No. 06-0714

IN THE SUPREME COURT OF TEXAS

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED,

Petitioner,

v.

CROWN CORK & SEAL COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

from the Fourteenth Court of Appeals at Houston, Texas

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STATEMENT OF THE CASE

Nature of the Case: Challenge to the constitutionality of part of House Bill 4 (2003), which retroactively eliminated all pending and future asbestos claims against Crown Cork & Seal Co, as successor to Mundet Cork Corp. The underlying claims were brought by John Robinson and his wife Barbara against Crown and others. Mr. Robinson was a 20-year U.S. Navy veteran who developed mesothelioma following asbestos exposure during his service as a boiler tender. I CR 75. Mr. Robinson died while the case was pending in the trial court.

Trial Court: The Hon. Jeff Brown, 55th Judicial District, Harris County.

Trial Court Disposition: Initially Crown did not contest its successor liability for actual damages, I CR 18, III CR 491, and the trial court granted partial summary judgment for the Robinsons on Crown's successor liability for actual damages on that basis. Tab E (I CR 46-48). While the case was pending, the Legislature enacted HB 4, which included a section providing Crown a new complete affirmative defense to all pending and future asbestos claims. The trial court then granted Crown's motion for summary judgment based on the new statute and rendered judgment that Robinson take nothing. Tab F (III CR 616-17, 743).

Parties in the Court of Appeals:

Appellant—Barbara Robinson, Individually and as Representative of the Estate of John Robinson, Deceased

Appellee—Crown Cork & Seal Company, Inc., Individually and as Successor in Interest to Mundet Cork Corp.

Court of Appeals: Fourteenth Court of Appeals, Houston; Justice Fowler authored the court's opinion, joined by Chief Justice Hedges. Justice Frost dissented. *See Robinson v. Crown Cork & Seal Co.*, No. 14-04-00658-CV, ___ S.W.3d ___, 2006 WL 1168782 (Tex. App.—Houston [14th Dist.] May 4, 2005, pet. filed). Tab A.

Appellate Disposition: The court of appeals affirmed the trial court's summary judgment. Tab A.

STATEMENT OF JURISDICTION

In this case of first impression presenting constitutional challenges to part of House Bill 4, this Court has jurisdiction under Texas Government Code §§ 22.001(a)(1), (2), (3), and (6).

First, this Court has jurisdiction under Texas Government Code § 22.001(a)(1) because the justices of the court of appeals disagree on a question of law material to the decision, *i.e.*, the proper test under the Texas Constitution[1] for determining whether a statute may retroactively extinguish a common-law tort claim. In a dissenting opinion that is a model of thorough and compelling legal analysis, Justice Kem Thompson Frost demonstrates precisely why the majority opinion cannot be sustained: without even mentioning the Bill of Rights, the majority improperly rejects the plain language of the Constitution and over 100 years of this Court's jurisprudence interpreting article 1, sections 16 and 29, to conclude that the police power is a trump card that may justify any legislative action, even that encroaching on the Bill of Rights' protection against retroactive laws extinguishing vested rights. *See* TEX. CONST. art. 1, §§ 16, 29.

Second, this Court has jurisdiction because the court of appeals' decision conflicts with prior decisions of this Court on questions of law material to this case. *See* TEX. GOV'T CODE § 22.001(a)(2). The majority wholly ignores over a century of this Court's precedent directly holding that the Bill of Rights is an express limitation on all powers of government,

[1] Unless otherwise indicated, all references to "the Constitution" and "the Bill of Rights" are to the Texas Constitution and Texas Bill of Rights.

and that the police power cannot constitutionally be exercised contrary to the specific provisions in the Bill of Rights. *See, e.g., Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90 (Tex. 1997); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995); *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1009-11 (Tex. 1934); *Houston & T.C. Ry. Co. v. City of Dallas*, 84 S.W. 648, 653-54 (Tex. 1905). Likewise, by refusing to determine whether Mrs. Robinson's vested rights have been eliminated by the Crown statute, the majority opinion conflicts with this Court's century-old jurisprudence testing retroactive legislation affecting common-law claims and defenses by whether a statute in fact eliminates or wholly impairs claims or defenses that accrued before the statute became effective. *See, e.g.*, *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997); *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916); *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887). The court of appeals' decision also conflicts with this Court's controlling authority of *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 450-51 (Tex. 2000), on the question of whether the Crown statute is a special law.

Third, this Court has jurisdiction because this case involves the validity of a statute necessary to a determination of the case. *See* TEX. GOV'T CODE § 22.001(a)(3). The court of appeals' decision is the only Texas appellate decision concerning the Texas version of the Crown statute, TEX. CIV. PRAC. & REM. CODE §§ 149.001-.006 (Tab B), although a similar case is pending before the Third Court of Appeals. *See Satterfield v. Crown Cork & Seal*

Co., 03-04-00518-CV (argued March 23, 2005). While this case was pending in the trial court, the supreme court of Crown's home state, Pennsylvania, held unconstitutional an almost identical version of the Crown statute because it retroactively eliminated vested rights in accrued claims. *Ieropoli v. AC&S Corp.*, 842 A.2d 919 (Pa. 2004) (Tab C). Since the Texas statute was enacted, Crown successfully sought passage of its protective statute in Florida, Ohio, Mississippi, South Carolina, and Georgia (Tab G), and any decision on the Texas version will no doubt have national implications.

Finally, the Court has jurisdiction because this case is important to the jurisprudence of the state and to all Texas citizens. *See* TEX. GOV'T CODE § 22.001(a)(6). This is a case of first impression involving constitutional challenges to a signature piece of recent "tort reform" legislation. In upholding part of that legislation over a retroactivity challenge, the court of appeals rejected the plain language of the Constitution, declined to follow this Court's continuing and unbroken line of authority rejecting legislative efforts to extinguish accrued claims under a vested-rights analysis, and instead ruled that the general police power supersedes the Texas Bill of Rights. Moreover, the court of appeals wholly failed to apply well-established elements of the test to determine whether the Legislature overstepped its constitutional bounds by granting a special privilege to one foreign corporation for the advancement of personal rather than public interest. These errors of law are of such importance to the jurisprudence of the state that they must be corrected by this Court.

ISSUES PRESENTED

I. Whether the court of appeals improperly declined to analyze Robinson's retroactivity challenge to TEX. CIV. PRAC. & REM. CODE §§ 149.001-.006 under this Court's well-established vested-rights jurisprudence and instead improperly held that the Legislature's police power supersedes the protections provided in the Texas Bill of Rights.

II. Whether the court of appeals improperly rejected Robinson's special-law challenge to the statute when: (a) the statute applies only to Crown, not a substantial class; and (b) there is no reasonable basis for distinguishing the putative "class" with respect to the public purpose sought to be accomplished by the statute.

STATEMENT OF FACTS

John Robinson joined the U.S. Navy in 1956, when he was 17-years old, and spent the next twenty years in the service. II CR 328. During his two decades in the Navy, he served on several vessels as a boiler tender, maintaining boilers, pipes, steam lines, and other machinery and equipment requiring insulation. *See, e.g.*, II CR 329, 332, 229, 347, 357. Robinson routinely used asbestos insulation in his work, *see, e.g.,* II CR 330, and he remembered working extensively with large amounts of the asbestos-containing insulation products of Mundet Cork Corporation, Crown's predecessor, which he identified by the distinctive "M" logo on Mundet packaging. *See, e.g.*, II CR 345-46, 389-94, 396-99, 400-02. In August 2002, Robinson was diagnosed with mesothelioma, an invariably fatal cancer that is uniquely associated with asbestos exposure. II CR 320-21. Based on the only expert testimony in the summary judgment record, it is likely that the other defendants in the case will contend that working with Mundet products was the sole proximate cause of his mesothelioma. II CR 409-10, I Supp. CR 80-81, III Supp. CR 1, Ex. D, pp. 1-3.

In September 2002, Robinson and his wife Barbara sued Crown and others for damages caused by Mr. Robinson's exposure to asbestos-containing products. I CR 75, II CR 295. Shortly thereafter, the Robinsons moved for partial summary judgment to establish Crown's liability as corporate successor to Mundet. I CR 2.[2] In its March 2003 response to

[2]Mundet had been a strong competitor of Crown's in cork and seal products. At the time, both Crown and Mundet were New York corporations. I CR 57. Crown first acquired 70% of Mundet's stock, several months later sold the assets of Mundet's insulation division, and eventually merged Mundet into Crown. The company that bought the insulation division assets expressly assumed only the liabilities arising on or after the date of sale. II Supp. CR 171, 176.

the Robinsons' motion, Crown did not contest its liability for actual damages as Mundet's successor, stating that it was "argu[ing] only that it is not liable for the punitive damages liability, if any, of Mundet Cork Corporation." I CR 18. Crown later explained that it admitted its liability for actual damages because it "had no basis under the current state of the law in Texas upon which to base an argument that a successor corporation could avoid compensatory damages liability which may be assessed against it as a result of alleged torts of its predecessor." III CR 491. In July 2003, the trial court granted the Robinsons' motion because Crown "did not contest its status as successor to any liability for compensatory damages that may be found by the jury . . . for the alleged torts of Mundet." I CR 46-48.

In June 2003, however, the Legislature had passed House Bill 4. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847. Section 17 of HB 4 created a new affirmative defense to successor liability for asbestos claims by limiting the cumulative successor liability of certain corporations to the fair market value of the predecessor company (referred to in the statute as the "transferor") as of the time of the merger or consolidation. *Id.* § 17.01 (codified at TEX. CIV. PRAC. & REM. CODE §§ 149.001-.006.) (Tab B). Among other limitations, the statute applies only to corporations that succeeded to asbestos liabilities before May 13, 1968, and to any of their successors. *Id.* (TEX. CIV. PRAC. & REM. CODE § 149.002). The successor liability limited by the statute includes "any liabilities . . . that are related in any way to asbestos claims that were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation . . . or the exercise of control or the ownership of stock of the corporation before the merger or consolidation." *Id.* (TEX. CIV.

