsuit may be brought *after* a cause of action has accrued." *Folta*, 2015 IL 118070, ¶ 33 (emphasis added). Because the limitations period begins to run when the cause of action accrues, it cannot vest at the same time as accrual because the limitations period has not yet finished running. Thus, the limitations period begins to run when the cause of action accrues and vests if the potential plaintiff does not bring suit within the limitations period.

because exclusive-remedy provisions like those in the Act operate as an affirmative defense, an "employer's potential for tort liability exists unless and until the defense" is established. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 207 (1997) (interpreting the analogous Workers' Compensation Act); *see also Hindle v. Dillbeck*, 68 Ill. 2d 309, 318 (1977) (exclusive-remedy provisions of the Workers' Compensation Act are "an affirmative defense" that defendant is required to plead and prove). As a result, a defendant may, for strategic purposes, waive an exclusive-remedy defense and proceed in court. *Braye*, 175 Ill. 2d at 208; *Hiatt v. W. Plastics, Inc.*, 2014 IL App (2d) 140178, ¶ 105 ("Whether to assert the exclusive-remedy provision as a defense can be a strategic decision, as a defendant 'may choose not to raise it in the hope that the plaintiff will be unable to prove negligence to a jury's satisfaction,' thus avoiding liability.)" (quoting *Doyle v. Rhodes*, 101 Ill. 2d 1, 10 (1984)). Thus, far from automatically extinguishing a cause of action, as a repose provision does, the Act's exclusive-remedy provisions presume the existence of a cause of action and can be waived after the defendant assesses the plaintiff's case.

This distinction is material. Rights become vested when "perfected," or when they are "so 'complete and unconditional'" that they may be equated with a property interest. *Dardeen*, 186 Ill. 2d at 295-96. But a defendant's right to an exclusive-remedy provision should not be thought of as "complete and unconditional" before a cause of action accrues, particularly because a defendant must plead and prove an exclusive-remedy defense, *Hindle*, 68 Ill.

2d at 318. By contrast, when a statute of repose expires, a defendant's right to the repose defense is "unconditional": once the period expires, any potential cause of action the plaintiff had is eliminated, *Folta*, 2015 IL 118070, ¶ 33.

For their part, defendants ignore the critical differences between repose provisions and exclusive-remedy provisions and instead conflate them, assuming that *all* of their potential defenses vested when the time period in section 1(f) expired. *See* AT Br. 37 ("When Plaintiff failed to meet Section 1(f)'s terms[,] . . . Defendants gained a vested right to invoke the statute of repose defense *and* the exclusivity defense[.]"). But defendants cite no authority for this proposition, and there is none. Section 1(f) and the exclusive-remedy provisions operate in a completely different way: the former extinguishes causes of action, while the latter do not affect the potential for liability until — and indeed, *unless* — they are invoked.

4. Defendants' right to an exclusive-remedy defense never vested in this case.

Because an exclusive-remedy provision is not a repose provision, the general rule applies, and a defendant's right to the exclusive remedy must vest at the time the plaintiff's cause of action accrues. *See Heinrich*, 186 Ill. 2d. at 405. In cases under the Act, the plaintiff's cause of action accrues at the time of diagnosis. *See Nolan*, 85 Ill. 2d at 169 ("[T]he cause of action accrues when the plaintiff knows or reasonably should know of an injury . . . ."). In December 2019, when the decedent was diagnosed, Exception 1.1 allowed employees to bring civil suits if their causes of action under the Act were

barred by a statute of repose. *See* 820 ILCS 310/1.1 (2022). Therefore, defendants could not have a vested right to the exclusive-remedy provisions of the Act.

Defendants argue that, insofar as Martin's claims are concerned, section 1(f) and the Act's exclusive-remedy provisions must be intertwined because, on the date section 1(f)'s timing requirement expired, the Act prevented any action from ever accruing. AT Br. 38. This ignores the fact that an "employer's potential for tort liability continues to exist unless and until" the defendant invokes the exclusive-remedy provisions of the Act as an affirmative defense. *See Braye*, 175 Ill. 2d at 207.

And just because a repose period bars one cause of action arising out of a set of facts does not mean that it must bar all similar causes of action, even when those causes of action are based on the same conduct, are brought against the same defendant, and result in the same remedy. In *Hayashi*, 2014 IL 116023, for example, this Court affirmed the creation of a remedial system that allowed a state agency to revoke the medical licenses of medical professionals who committed sexual assault, even though the statute of repose ran on a separate law that allowed for the revocation of those exact same licenses for the exact same reason. *Id.* at ¶¶ 35-36.