PRAC. & REM. CODE § 149.001(3)). Once the corporation demonstrates that its cumulative successor asbestos-related liability is equal to the fair market value of the total gross assets of the transferor at the time of the merger or consolidation, "[t]he corporation does not have any responsibility for successor asbestos-related liabilities." *Id.* (TEX. CIV. PRAC. & REM. CODE § 149.003(a)).

As explained in further detail in section II below, the class protected by the statute is narrowly drawn and dovetails neatly with Crown's own corporate history. Crown, a thriving Pennsylvania corporation with worldwide manufacturing operations and net sales of $6.9 billion in 2006, (Tab D, 10-K annual report at 1), has admitted that "its involvement in asbestos litigation precipitated the Legislature's action with regard to The Statute," and that the major impetus for the legislation was that "[t]he Texas Legislature sought to rescue corporations like Crown Cork & Seal." Crown CA Br. at 35, 38. The HB 4 version of the Crown statute was modeled on a statute enacted in Pennsylvania in December 2001 (15 PA. C.S. § 1929.1 (held unconstitutional as applied retroactively in *Ieropoli v. AC&S Corp.*, 842 A.2d 919 (Pa. 2004))) (Tabs C, G). In April 2004, January 2005, May 2005, May 2006, and April 2007, Crown obtained passage of similar statutes in Mississippi, Ohio, Florida, South Carolina, and Georgia, respectively. *See* MISS. CODE ANN. §§ 79-33-1–79-33-11; OHIO REV. CODE ANN. § 2307.97; FLA. STAT. ANN. §§ 774.001-.008; S.C. CODE ANN. § 15-81-110–15-81-160; 2007 Ga. Laws Act 9, § 2 (Tab G). With the exception of the two most recent versions (the Georgia statute applies only to claims accruing on or after the statute's effective date, 2007 Ga. Laws Act 9, § 4; the South Carolina version applies to cases filed on or after

its effective date, 2006 S.C. Act 280, § 4), the Crown statutes provide a complete defense to successor liability for all pending and future claims against Crown. Despite the availability under these statutes of that complete defense, Robinson is unaware of any other company that has asserted the statute's defense in any state, and Crown has not identified any.

Section 17 was the only section of HB 4 made immediately effective (following the vote of two thirds of each house of the Legislature). *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 23.02(b), 2003 Tex. Gen. Laws 898, 899. Section 17 was also the only section of HB 4 made retroactively applicable to all cases "pending on that effective date and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that effective date." *See id.* § 17.02(2), 2003 Tex. Gen. Laws 895.

Crown moved for summary judgment on its new defense, arguing that because it has already paid successor asbestos claims in excess of the limits under the statute, it had no further liability in any asbestos case. I CR 51. The Robinsons responded with constitutional challenges, arguing among other things that the statute, as applied to them, retroactively deprived them of vested property rights in their accrued claims in violation of Texas Constitution article 1, section 16. They also argued that the statute was facially unconstitutional because it granted a special privilege to one corporation for the advancement of personal rather than public interests and was therefore a special law in contravention of article 3, section 56. I CR 119-31. The trial court granted Crown's motion, III CR 616-17, and severed the Robinsons' claims against Crown. III CR 743-49 (Tab F).

Mr. Robinson died on November 16, 2003, a little more than a year after he was diagnosed with mesothelioma. III CR 636. Mrs. Robinson, individually and as the representative of Mr. Robinson's estate, appealed, bringing forward three issues: (1) that the statute could not constitutionally be applied to retroactively eliminate the Robinsons' claims; (2) that the statute was an unconstitutional special law; and (3) that Crown failed to establish as a matter of law that it did not engage in the business of asbestos after acquiring Mundet, and therefore was not entitled to summary judgment under the statute. III CR 755; Robinson CA Br. at 1. The court of appeals rejected all three challenges. Tab A at *17.

On Robinson's first issue, in a 2-1 decision, despite recognizing that the statute retroactively eliminated the Robinsons' claims against Crown, the court of appeals declared "we choose not to employ a vested-rights analysis to assess the Statute's constitutionality." Tab A at *3, *17. Instead, it concluded that, under *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633-34 (Tex. 1996), it could measure whether the statute was unconstitutionally retroactive in eliminating Robinson's claims by looking solely to whether the statute was a valid exercise of police power. *Id.* at *6. Deriving a test from *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 591 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.), which did not involve a retroactivity challenge, the court determined that there was a reasonable basis for the statute, that it was a valid exercise of police power, and therefore was not unconstitutionally retroactive. Tab A at *8-*9. The majority did not mention the Bill of Rights.

Justice Frost, dissenting, exposed the multiple fallacies of the majority's reliance on the police power to reject the retroactivity challenge, pointing out that this Court has long held that the police power does not trump the individual guarantees of the Bill of Rights. She explained that "in this context [a claim that a statute violates the prohibition on retroactive laws], it makes no sense to ask whether the Texas Legislature reasonably exercised its police power to enact a 'retroactive law' because the Texas Legislature has no police power to enact such a law at all":

> In deciding whether the legislation at issue violates the prohibition against retroactive laws in the Texas Bill of Rights, the court concludes that if the Texas Legislature reasonably exercises its police power to enact a statute, then that statute does not violate the Texas Constitution, even though the statute is retroactive and destroys the vested rights of some individuals. The people of the State of Texas, in emphatic and compelling language set forth in section 29 of the Texas Bill of Rights, have expressly withheld from the Legislature the authority to enact retroactive laws in violation of section 16 of the Texas Bill of Rights. Because the Legislature has no police power to enact retroactive laws in violation of section 16, this court should not use a police-power analysis to determine whether the statute is unconstitutionally retroactive. Furthermore, the weight of precedent from the Texas Supreme Court and this court requires the use of the vested-rights analysis. Under this analysis, the statute in question destroys the vested rights of the appellant in this case and therefore violates section 16 of the Texas Bill of Rights, as applied.

Id. at *17, *21.

Justice Frost first looked to the plain language of the Constitution, noting that every Constitution of the State of Texas has provided that "'no . . . retroactive law . . . shall be made'," and has contained a declaration that the provisions of the Bill of Rights are "'excepted out of the general powers of government, and shall forever remain inviolate, and

all laws contrary thereto . . . shall be void.'" *Id.* at *18 (quoting TEX. CONST. art. 1, §§ 16, 29). She noted that the majority's conclusion that a statute is not an unconstitutionally retroactive law if the Legislature reasonably exercised its police power in enacting the statute is thus "problematic given the structure and plain language of the Texas Constitution, which, in clear and forceful terms, expressly and unequivocally withholds from Texas Government the power to enact retroactive laws." *Id.* at *20. She explained that this Court has long held that article 1, section 29 limits the power of the Legislature so that it may not enact laws contrary to the Bill of Rights, and that the Legislature has no police power to violate article 1, section 16 because of the express limitation in article 1, section 29. *Id.* at *18 (citing *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89-90 (Tex. 1997) (article 1, section 29 excepts everything in the Bill of Rights out of the general powers of government); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995) (same); *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1001, 1010-11 (Tex. 1934) (the Legislature has no police power to violate article 1, section 16 because section 29 excepts this power from the powers of the government)). Justice Frost concluded that a vested-rights analysis was the proper method for evaluating a retroactivity challenge because "[w]hatever shortcomings the vested-rights analysis may have, it is consistent with the structure and plain language of the Texas Constitution," and that "[u]nder this analysis, the Legislature lacks the power to enact statutes that nullify or destroy vested rights." *Id.* at *20 (citing, for example, *DeCordova v. City of Galveston*, 4 Tex. 470, 473-80 (1849)). As discussed in greater detail below, Justice Frost

distinguished *Barshop* at length, and fully explained why it is not controlling authority in the context of a statute that retroactively extinguishes accrued claims.

Justice Frost further explained that even without considering article 1, § 29, the weight of Texas precedent, from the Supreme Court of the Republic of Texas through this Court's recent cases, required the court of appeals to conduct a vested-rights analysis of Robinson's article 1, section 16 challenge. *Id.* at *21 (citing, among other cases, *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219-23 (Tex. 2002); *Taylor v. Duncan*, Dallam 514, 517 (Tex. 1843)). The cited authority demonstrates that a vested right, such as an accrued claim like that presented here, or a comparable accrued defense like that of limitations, may not be retroactively eliminated. *Id.* (citing, among other cases, *In re A.D.*, 73 S.W.3d 244, 247-49 (Tex. 2002); *Baker Hughes*, 12 S.W.3d at 4-5; *Likes*, 962 S.W.2d at 502-03; *Middleton*, 185 S.W. at 559-61; *Mellinger*, 3 S.W. at 251-54). Thus, based on "the structure and plain language of the Texas Constitution as well as the weight of binding precedent," under the proper vested-rights analysis, Justice Frost concluded that the statute is unconstitutionally retroactive as applied here. *Id.* at *26.

The court of appeals also rejected Robinson's special-law challenge. *Id.* at *11-*17. Despite beginning its analysis by setting out the multiple factors this Court considers when determining if a statute is an unconstitutional special law, *see Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 451 (Tex. 2000), the court of appeals nonetheless looked solely at whether there appeared to be a reasonable basis for the class to support its determination that the statute is not a special law. Tab A at *13-*14. The court stated that because "[t]he viability

of corporations and their ability to continue to provide jobs and pension benefits are matters of importance to Texas and its citizens," therefore "a reasonable basis exists for the Statute's classification of innocent successor corporations, like Crown Cork, burdened by asbestos liabilities." *Id.* at *14. The court further concluded that Crown's inclusion in the class is "rationally related to the Statute's stated purposes, because it will cap the amount of money Crown Cork is liable to pay out for asbestos-related liabilities resulting solely from its merger with Mundet." *Id.* at *15.

Robinson petitions for review of the court of appeals' incorrect statements of the law and improper holdings on both of her constitutional challenges to the Crown statute.

SUMMARY OF THE ARGUMENT

First, the court of appeals' decision is nothing less than a radical revision of the Texas Constitution, which is supported by neither the plain language nor the structure of the Constitution, and which defies the citizens' clear and express directive in the Bill of Rights that its guarantees are "excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto . . . shall be void." TEX. CONST. art. 1, § 29. Without so much as mentioning article 1, section 29, the court of appeals incorrectly held that the Legislature's police power can justify retroactively eliminating Robinson's claims and thereby supersede the Bill of Rights' protections. To support its improper mode of analysis, the court relied on *Barshop*, in which this Court did not mention article 1, section 29, and which involved a water and environmental regulation statute that took past facts into account, but which had nothing to do with retroactive elimination of accrued claims.

As demonstrated by Justice Frost's compelling dissent, the court's untenable conclusion is at odds with the plain language of the Constitution, and over a century of law interpreting article 1, section 29 as imposing an express limit on the exercise of the police power, *see Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89-90 (Tex. 1997); *Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995); *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1001, 1010-11 (Tex. 1934). The majority opinion likewise cannot be reconciled with over a century of law, reaching back even to the days of the Republic of Texas, using a vested-rights analysis to protect the citizens of this state from retroactive legislation that destroys or impairs vested rights. *Subaru*, 84 S.W.3d at 219-23; *Taylor v. Duncan*, Dallam 514, 517 (Tex. 1843)). And it cannot be reconciled with the fundamental law of this state that the police power may not be used to deprive citizens of their property retroactively by eliminating their vested rights in accrued claims. *See, e.g., City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997); *Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916); *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887). Even if the court of appeals were correct that a police-power analysis can be used to analyze retroactivity in the context presented here, there is no authority for its conclusion that it is a valid exercise of the police power to help one private corporation avoid the consequences of its business transactions.

It is undisputed that the Robinsons' claims against Crown accrued and were pending before the statute's effective date, and that those claims were extinguished by the statute. Under the express language of the Bill of Rights and this Court's well-established precedent

under both sections 16 and 29, the statute is an unconstitutional retroactive law as applied in this case. *See* TEX. CONST. art. 1, §§ 16, 29.

Second, the court of appeals improperly reduced this Court's well-developed special-law jurisprudence, which looks at a number of factors in evaluating a special-law challenge, to the sole element of reasonable basis, while ignoring other elements critical to measuring the statute's constitutionality under article 3, section 56. Article 3, section 56 prohibits legislation granting special privileges to a particular class for the advancement of personal rather than public interests. *Sheldon*, 22 S.W.3d at 450. While reasonable basis is the primary test, it is not the exclusive measure of constitutionality because, as with article 1, section 16, the Constitution imposes limits on the exercise of legislative power. To avoid the Constitution's prohibition on special laws, the classification must "'be broad enough to include a substantial class'" and must "'be based on characteristics legitimately distinguishing such class from others with respect to the public purpose sought to be accomplished.'" *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996) (quoting *Miller v. El Paso County*, 150 S.W.2d 1000, 1001 (Tex. 1941)). The Crown statute meets none of these requirements. The statute is so narrowly drawn as to plainly encompass a class of one (Crown), not a substantial class, and Crown, a thriving corporation with worldwide operations, does not even fall within the purported justification for the class, to save innocent successor companies threatened by bankruptcy from asbestos claims. The Crown statute plainly grants a special privilege for the advancement of personal rather than public interests, which is forbidden by article 3, section 56.

For these reasons, the Court should grant Mrs. Robinson's petition for review, reverse the court of appeals' judgment, and remand this case to the trial court for further proceedings.

ARGUMENT

I. BY ELEVATING THE POLICE POWER OVER THE BILL OF RIGHTS, THE COURT OF APPEALS' REWRITES THE TEXAS CONSTITUTION.

A. The Plain Language of the Constitution and Over a Century of This Court's Precedents Demonstrate That the Bill of Rights Is a Fundamental Check on the Police Power.

By refusing to review Robinson's claims under the proper retroactivity analysis, and instead relying on the police power to uphold the statute, the court of appeals has stricken article 1, section 16 from the Constitution in defiance of article 1, section 29, which holds the Bill of Rights to be inviolate. In defiance of the Constitution's plain language, and without so much as mentioning section 29, the court reverses the hierarchy of the powers entrusted by the citizens to the state and eliminates the protections the citizens carefully excepted from those powers in the Bill of Rights. *See* TEX. CONST. art. 1, § 29. The court's analysis is also contrary to over a century of this Court's precedent recognizing that the very purpose of the Bill of Rights is to serve as a check against legislative overreaching.

When interpreting the Constitution, this Court relies heavily on the literal text, giving effect to the Constitution's plain language. *Dietz*, 940 S.W.2d at 89; *Bouillion*, 896 S.W.2d at 148. The Court "presumes the language of the Constitution was carefully selected, and we interpret words as they are generally understood." *Bouillion*, 896 S.W.2d at 148. The plain language of the Constitution makes clear that the citizens of the State of Texas have

expressly withheld from the Legislature the authority to enact retroactive laws in violation of section 16 of the Bill of Rights:

> **PREAMBLE**
>
> Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.
>
> **ARTICLE 1**
>
> **BILL OF RIGHTS**
>
> That the general, great and essential principles of liberty and free government may be recognized and established, we declare:
> . . . .
>
> **Sec. 16. BILLS OF ATTAINDER; EX POST FACTO OR RETROACTIVE LAWS; IMPAIRING OBLIGATION OF CONTRACTS.** No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.
>
> . . . .
>
> **Sec. 29. PROVISIONS OF BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT; TO FOREVER REMAIN INVIOLATE.** To guard against transgression of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

TEX. CONST. Preamble, art. 1, §§ 16, 29. Every Constitution of the State of Texas has contained the language currently found in sections 16 and 29, and the Constitution of the Republic of Texas contained substantially similar language. *See* TEX. CONST. of 1869, art. 1, §§ 14, 23; TEX. CONST. of 1866, art. 1, §§ 14, 21; TEX. CONST. of 1861, art. 1, §§ 14, 21;

TEX. CONST. of 1845, art. 1, §§ 14, 21; REPUB. TEX. CONST. of 1836, Declaration of Rights, Preamble & Sixteenth, *reprinted in* TEX. CONST. app. 482, 493-94 (Vernon 1993).

Under the plain meaning and structure of the Bill of Rights, the mandate that retroactive laws shall not be made is part of the Bill of Rights, and thus the power to enact such laws is excepted out of the general powers of government. TEX. CONST. art. 1, §§ 16, 29. Based on section 29, this Court long ago expressly rejected the argument that the police power, even when exercised under emergency conditions, can be used to justify violating article 1, section 16: "We recognize, of course, that the police power is broad and comprehensive; but the Constitution forbids its exercise when the result would be destruction of the rights, guaranties, privileges and restraints excepted from the powers of government by the Bill of Rights. 'However broad the scope of the police power, it is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state constitution.'" *Marshall*, 76 S.W.2d at 1010-11 (citation omitted).

The police power is "a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public." *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921); *Houston & T.C. Ry. Co. v. City of Dallas*, 84 S.W. 648, 653-54 (Tex. 1905) ("The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience as consistently as may be with private property rights."); *see also Jefco, Inc. v. Lewis*, 520 S.W.2d 915, 922 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). Yet, "[c]onstitutional powers can never transcend

constitutional rights. The police power is subject to the limitations imposed by the Constitution upon every power of government." *Spann*, 235 S.W. at 515.

Thus, while the police power is indeed broad authority granted to legislate for the health, safety, and welfare of the people, for over a century this Court has repeatedly made clear that such power does not eliminate all constitutional limits on that power. *See, e.g., Tex. Boll Weevil Eradication Found.*, 952 S.W.2d at 461 ("The Legislature has broad discretion to legislate under its police power, and we must uphold such legislation as long as it is justified by a rational legislative purpose and **does not violate a specific constitutional provision**."); *Dietz*, 940 S.W.2d at 89-90 ("[T]he provisions in section 29 excepting everything in the Bill of Rights 'out of the general powers of government' and providing that 'all laws' contrary to the Bill of Rights shall be void demonstrates that **the Bill of Rights serves as a shield against the powers and laws of government**."); *Bouillion*, 896 S.W.2d at 149 ("When a law conflicts with rights guaranteed by Article 1, the Constitution declares that such acts are void because **the Bill of Rights is a limit on State power**."); *Marshall*, 76 S.W.2d at 1009-11 (recognizing that article 1, section 29 "is an **express limitation on the police power** which does not appear in the Federal Constitution"); *Spann*, 235 S.W. at 515 ("The **police power is subject to the limitations imposed by the Constitution** upon every power of government," quoting article 1, section 29); *Houston & T.C. Ry. Co.*, 84 S.W. at 653 (refusing to accept the mere fact that ordinance was enacted pursuant to police power as sufficient to ensure its constitutionality: "**If this were true, it would always be within legislative power to disregard the constitutional provisions**

giving protection to the individual."); *see also Henderson v. Love*, 181 S.W.3d 810, 815 (Tex. App.—Texarkana 2005, no pet.) (noting that **article 1, section 29 "expressly limits the state's police power"**); *Faulk v. Buena Vista Burial Park Ass'n*, 152 S.W.2d 891, 894 (Tex. Civ. App.—El Paso 1941, no writ) (quoting article 1, section 29, and explaining that "[T]he extent of **[the police] power is not unlimited. Such power must be exercised in conformity to the limitations prescribed by the Constitution. All the powers of government are subject to the Bill of Rights.**"). (All emphasis added.)