Specifically, the General Assembly amended the Department of Professional Regulation Law to require permanent revocation of the license of any healthcare worker convicted of criminal offenses like sexual assault. *See*

20 ILCS 2105/2105-165 (2022); *see also Hayashi*, 2014 IL 116023, ¶ 8. A group of healthcare workers challenged the amendment, in part because a statute of repose in the Medical Practice Act of 1987, which permitted the revocation of medical licenses on similar grounds, had expired at the time of the amendment. *See* 225 ILCS 60/22(A) (2022); *see also Hayashi*, 2014 IL 116023, ¶ 34. This Court rejected the workers' challenge as "misguided." *Hayashi*, 2014 IL 116023, ¶ 35. Because "the legislature did not affect the statutory limitations or repose provisions" in the Medical Practice Act when it amended the Department of Professional Regulation Law, the Court explained, "[p]laintiffs' rights to their repose defenses were not changed or removed." *Id.* In other words, because the plaintiffs' medical licenses were revoked under a different law, the repose defenses in the Medical Practice Act upon which they relied had no applicability. *Id.*

As in *Hayashi*, defendants' right to their repose defense under the Act has not been "changed or removed." 2014 IL 116023, ¶ 35. As a result, Martin is not entitled to the benefits of no-fault liability under the Act. *See Folta*, 2015 IL 118070, ¶ 12 (plaintiff suing under the Act must show only that his disease arose "out of and in the course of" his employment). Instead, Martin must (and did) file a lawsuit in court, where she will need to show that the elements of a tort cause of action are met, including duty and breach of duty, in addition to causation and harm. *See, e.g.*, *Bd. of Educ. of City of Chi. v. A, C & S, Inc.*, 131 Ill. 2d 428, 445-60 (1989) (describing elements of asbestos-

related negligence and fraudulent concealment claims that are not brought under Workers' Compensation Act); *Simpkins*, 2012 IL 110662, ¶¶ 14, 25-27 (similar). Thus, unlike under the Act, in a civil case, an employer may prevail even where the employer's action or inaction caused an employee's injury. *See Simpkins*, 2012 IL 110662, ¶ 27 (affirming dismissal of employee's complaint because employee "failed to allege facts specific enough to analyze whether, if those facts were proven true, defendant would have been able to reasonably foresee plaintiff's [asbestos-related] injury").

At bottom, defendants have the burden to prove that Exception 1.1 is unconstitutional. *Folta*, 2015 IL 118070, ¶ 44 ("[T]he party challenging the constitutionality of a statute carries the burden of proving that the statute is unconstitutional."). But defendants' argument depends on equating an exclusive-remedy provision with a statute of repose. The two are not the same: one vests when the plaintiff's cause of action accrues but the other prevents a cause of action from ever accruing and thus vests when a statutorily prescribed event occurs. Martin's cause of action accrued after Exception 1.1's effective date. Defendants thus have no vested right to an exclusive-remedy defense, and, as a result, Exception 1.1 does not unconstitutionally burden their due process rights.

B. The General Assembly has a continuing right to amend existing laws and rebalance competing interests.

"No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *Grand Trunk W. Ry. Co.*

v. Indus. Comm'n, 291 Ill. 167, 173 (1919); *accord Wingert v. Hradisky*, 2019 IL 123201, ¶ 33. Thus, it is "well established that 'the legislature has an ongoing right to amend a statute.'" *Dardeen*, 186 Ill. 2d at 300 (quoting *First of Am. Tr. Co.*, 171 Ill. 2d at 291 (cleaned up)). Here, the General Assembly exercised that right when it responded to *Folta* by rebalancing the "rights, remedies, and procedures that govern the disposition of employees' work-related injuries." *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 44 (1994).

Folta noted the "harsh result" created by the combination of the Act's timing and exclusive-remedy provisions. 2015 IL 118070, ¶ 43. There, a plaintiff with diagnosed mesothelioma was left without remedy under the Act because his illness did not manifest until after the 25-year time limit for filing a claim had expired. *Id.* at ¶ 4. And because of the Act's exclusive-remedy provisions, the plaintiff was without remedy, including in court. *Id.* at ¶ 36. This Court explained that "ultimately, whether a different balance should be struck under the acts given the nature of the injury and the current medical knowledge . . . is a question more appropriately addressed to the legislature." *Id.* at ¶ 43. The Court thus invited the General Assembly to "draw the appropriate balance" between the sacrifices and gains of employees and employers. *Id.*

The General Assembly did so by striking a new balance — one that would allow employees with latent diseases to receive a remedy for their

workplace-related injuries if they could prove their claims in court. During floor debates, legislators explained their intent to ensure that employees who contracted latent diseases at their workplaces would have the opportunity to seek redress from their employers. *See* A169. For example, after noting that some diseases take "30 to 50 years" to manifest, one of Exception 1.1's sponsors stated that *Folta*'s effect was to deny employees suffering from the "death sentence" of latent diseases the opportunity to seek compensation from their employers. *Id.* (statement of Rep. Hoffman). But at the same time, the legislators recognized that employers had a constitutionally protected right to the Act's repose provision. Some legislators argued in favor of modifying the statute of repose. A186-87 ("If we are saying that disease will not present itself, and sometimes does not present itself before the end of the statute of repose, why not just use the legislation to extend the statute of repose?") (statement of Rep. Unes). But as Exception 1.1's sponsor explained, extending the statute of repose would impermissibly interfere with the vested rights of employers. A187 (statement of Rep. Hoffman). Thus, the General Assembly decided to add an exception to the exclusive-remedy provisions rather than change the repose provision, thereby allowing an employee with an asymptomatic, latent disease to seek compensation under the Act in "civil court." A172 (statement of Rep. Hoffman).