With little informed analysis, and without mentioning article 1, section 29, the court of appeals improperly relied on *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 633-34 (Tex. 1996), to replace a vested-rights analysis with the police-power's rational-basis test. Tab A at *5, *9. This reliance is misplaced. Although different kinds of rights may be considered "vested" for different purposes, and a court's retroactivity analysis may vary depending on the context, that is precisely why the court of appeals' reliance on *Barshop* does not support dispensing with a vested-rights analysis in the context presented here, the retroactive elimination of accrued claims.

Barshop involved, among other claims, a *facial* retroactivity challenge (a claim that the statute operated unconstitutionally in all circumstances, *see infra* n.3) to the Edwards Aquifer Act, a water-regulation law grounded in the Conservation Amendment to the Texas Constitution, which took past facts into account in determining how much water users could draw from the aquifer. *Id.* at 623, 633-34. Reviewing the "essentially . . . legislative function" of water regulation against a number of challenges, including retroactivity, this

Court agreed that the statute "may have retroactive effect." *Id.* at 633-34. But without addressing the State's argument that the plaintiffs did not have vested rights in the water while it remained underground, and without mentioning article 1, section 29, the Court rejected the plaintiffs' retroactivity challenge, explaining that the Legislature may legitimately take into account past conduct without necessarily running afoul of article 1, section 16. *Id.* at 625, 633-34 (citing *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642 (Tex. 1971)); *see also Bd. of Med. Exam'rs. v. Nzedu*, No. 03-05-00032-CV, 2007 WL 1295790 (Tex. App.—Austin May 4, 2007, no pet. h.). The Court in *Barshop* also stated that "a valid exercise of the police power by the Legislature to safeguard the public safety and welfare can prevail over a finding that a law is unconstitutionally retroactive." *Id.*

To support its conclusion that the Act was "necessary to safeguard the public welfare of the citizens of this state," the Court quoted from and expressly relied on findings adopted by the legislature and incorporated into the text of the Act itself that the Act was "'required . . . to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state'" and was "'vital to the general economy and welfare of this state.'" *Id.* at 634; *cf.* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (incorporating into text of statute legislative findings and findings of legislative commission report on purposes of medical-malpractice act). As even the majority here recognizes, however, *Barshop* gives "scant guidance on how to measure the legitimacy of an act of police power against a private right." Tab A at *5. That is because *Barshop* presented a retroactivity challenge in the wholly different context of a statute within the

traditional sphere of the police power—water and environmental regulation—that took into account prior conduct to allocate scare resources. None of the factors relied on by this Court to uphold that statute are present here. The Crown statute is not simply a look-back statute that takes into account past conduct, is not supported by any legislative findings, is certainly not grounded in any constitutional mandate, and, as explained in more detail below, is not a valid exercise of police power. Thus *Barshop* does not control in place of this Court's precedents directly addressing retroactivity in the context of accrued claims and defenses.

Moreover, in her dissent Justice Frost persuasively evaluates each of the cases cited by this Court in *Barshop*, reviews this Court's precedent both before and after *Barshop*, and further explains why *Barshop* is not controlling authority in the context presented here:

> Although *Barshop* supports a police-power analysis, it does not mention or overrule prior Texas Supreme Court authority that uses the vested-rights analysis. Since *Barshop* was decided nearly a decade ago, the Texas Supreme Court and this court have used the vested-rights analysis without mentioning or discussing *Barshop*. Research indicates that *Barshop* is the only Texas Supreme Court case holding that a police-power type of analysis is appropriate for evaluating a claim that a statute violates the Texas Constitution's prohibition against retroactive laws. . . . Not only does the weight of authority rest in these cases, but these opinions discuss the issue in light of section 29 of the Texas Bill of Rights. Therefore, this court should apply the vested-rights analysis rather than a police-power analysis.

Tab A at *23-*24 (Frost, J., dissenting).

Article 1, section 16 was designed to protect individuals from precisely the kind of legislative overreaching caused here by the Legislature's retroactively extinguishing the Robinsons' legitimate and settled expectation of having their accrued claims heard. *See Likes*, 962 S.W.2d at 502; *see also Owens Corning v. Carter*, 997 S.W.2d 560, 572-73 (Tex.

1999). (Crown also clearly expected Mrs. Robinson to recover actual damages—as the Court acknowledged, it admitted its liability for those damages before the Crown statute was enacted.) If courts can dispense with a vested-rights analysis under article 1, section 16, and instead perform a rational-basis review of a statute that retroactively eliminates vested rights, then protection against retroactive laws in this context is rendered meaningless. Adoption of the court of appeals' analysis is tantamount to an invalidation of the Constitution's clear and unambiguous prohibition against retroactive laws. Perhaps the San Antonio Court of Appeals expressed it best in sustaining an article 1, section 16 contracts-clause challenge to a foreclosure moratorium statute, that foreshadowed precisely what this Court would hold in *Marshall*, including that violation of section 16 cannot be justified on the basis of a legislatively declared emergency:

> If House Bill 231 can be held to be valid on the ground that the police power is superior to the inhibitions in the Constitution, then another moratorium law can be upheld staying such sales for another year. . . . Such a doctrine would make the Legislature and the courts judges of when an emergency is of sufficient magnitude to justify setting aside the provisions and inhibitions contained in the Bill of Rights. Such was never the intention of the founders of our Constitution. When they wrote into our Bill of Rights . . . "We declare that everything in this 'Bill of Rights' is excepted out of the general powers of government . . ." they meant exactly what they said. ***When they said such powers were taken out of the general powers of government, they meant they were taken out of the police power of the government.***

Murphy v. Phillips, 63 S.W.2d 404, 409 (Tex. Civ. App.—San Antonio 1933, writ dism'd) (emphasis added); *see Marshall*, 76 S.W.2d at 1010-11.

Whether a statute has a rational basis cannot be the measure of whether a statute violates article 1, section 16 without reading that section and section 29 out of the

Constitution. If the test is whether a retroactive statute is a legitimate exercise of police power, then the protections of article 1, section 16 are eliminated from the Texas Constitution in violation of article 1, section 29. As Justice Frost explained, the language of both section 16 and section 29 has appeared in some form in every Constitution of the State of Texas and the Constitution of the Republic of Texas. Tab A at *18. "The people of the State of Texas, in emphatic and compelling language set forth in section 29 of the Texas Bill of Rights, have expressly withheld from the Legislature the authority to enact retroactive laws in violation of section 16 of the Texas Bill of Rights." *Id.* at *17. To permit the court of appeals' opinion to stand would be a miscarriage of justice that strikes at the heart of our fundamental social compact.

B. Even If the Police Power Could Trump the Bill of Rights, the Crown Statute Does Not Pass Muster Under a "Reasonableness" Test.

Even if the court of appeals were correct that exercise of the police power could supersede the Bill of Rights, the statute here does not satisfy that court's two-part reasonableness test: (1) whether the act is appropriate and reasonably necessary to accomplish a purpose within the scope of the police power; and (2) whether the ordinance is reasonable by not being arbitrary or unjust or whether the effect on individuals is unduly harsh so that it is out of proportion to the end sought to be accomplished. Tab A at *8. The court derived its test from *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 591 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.), in which the court upheld as a reasonable exercise of the police power a penal statute forbidding the sale of "filled milk" as injurious to public

health over due-process and equal-rights challenges. *Id.* *Martin* did not involve a retroactivity challenge (or a claim of vested rights), and did not involve a statute even remotely similar to that at issue here, and the court of appeals did not explain why it chose *Martin* as the standard by which to measure Robinson's retroactivity challenge. But even under the *Martin* test, the statute does not pass constitutional muster.

First, the court of appeals simply assumed that the first part of the test—that the statute accomplishes a purpose within the scope of the police power—is met. Without citing any supporting authority or anything similar to the statutory legislative findings relied on by this Court in *Barshop*, the court simply stated that protecting "the financial viability of the State and businesses in the State is a valid exercise of the police power" and that "the Statute benefits the entire economy of the State, an appropriate purpose for which to exercise police power." Tab A at *8. Robinson has been unable to discover any case holding that bolstering the bottom line of a single corporation is within the scope of the police power. The court of appeals cites no case in which that power has been exercised to protect the allegedly endangered fiscal health of a private corporation, or which involved a similar statute.

To the contrary, the cases cited by the court of appeals involve the traditional exercise of police power for purposes obviously related to public health, safety, and welfare: upholding laws related to food products and health (*Martin*), environmental protection and water conservation as required by the Conservation Amendment to the Texas Constitution (*Barshop*), regulating professions (*Tex. State Teachers Ass'n v. State*, 711 S.W.2d 421, 425 (Tex. App.—Austin 1986, writ ref'd n.r.e.)); *State Bd. of Registration for Prof'l Eng'rs v.*

Wichita Eng'g Co., 504 S.W.2d 606, 608 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.)), classifying marital property (*Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)), regulating water, sewage, and garbage disposal (*City of Breckenridge v. Cozart*, 478 S.W.2d 162, 164-65 (Tex. App.—Eastland 1972, writ ref'd n.r.e.)), and forbidding parking in fire lanes (*City of Coleman v. Rhone*, 222 S.W.2d 646, 648-49 (Tex. Civ. App.—Eastland 1949, writ ref'd)). Tab A at *5. The last two of the cases cited by the court did not even present retroactivity challenges, and although the court cited *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955), for the proposition that the Legislature may withdraw remedies for causes of action in the reasonable exercise of the police power, the court ignored the context and holding of that case. Tab A at *6. The part of this Court's opinion in *Lebohm* cited by the court of appeals here involved a discussion of *Middleton*, and this Court's holding in *Middleton* that the Legislature did not arbitrarily abolish negligence claims by enacting the Worker's Compensation Act because it substituted "a different but certain and adequate legal remedy for the one that existed at common law." *Lebohm*, 275 S.W.2d at 954. The holding of *Lebohm*, by which this Court sustained an open-courts challenge to a charter provision exempting the city from all negligence liability for damages caused by defects in streets and sidewalks, actually supports Robinson's arguments: "As the major basis for our conclusion that section 47 of the Galveston Charter is invalid, we consider that the necessary effect of [prior decisions] is to deny to legislative bodies the right to arbitrarily abolish causes of action against municipalities where such causes of action are well established and well defined in the common law." *Id.* at 953.

Citing the state's duty to protect the safety and welfare of its children, this Court concluded in *In re A.V.*, 113 S.W.3d 355, 360-61 (Tex. 2003), that a statute permitting termination of parental rights based on prior criminal conduct could be applied retroactively in part because it was a legitimate exercise of police power (citing *Barshop*), and also because the complaining party had no reasonable expectation that the state would not act to protect his children during his imprisonment. *See also, e.g., In re E.M.N.*, No. 2-06-319-CV, 2007 WL 1018605, at *3-*5 (Tex. App.—Fort Worth Apr. 5, 2007, no pet. h.) (concluding that different section of same statute analyzed in *In re A.V.* was valid exercise of police power and could be applied retroactively because the statute advances the public interest by "facilitating termination when one parent murders the other" and claimant could not have expected otherwise under the circumstances); *Liberty Mut. Ins. Co. v. Tex. Dep't of Ins.*, 187 S.W.3d 808, 824 n.14 (Tex. App.—Austin 2006, pet. denied) (insurance department rule requiring pass through of surplus funds to policyholders was valid exercise of police power); *Campbell v. Tex. Dep't of Pub. Safety*, No. 03-02-00604-CV, 2003 WL 22037277, at *4 (Tex. App.—Austin Aug. 29, 2003, no pet.) (mem. op., not reported) (statute forbidding convicted felons from obtaining concealed handgun permits could be applied retroactively because felon does not have vested right to carry concealed weapon and even if vested right were affected, statute was valid exercise of police power). None of the cases cited by the court of appeals or that Mrs. Robinson has found involved a statute designed to protect the profits of a private company, none involved the wholesale elimination of accrued claims, and none involved a statute written to relieve a single corporation from its formerly admitted

successor liability for personal injury or the consequences of its business transactions. The court of appeals thus not only read the protections of the Bill of Rights out of the Constitution, but expanded the police power beyond its legitimate and recognized scope.

As to the second part of the *Martin* test—determining whether the statute is reasonable in the sense of not being arbitrary and unjust, or whether the effect on the individuals of the action taken is so unduly harsh that it is out of proportion to the end sought to be accomplished—the court of appeals misapplied it by looking solely to one legislator's statements and ignoring the facts of this case. Upon review of the facts here, it is clear that the Crown statute fails because its effect on the Robinsons is unduly harsh and is out of proportion to the end sought to be accomplished, and is therefore unconstitutional.

In *Martin*, after setting out the police-power test, the Third Court of Appeals proceeded to "examine the testimony to determine whether there was a reasonable basis for the Legislature to enact [the statute] in the exercise of the police power of the State." *Martin*, 437 S.W.2d at 592. The court then spent nine pages reviewing the testimony presented at trial about the actual effects of the statute before reaching its conclusion that the statute was a reasonable exercise of the police power. *Id.* at 591-601. Yet the court of appeals here simply accepted at face value one representative's statement that the end sought to be accomplished by the Crown statute was to keep successor corporations out of bankruptcy—even though that statement is belied by the fact that Crown, the sole corporation that has sought the benefit of the statute, is not on the verge of bankruptcy—and then concluded that the statute had a reasonable basis. Tab A at *7-*8. Yet this Court has repeatedly cautioned

that "the statement of a single legislator, even the author and sponsor of the legislation does not determine legislative intent." *AT&T Communications v. Southwestern Bell Tel. Co.*, 186 S.W.3d 517, 528-29 (Tex. 2006); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993) ("[T]he intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction to be given a statute."); *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328 (Tex. 1994) (Hecht, J., concurring & dissenting) ("While the perspectives of individual legislators on the meaning of statutes may be instructive, they do not govern the construction of the statute. We are obliged to effectuate the intent of the Legislature and not merely that of some of its members. . . . Even when [the] words leave us in such doubt as to the Legislature's purpose that we must look beyond the provision for assistance, it is ordinarily inappropriate to consider the views of individual legislators."). But even if that single statement reflected the true goal of the statute, the facts demonstrate that the effect of the statute is unduly harsh and out of proportion to that purported goal.

First, the record shows that the effect of the statute is to extinguish Mrs. Robinson's accrued common-law causes of action. In this context, extinguishing her claims is the harshest result possible, particularly when before the statute was enacted Crown had admitted its liability for actual damages. III CR 491. The purported end sought to be accomplished by the statute according to Representative Nixon is to keep "hard-pressed successors out of bankruptcy" H.J. OF TEX., 78th Leg., R.S. 6044 (2003). But extinguishing Mrs. Robinson's claims does not further that end in this case because it is undisputed that Crown is not on the verge of bankruptcy and is the only known corporation to which the statute applies. Far from

being threatened by bankruptcy, Crown's Securities & Exchange Commission filings demonstrate its robust fiscal health, and Crown itself has declared to the SEC and Crown shareholders in its annual report that "resolution of [asbestos-related claims and settlements] is not expected to have a material adverse effect on the Company's financial position." *See* Tab D, 10-K annual report at 55. The purported goal of the statute to save innocent successor companies from bankruptcy is not served by stripping Robinson of her claims against the financially thriving Crown, and therefore, there is no reasonable basis upon which to apply the statute here.

The other effect that is out of proportion to the end sought is that, as applied to Crown, the statute erases the corporate liabilities Crown took on by purchasing the stock of and later merging with Mundet, even while Crown continues to reap the benefits of that purchase. Corporate liabilities do not simply disappear with a change in corporate form; that is why the purported "innocence" of a particular corporation does not matter. Specific kinds of transactions have certain consequences. The general rule is that when a company buys the shares of another company, or merges or consolidates with another company, the predecessor ceases to exist and is merged into the successor or both cease to exist and are consolidated into a new corporation. Under these circumstances, the successor corporation retains the liabilities of the predecessor. 15 FLETCHER CYCLOPEDIA CORPORATIONS §§ 7121-22 (1999); Cantu & Goldberg, *Products Liability: An Argument for Product Line Liability in Texas*, 19 ST. MARY'S L.J. 621, 623-24 (1988). A corporation may choose to buy only the assets of another corporation, and not the liabilities, *id.*, but that is not what happened here. Crown

structured the transaction in which it acquired Mundet as a stock purchase and merger (instead of another form such as a limited asset purchase) in which it acquired Mundet's assets *and liabilities*. When Crown sold Mundet's thermal-insulation assets, by contrast, the buyer expressly assumed only the liabilities arising on or after the date of sale, II Supp. CR 171, 176, and therefore upon merger, Crown kept those Mundet liabilities that arose before the sale. This is consistent with law of Texas, New York, and Pennsylvania that liabilities stay with the surviving company following a merger. *See* TEX. BUS. CORP. ACT § 5.06; N.Y. BUS. CORP. LAW § 906; 15 PA. CONS. STAT. § 1929. That is why until the Crown statute was enacted, Crown did not challenge its successor liability for compensatory damages, and admitted that it "had no basis under the current state of the law in Texas upon which to base an argument that a successor corporation could avoid compensatory damages liability which may be assessed against it as a result of alleged torts of its predecessor." III CR 491. The trial court granted partial summary judgment to the Robinsons on Crown's successor liability on that very basis. Tab E. Mundet's liabilities remained with Crown, as it admitted, until the Texas Legislature relieved it of those liabilities 40 years later.

Moreover, Crown avoids the fact that it has benefitted for over 40 years from its stock purchase and subsequent merger with Mundet. It purchased the majority of stock of Mundet, a strong competitor in a desired market, and obtained sought-after operations that reduced its costs. II Supp. CR at 34. There can be no doubt that Crown benefitted all these years from that transaction. Yet Crown seeks to use changing corporate forms to keep the benefits while jettisoning the liabilities at the expense of claimants like the Robinsons. The law does

not permit that kind of manipulation of the corporate form. To use the police power to undo Crown's freely entered-into business transactions and relieve it of successor liability is unjust and out of proportion to the statute's stated purpose of saving successor corporations from bankruptcy. Thus even under the court of appeals' police-power test, the statute is unconstitutionally retroactive as applied to Robinson's claims.

C. Under This Court's Well-Established Authority, Article 1, Section 16 Protects Robinson's Accrued Claims From Retroactive Elimination.