This balanced solution serves the underlying purposes of the Act. The Act is meant to be "a humane law of a remedial nature whose fundamental

purpose is to provide employees and their dependents prompt, sure and definite compensation, together with a quick and efficient remedy, for injuries or death suffered in the course of employment." *Gen. Am. Life Ins. Co. v. Indus. Comm'n*, 97 Ill. 2d 359, 370 (1983) (describing the Worker's Compensation Act, the Act's sister statute). It would be contrary to this purpose for the Act to operate to bar employees with latent workplace-related diseases from seeking compensation in any forum whatsoever. Exception 1.1 is likewise consistent with the Act's goal of establishing a "*quid pro quo*" between employees and employers. *See Folta*, 2015 IL 118070, ¶ 12. In typical cases, employers still receive the benefit of "statutory limitations on recovery for injuries," and, in exchange, employees receive the benefit of "no-fault liability." *Id.* But where an employee contracts a latent disease, there is no *quid pro quo* under the pre-amended Act. The employer receives immunity from liability, and the employee receives nothing. After *Folta*, Exception 1.1 ensures that employers do not receive something for nothing.

Defendants nevertheless point to policy concerns about having to litigate "claims too old to be adequately investigated and defended." AT Br. 42. But, as this Court recognized in *Folta* when inviting a legislative solution to a "harsh result," "[i]t is the province of the legislature to draw the appropriate balance" among stakeholder interests. 2015 IL 118070, ¶ 43. Thus, the "policy arguments [defendants] advance are properly addressed to the legislature rather than this court." *Roselle Police Pension Bd. v. Vill. of*

Roselle, 232 Ill. 2d 546, 557 (2009). Here, the General Assembly carefully avoided enacting legislation that would affect an employer's vested right to the Act's repose provision. Instead, it added an exception to the exclusive-remedy provisions, which conferred on employers a potential property interest that, in this case, had not vested. Accordingly, if this Court answers the two questions of statutory interpretation in Martin's favor, the Court should hold that the application of Exception 1.1 to Martin's claims does not violate due process.

CONCLUSION

For these reasons, assuming section 1(f) is a statute of repose, and assuming Exception 1.1 can be applied to Martin's claims, this Court should answer the third certified question in the negative and hold that application of Exception 1.1 to past conduct would not offend the Illinois Constitution's due process guarantee.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-3000

Attorneys for Intervenor-Appellee Attorney General Kwame Raoul

MEGAN L. BROWN
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(224) 204-9642 (office)
(312) 415-6318 (cell)
CivilAppeals@ilag.gov (primary)
Megan.Brown@ilag.gov (secondary)

August 23, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of the brief, excluding the pages contained in the Ruled 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Ill. Sup. Ct. R. 342(a), is 32 pages.

/s/ Megan L. Brown
MEGAN L. BROWN
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(224) 204-9642 (office)
(312) 415-6318 (cell)
CivilAppeals@ilag.gov (primary)
MeganBrown@ilag.gov (secondary)

CERTIFICATE OF FILING AND SERVICE

I certify that on August 23, 2024, I electronically filed the foregoing Brief of Intervenor-Appellee Attorney General Kwame Raoul with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system. I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Jonathan B. Amarilio
jamarilio@taftlaw.com

Patricia Braun
pbraun@taftlaw.com

Chicago Docketing Team
CHI_Docket_Assist@taftlaw.com

Adam W. Decker
adecker@taftlaw.com

Timothy Eaton
teaton@taftlaw.com

Patrick Jennetten
pjjennetten@law-pj.com

Andrew Lipton
alipton@liptonlaw.net

Ambrose McCall
amccall@hinshawlaw.com

Timothy Coughlin
Tim.Coughlin@thompsonhine.com

Daniel McGrath
dmcgrath@hinshawlaw.com

Emily Montion
Emily.Montion@thompsonhine.com

Matthew C. Wolfe
mwolfe@shb.com

SHB Docket
docket@shb.com

Edward Grasse
edgrasse@grasselegal.com

Christoper Willis
cwillis@grasselegal.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

By: /s/ Megan L. Brown

MEGAN L. BROWN
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(224) 204-9642 (office)
(312) 415-6318 (cell)
CivilAppeals@ilag.gov (primary)
Megan.Brown@ilag.gov (secondary)