Article 1, section 16 commands that "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." TEX. CONST. art. I, § 16. Even without considering article 1, section 29's mandate that the provisions of the Bill of Rights are excepted from the general powers of government and shall remain inviolate, for over a century article 1, section 16's ban on retroactive lawmaking has served to protect parties' settled expectations that they will not be stripped of their vested rights after the fact. For over a century it has also been settled Texas law that an accrued cause of action or defense is a vested right that cannot be retroactively extinguished. As it is undisputed that by its express terms the Crown statute operates retroactively, applying the Crown statute to the Robinsons' claims in this case completely eliminates their accrued tort claims against Crown, and therefore violates article 1, section 16.[3]

[3]Under this "as applied" challenge, Mrs. Robinson need only show that the statute operates unconstitutionally under the particular circumstances of this case. *See Tex. Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995) (distinguishing between "as applied" and "facial" constitutional challenges). Robinson's special-law challenge, by contrast, is a facial challenge, in which she argues that the statute is unconstitutional on its face and therefore always operates unconstitutionally.

Yet, to justify relying on a minimal rational-basis review test, the court of appeals throws up its hands and declared that "[a]pparently, the job of ascertaining when a right is vested, and when it is not, has vexed courts and commentators for years." Tab A at *4. To reach that conclusion, however, the court reviewed cases from other jurisdictions and the views of commentators, and cited Texas cases involving different circumstances from those presented here. *See* Tab A at * 3-5. As the dissenting opinion points out, because other jurisdictions' constitutions are different from that of Texas, "cases interpreting these states' constitutions provide little, if any, insight in evaluating the availability and scope of the police power under the Texas Constitution." *Id.* at *20. Moreover, the Texas cases cited are not analogous in that they either do not challenge acts of the Texas Legislature under the Texas Constitution (*Walls v. First State Bank of Miami*, 900 S.W.2d 117, 122 (Tex. App.—Amarillo 1995, writ denied)) (challenge to federal statute under federal constitution) or do not involve similar claims (*Ex parte Abell*, 613 S.W.2d 255, 261 (Tex. 1981) (claim of "vested right" to have interrogatory answered under prior law); *Houston Indep. Sch. Dist. v. Houston Chronicle Pub'g Co.*, 798 S.W.2d 580, 589 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (claim that newspaper had "vested right" to application of prior version of the Open Records Act)). *See* Tab A at *3.

Contrary to the majority opinion, and as explained below, this Court has clearly and consistently held that both accrued tort claims and the analogous circumstance of defenses such as limitations are vested rights that are protected from being retroactively extinguished. *See, e.g.*, *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *City of Tyler*

v. Likes, 962 S.W.2d 489, 502 (Tex. 1997); *Mellinger v. City of Houston*, 3 S.W. 249, 252-53 (Tex. 1887); *see also Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916). The mode of retroactivity analysis that applies here is clear in an unbroken chain of cases from *Mellinger* to *Likes* to *Baker Hughes* to *Subaru*. *See also DeCordova*, 4 Tex. at 473-80; *Taylor*, Dallam at 517.

As the United States Supreme Court has recognized, prohibitions on retroactive lawmaking are grounded in concerns about protecting settled expectations: "Elementary considerations of fairness dictate that . . . settled expectations should not be lightly interrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Robinson does not claim that the Legislature may not regulate or even abolish common-law claims. It just cannot do so without giving some protection to vested rights and well-settled expectations by affording "a reasonable time or a fair opportunity to preserve a claimant's rights under the former law." *Likes*, 962 S.W.2d at 502; *see Owens Corning*, 997 S.W.2d at 572-73 (reaffirming that the Legislature may enact legislation affecting a remedy for an accrued claim without violating article 1, section 16 if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law); *City of Fort Worth v. Morrow*, 284 S.W. 275, 276-77 (Tex. Civ. App.—Fort Worth 1926, writ ref'd) ("A state may abolish old remedies and substitute new, or may abolish even without substitution if a reasonable remedy remains, but it cannot deny a remedy entirely."). The court of appeals' opinion stands only for the untenable proposition that this long-standing precedent is no longer good law.

1. A statute may not retroactively destroy or impair vested rights.

Unlike the federal constitution, which expressly prohibits only three types of retroactive laws (bills of attainder, ex post facto laws, and laws impairing the obligations of contracts), *see* U.S. CONST. art. 1, § 10, the Texas Constitution contains additional protection against retroactive lawmaking in the form of a general ban on the passage of any "retroactive law." TEX. CONST. art. 1, § 16; *Mellinger*, 3 S.W. at 252-53. Following this constitutional mandate, Texas law militates strongly against retroactive application of statutes, and statutes are presumed to be prospective in operation unless expressly made retroactive. *See* TEX. GOV'T CODE § 311.022; *Harris County Appraisal Dist. v. Coastal Liquids Transp., L.P.*, 7 S.W.3d 183, 187 (Tex. App.—Houston [1st Dist.] 1999), *aff'd in part and rev'd in part on other grounds*, 46 S.W.3d 880 (Tex. 2001). By creating a new substantive defense to successor liability and making it immediately effective in all pending cases, the Legislature made the Crown statute expressly retroactive, thereby attaching new legal consequences to events completed before its enactment. *Landgraf*, 511 U.S. at 269-70; *Zeolla v. Zeolla*, 15 S.W.3d 239, 243 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Int'l Sec. Life Ins. Co. v. Maas*, 458 S.W.2d 484, 490 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).

Not all retroactive legislation, however, is unconstitutional. Retroactive legislation violates article 1, section 16, only "if, when applied, it takes away or impairs vested rights acquired under existing law." *Subaru*, 84 S.W.3d at 219; *see Abell*, 613 S.W.2d at 260; *Price Pfister, Inc. v. Moore & Kimmey, Inc.*, 48 S.W.3d 341, 354 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Vested rights have long been defined as including "a well-founded claim,

and a well-founded claim means nothing more nor less than a claim recognized or secured by law." *Mellinger*, 3 S.W. at 253; *see Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971).

Statutes affecting vested or substantive rights are frequently contrasted with those effecting procedural or remedial changes, which may, in many circumstances, be applied retroactively without violating article 1, section 16. *See, e.g., In re A.D.*, 73 S.W.3d at 249; *Merchants Fast Motor Lines, Inc. v. Railroad Comm'n of Tex.*, 573 S.W.2d 502, 504-05 (Tex. 1978); *Morrow*, 284 S.W. at 276; *Reames v. Police Officers' Pension Bd.*, 928 S.W.2d 628, 631 (Tex. App.—Houston [14th Dist.] 1996, no writ) (explaining that "substantive law relates to the rules and principles which fix and declare the primary rights of individuals and provides the type of remedy available in case of invasion of those rights," while remedial matters refer to the "practice and procedure by which substantive law is made"). But even procedural or remedial statutes may not be applied to suits pending at the time the statutes become effective if to do so would destroy or impair rights that vested before the statute became effective. *See Baker Hughes*, 12 S.W.3d at 4 (noting settled law that after a claim is barred by the statute of limitations, which is procedural, the defendant has a vested right to rely on that defense); *In re K.N.P.*, 179 S.W.3d 717, 720-21 (Tex. App.—Fort Worth 2005, pet. denied) (holding that statute of limitations for paternity suit could not be retroactively applied because "the statute did not provide a reasonable time for appellants to bring suit after enactment of the new law"); *Commercial Ins. Co. of Newark v. Lane*, 480 S.W.2d 781, 783 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (explaining that a procedural or remedial

statute is unconstitutional if it "destroys or impairs vested rights, or takes away a litigant's remedy or right of action, or of defense, or so unreasonably incumbers or limits it as to render [it] useless or impracticable").

The rights at issue in this case fall squarely within this Court's established jurisprudence recognizing that accrued causes of action like the Robinsons' are vested rights entitled to protection under article 1, section 16.

2. The Robinsons' accrued causes of action against Crown are vested rights.

For over one hundred years, this Court has recognized accrued causes of action as one species of vested right protected by Article 1, section 16:

> [Article 1, section 16] must be held to protect every right, although not strictly a right to property, which may accrue under existing laws prior to the passage of any, which if permitted a retroactive effect, would take away the right. . . .
>
> When . . . such a state of facts exists as the law declares shall entitle a plaintiff to relief in a court of justice on a claim which he makes against another, or as it declares shall operate in favor of a defendant as a defense against a claim made against him, then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation, if there be a constitutional prohibition of such laws.

Mellinger, 3 S.W. at 253; *see Middleton*, 185 S.W. at 560; *Likes*, 962 S.W.2d at 502. Thus, the Legislature may not retroactively extinguish or eliminate accrued causes of action, either by procedural changes such as shortening statutes of limitation, or by substantive changes, such as creating new affirmative defenses. *See, e.g., Likes*, 962 S.W.2d at 502 (upholding retroactive application of new immunity defense when the Legislature afforded reasonable time to file accrued causes of action); *DeCordova*, 4 Tex. at 480 ("[If] a statute of limitations

applied to existing causes barred all remedy or did not afford a reasonable period for their prosecution . . . such legislation would be retrospective within the intent of the prohibition, and would therefore be wholly inoperative."); *In re K.N.P.*, 179 S.W.3d at 720-21 (shortened statute of limitations could not be applied retroactively without providing reasonable time for plaintiffs to bring suit after enactment of new law); *Johns-Manville Sales Corp. v. Reagan*, 577 S.W.2d 341, 345-46 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (holding that defendant could not assert statutory affirmative defense enacted three years after claim accrued because it would affect "vested rights and substantive law").

The Legislature has itself long adhered to this fundamental principle by providing for prospective operation or grace periods when enacting statutes affecting vested rights. For example, in upholding the constitutionality of the first worker's compensation law, the Texas Supreme Court stressed the fact that the Legislature did not make the act applicable to personal injury claims that had accrued before the act's passage: "A *vested* right of action given by the principles of the common law is a property right, and is protected by the Constitution as is other property. The Act, however, does not profess to deal with rights of action accruing before its passage. . . . The laws may be changed by the Legislature so long as they do not destroy or prevent adequate enforcement of vested rights." *Middleton*, 185 S.W. at 560. Likewise, in rejecting an argument that an amendment providing additional bases for immunity under the Tort Claims Act unconstitutionally deprived a plaintiff of her vested rights, the supreme court emphasized that the amendment was constitutional because the Legislature afforded a grace period: "The Legislature can affect a remedy . . . for an

accrued cause of action without violating the retroactivity provision of the Constitution if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law, or if the amendment does not bar all remedy." *Likes*, 962 S.W.2d at 502.

In *Landgraf* the United States Supreme Court has pointed out that absent constitutional protection against retroactive lawmaking, "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." 511 U.S. at 267. This Court has likewise recognized these policy considerations. For example, in *Owens Corning v. Carter*, 997 S.W.2d 560, 572-73 (Tex. 1999), after reaffirming the rule of *Likes*—that the Legislature may enact legislation affecting a remedy for an accrued cause of action without violating article 1, section 16 if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law—the supreme court elaborated on the policy considerations underpinning article 1, section 16:

> The prohibition against retroactive laws derives largely from the sentiment that such laws unfairly deprive people of legitimate expectations. Considerations of fair notice, reasonable reliance, and settled expectations play a prominent role when a state legislature shortens an existing statute of limitations for causes of action arising in that state or when it creates an immunity where none existed before, thereby disrupting settled expectations and extinguishing accrued causes of action.

Id. at 572-73 (citations omitted); *see also In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) ("A law that does not upset a person's settled expectations in reasonable reliance upon the law is not unconstitutionally retroactive.").

This case falls squarely within the core policy rationale for article 1, section 16, as articulated by this Court in *Likes* and reiterated in *Owens Corning*. The Robinsons' tort claims against Crown accrued and were filed before the effective date of the Crown statute. The Robinsons thus had the reasonable, settled, and legitimate expectation of pursuing their claims against Crown as successor to Mundet, particularly when Crown did not contest liability for compensatory damages before the Crown statute was passed. *See* I CR 18. The Crown statute, however, by changing the law of successor liability "creates an immunity where none existed before, thereby disrupting settled expectations and extinguishing accrued causes of action." *Owens Corning*, 997 S.W.2d at 573. As explained below, the statute retroactively deprives the Robinsons of their vested rights by eliminating all remedy for their accrued claims against Crown, without affording them a reasonable time or fair opportunity to preserve their rights under the former law. *See Likes*, 962 S.W.2d at 502.

3. It is undisputed that the Crown statute completely extinguishes the Robinsons' accrued claims against Crown; the statute is therefore unconstitutional.

The facts necessary to demonstrate that the Crown statute violates article 1, section 16, by extinguishing the Robinsons' accrued causes of action are undisputed. There is no dispute that the Robinsons' claims against Crown accrued when Mr. Robinson discovered that he suffered from work-related mesothelioma. *See Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 653 (Tex. 2000); *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998). There is no dispute that the Robinsons discovered the injury and filed this lawsuit before the effective date of the Crown statute. II CR 295, I CR 75. In fact, the Robinsons obtained a

summary judgment holding Crown liable for compensatory damages as successor to Mundet based on Crown's having admitted liability for those damages before the statute became effective. I CR 18, 46-48, III CR 491. And based on the only expert testimony in the summary judgment record, it is likely that the other defendants in the case will contend that exposure to Mundet products was the sole proximate cause of Mr. Robinson's cancer. II CR 409-10, I Supp. CR 80-81, III Supp. CR 1, Ex. D, pp. 1-3.

And there is also no dispute that the Crown statute extinguishes any potential liability against Crown—that is the statute's very purpose. The statute does this by limiting Crown's total asbestos liability to the fair market value of Mundet's gross assets at the time of the merger, which Crown alleges was in the range of $55.6 to $ 57.5 million. TEX. CIV. PRAC. & REM. CODE § 149.003(a); I CR 68. Crown further asserts that it has already paid well over that amount in asbestos-related claims, *id.*, and therefore, that it "cannot now be liable to Plaintiffs." I CR 70. The trial court agreed. III CR 616-17. The Robinsons' claims against Crown are now completely extinguished, despite the fact that, based on the only expert testimony in the summary judgment record, the remaining defendants are likely to contend that working with Mundet products was the sole proximate cause of Mr. Robinson's mesothelioma, II CR 409-10, I Supp. CR 80-81, III Supp. CR 1, Ex. D, pp. 1-3, despite the trial court's prior ruling that Crown was liable for compensatory damages based on Crown's failure to challenge that liability, I CR 48-49, and despite the Robinsons' well-settled expectation that they could pursue their mature tort causes of action against Crown. *See Pustejovsky*, 35 S.W.3d at 654 (acknowledging that asbestos litigation is a mature tort).

Because the Crown statute retroactively deprives the Robinsons of all remedy against Crown, and thereby extinguishes their vested rights, it is unconstitutional as applied in this case.

4. The Pennsylvania Supreme Court has determined that the Crown statute unconstitutionally extinguishes vested rights.

In 2001, the General Assembly of Crown's home state, Pennsylvania (II Supp. CR at 34, Ex. 2, ¶ 4) enacted the first Crown statute, which became the model for the Texas Crown statute, as well as for the Crown statutes enacted in Mississippi, Ohio, Florida, South Carolina, and Georgia. *See* 15 PA. C.S. § 1929.1. (Tab G). In the only other decision on a Crown statute besides that of the court of appeals here, the Pennsylvania Supreme Court held the statute unconstitutional as applied under the Pennsylvania Constitution because the statute eliminated all remedy for an accrued cause of action, and "an accrued cause of action is a vested right and as such, cannot be eliminated by subsequent legislation." *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 932 (Penn. 2004) (Tab C).[4] Although decided under a different constitutional provision, the court's core reasoning in *Ieropoli* applies to this case.

In *Ieropoli*, as in this case, there was no dispute that the plaintiffs' causes of action accrued (and were in fact pending) before the effective date of the statute, and no dispute that application of the statute would eliminate any recovery against Crown. *Id.* at 921, 923. As in this case, the plaintiffs argued that the statute was unconstitutional because applying it retroactively to their accrued causes of action would extinguish their remedy for those causes of action against Crown. *Id.* at 924. Under Pennsylvania law, as under Texas law, an

[4]Perhaps Crown learned something from *Ieropoli*. As explained above, the two most recent versions of the Crown statute (Georgia and South Carolina) are not retroactive.

accrued cause of action is a vested right accorded constitutional protection. *Id.* at 930. As in this case, Crown argued that the statute did not eliminate the plaintiffs' vested rights because the plaintiffs could pursue claims against other defendants in the case and had in fact settled with some of those defendants. *Id.* at 928. The trial court had granted summary judgment to Crown for that reason. *Id.* at 924.

The supreme court reversed and remanded, holding that because an accrued cause of action is a vested right, that right cannot be extinguished by subsequent legislation under the remedies clause of the Pennsylvania Constitution:

> Before the Statute's enactment, each cause of action that [plaintiffs] brought against Crown Cork was a remedy—it was the vehicle by which [plaintiffs] lawfully pursued redress, in the form of damages, from Crown Cork for an alleged legal injury. But under the Statute, [plaintiffs] cannot obligate Crown Cork to pay them damages on those causes of action. In this way, each cause of action has been stripped of its remedial significance, as it can no longer function as the means by which [plaintiffs] may secure redress from Crown Cork. As a remedy, each cause of action has been in essence, extinguished. Under [the remedies clause], however, a statute may not extinguish a cause of action that has accrued. Therefore, as [plaintiffs'] causes of action accrued before the Statute was enacted, we hold that the Statute's application to [plaintiffs'] causes of action is unconstitutional . . . .

Id. at 930. The supreme court accordingly reversed the summary judgment for Crown and remanded the case for further proceedings. *Id.* at 932.

Yet the court of appeals here dismissed *Ieropoli* out of hand. Its refusal to conduct a vested-rights analysis led it to reject the Pennsylvania Supreme Court's reasoning based on superficial distinctions between the constitutional clauses at issue and slight differences in the two statutes, without considering the underlying basis for the Pennsylvania Supreme

Court's decision. Again, as Justice Frost correctly explains in dissent, the Pennsylvania Supreme Court's decision rests on precisely the same reasoning as do the Texas vested-rights cases from *Mellinger* to *Likes*. Because the Pennsylvania version of the Crown statute eliminated all remedy for an accrued cause of action, the statute unconstitutionally eliminated vested rights. *Ieropoli*, 842 A.2d at 932. Both the Pennsylvania Supreme Court and this Court recognize that an accrued cause of action is a vested right that cannot be eliminated by subsequent legislation. *Id.*; *Mellinger*, 3 S.W. at 253. "Although the Pennsylvania Constitution is different from the Texas Constitution, both states use the vested-rights analysis and both constitutions prohibit statutes that retroactively eliminate accrued claims; therefore the majority's distinctions between the *Ieropoli* decision and this case are not convincing." Tab A at *26. Because the Texas Crown statute, like the Pennsylvania Crown statute, eliminates Mrs. Robinson's vested right to pursue her accrued claims against Crown, it is unconstitutionally retroactive as applied in this case. To hold otherwise requires this Court to ignore over one hundred years of its precedent interpreting article 1, section 16 of the Texas Constitution to ban retroactive laws that eliminate vested rights.

II. THE COURT OF APPEALS FAILED TO APPLY THE CORRECT LEGAL TEST FOR EVALUATING A SPECIAL LAW UNDER ARTICLE 3, SECTION 56.

In reflecting on the evils of retroactive legislation, the United States Supreme Court has noted that "James Madison argued that retroactive legislation also offered special opportunities for the powerful to obtain special and improper legislative benefits," and that a retroactive statute "'may be passed with an exact knowledge of who will benefit from it.'"

Landgraf, 511 U.S. at 267 n.20. Those same evils are part of the core policy forbidding the passage of special laws under article 3, section 56 of the Texas Constitution. In analyzing Mrs. Robinson's special-law challenge, as it did with her retroactivity challenge, the court of appeals improperly resorted to a minimal rational-basis test, ignoring the other factors that must be taken into account when determining if a law is a prohibited special law. Tab A at *11-*16. Proper consideration of all the special-law factors leads to the conclusion that because the statute singles out Crown and Crown alone for special treatment it is an unconstitutional special law, and summary judgment in favor of Crown was improper.

A. Article 3, Section 56 Forbids the Legislature From Conferring Special Benefits or Privileges on a Class of One.

Article 3, section 56(b) provides that "where a general law can be made applicable, no local or special law shall be enacted." TEX. CONST. art. 3, § 56(b). A special law is one limited to a particular class of people distinguished by some characteristic other than geography. *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 450 (Tex. 2000). The prohibition on special laws was intended to "prevent the granting of special privileges" and to "suppress the enactment of 'laws for the advancement of personal rather than public interests' and 'the reprehensible practice of trading and "logrolling"'." *Id.* (citing *Miller v. El Paso County*, 150 S.W.2d 1000, 1001 (Tex. 1941)). Although the Legislature has broad authority to make classifications for legislative purposes, that authority is not unlimited: when a law is limited to a particular class, it passes constitutional muster only if it (1) includes a substantial class; and (2) is based on characteristics legitimately distinguishing the class from others with

respect to the public purpose sought to be accomplished by the law. *Id.*; *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996). This Court has also stated that the "primary and ultimate test of whether a law is general or special is whether there is a reasonable basis for the classification made by the law, and whether the law operates equally on all within the class." *Rodriguez v. Gonzales*, 227 S.W.2d 791, 793 (Tex. 1950); *see Sheldon*, 22 S.W.3d at 451. While the court of appeals here recited the rules limiting the Legislature's authority to create classifications, it proceeded to ignore those rules, turning the "primary and ultimate test" of reasonable basis into an exclusive test, ignoring the myriad of factors this Court reviews under article 3, section 56. Tab A at *12-*13.

When analyzing the constitutionality of a law challenged under article 3, section 56, this Court has looked to the composition and numerosity of the class, the purported policy justification for the law, and whether the members of the class have been singled out for special treatment. *See Maple Run*, 931 S.W.2d at 945-46 (collecting cases). The Constitution demands that the class created by a statute "must be a real class, and not a 'pretended' class created by the legislature to evade the constitutional restriction." *Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 478, 485 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (quoting *Pub. Util. Comm'n of Tex. v. Southwest Water Servs., Inc.*, 636 S.W.2d 262, 265 (Tex. App.—Austin 1982, writ ref'd n.r.e.)); *Clark v. Finley*, 54 S.W. 343, 345-46 (Tex. 1899). And, this Court has not hesitated to invalidate laws singling out a class of one for special treatment. *See, e.g., Maple Run*, 931 S.W.2d at 947 (invalidating law singling out one municipal utility district); *Miller*, 150 S.W.2d at 1002 (invalidating law

singling out one county); *Anderson v. Wood*, 152 S.W.2d 1084, 1087 (Tex. 1941) (same); *Bexar County v. Tynan*, 97 S.W.2d 467, 470 (Tex. 1936) (same); *City of Fort Worth v. Bobbitt*, 36 S.W.2d 470, 471-72 (Tex. 1931) (invalidating law singling out one city for special treatment). These cases make clear that the special-law analysis is not simply a minimal rational-basis test, but takes into account several factors, and that the Legislature's power has some concrete limits, including that a classification must contain a real, substantial class that is reasonably related to the purported purpose of the law. As with Mrs. Robinson's retroactivity challenge, there is no basis for the court of appeals' refusal to measure the Crown statute by the appropriate legal standards.

B. The Crown Statute Singles Out Crown For Special Treatment Without a Reasonable Public Purpose.

As noted above, the Texas Crown statute is modeled on a statute enacted by the Pennsylvania General Assembly in 2001, and similar statutes have since been enacted in Mississippi, Ohio, Florida, South Carolina, and Georgia. *See* 15 PA. CONS. STAT. § 1929.1 (II CR 305–07); MISS. CODE ANN. §§ 79-33-1–79-33-11; OHIO REV. CODE ANN. § 2307.97; FLA. STAT. ANN. §§ 774.001-.008; S.C. CODE ANN. § 15-81-110–15-81-160; 2007 Ga. Laws § 2. (Tab G). With the exception of the most recent versions (the Georgia statute applies only to claims accruing on or after the statute's effective date, 2007 Ga. Laws Act 9, § 4; the South Carolina version applies to cases filed on or after its effective date, 2006 S.C. Act 280, § 4), the Crown statutes provide a complete defense to successor liability for all pending and future claims against Crown. Despite the availability under these statutes of a complete

affirmative defense to successor liability for almost all pending and all future claims, Mrs. Robinson has been unable to discover any corporation other than Crown that has asserted the statute as a defense in any of the seven states with Crown statutes. Crown itself does not dispute that the statute creates a class of one, and has not identified even one other possible member of the putative "class" defined by the statute. *See* I CR 164. Kevin Collins, Crown's expert who prepared a report on the fair market value of Crown's predecessor, testified that despite performing over 750 valuations a year, he did not know of a single company other than Crown to which this statute would apply. II CR 282-83. It is hard to imagine that if there were even one other corporation that could take advantage of the complete immunity from liability provided by the Crown statute that such corporation would not have already moved for summary judgment in a pending case based on the statute. It is also hard to imagine that the identity of such a corporation would not be readily known to either Crown or to counsel familiar with asbestos litigation. While Crown has no legal burden to identify other corporations that might fit within the statute's class, the fact it has not done so, when doing so would easily refute the obvious problem of the class applying only to Crown, is telling. The fact that only Crown has taken advantage of the statute is not surprising, however, because the statute was plainly tailored to fit Crown's specific corporate history, and was not a general law designed to effectuate public policy.

First, the details defining the class fit Crown perfectly. The statute applies only to corporations (not any other form of business entity) that incurred successor asbestos liability in connection with a merger or consolidation, or based on the exercise of control or the

ownership of stock of the predecessor before the merger or consolidation. TEX. CIV. PRAC. & REM. CODE § 149.001(3). Crown first acquired its successor liability by exercising control of Mundet after purchasing a majority of its stock, before later merging with it. *See* I CR 57-58. The statute applies only to corporations that did not continue in the asbestos business, which Crown asserts it has not. TEX. CIV. PRAC. & REM. CODE § 149.002(b)(5); I CR 56. The statute does not apply to premises or contractor defendants, which Crown is not. TEX. CIV. PRAC. & REM. CODE § 149.002(b)(8).

But most important are two details tied specifically to Crown's corporate history. First, Crown's formal merger with Mundet did not occur until 1966. 2d Supp. CR 179-84 (Ex. 5, attachment 5-a). The statute protects only those corporations whose first relevant successorship transaction occurred before May 13, 1968. TEX. CIV. PRAC. & REM. CODE § 149.002(a). According to Representative Nixon, successor corporations would have been less likely to know of the dangers of asbestos before the mid-1960s, "when Dr. Irving Selikoff issued his now famous warnings about the dangers of asbestos in the workplace." H.J. OF TEX., 78th Leg., R.S. 6044 (2003). But Representative Nixon offered no authority or evidence to support his conclusion, and as early as 1958 the Texas Department of Health had in fact adopted a workplace regulation (with which all corporations operating in Texas had to comply) limiting the maximum permissible concentration of asbestos. II CR 317. Thus restricting the benefit of the statute to corporations who acquired their successor liability before 1968 is tied not to knowledge of asbestos as a workplace hazard, which the

State of Texas recognized ten years earlier by imposing statewide workplace limits on exposure, but to a date after Crown's formal merger with Mundet in 1966.

Second, Crown changed its state of incorporation from New York to Pennsylvania via a merger and consolidation in 1989. 2d Supp. CR 40 (attachment 2-a). To accommodate this further transfer of successor liability, the statute provides that as long as the original transaction yielding successor liability took place before May 13, 1968, the statute's original limitation of liability survives intact through an infinite number of subsequent transactions, no matter when they took place. TEX. CIV. PRAC. & REM. CODE § 149.002(a) ("the limitations . . . shall apply . . . [to a corporation] that is a successor which became a successor prior to May 13, 1968, or which is any of that successor corporation's successors"). Because the current Crown corporation inherited its asbestos liability by virtue of the 1989 merger, the statute includes a "successor to a successor" extension of the May 13, 1968 cutoff date, another provision tailored to fit Crown's corporate history.

The statute itself does not contain any justification or explanation for the narrowly defined class that it protects; nor does it contain legislative findings in support. Representative Nixon offered his view that the narrowness of the class was justified for two primary reasons: to "limit the benefits of the statute to those who were more innocent than others and were unwittingly saddled with often massive long-tail liabilities only because of a merger;" and (2) "to help keep remaining hard-pressed successors out of bankruptcy." H.J. OF TEX., 78th Leg., R.S. 6044 (2003). But even assuming that these are legitimate legislative goals, they must be accomplished through general legislation that is broad enough to

encompass a substantial class, not a special law designed to benefit a class of one, and the class must be reasonably related to the objectives of the legislation. *See Maple Run*, 931 S.W.2d at 945. While the fact that a law benefits a class of one is not alone determinative of the special-law analysis, *see id.* at 947, it is a factor that cannot be ignored as did the court of appeals did here, particularly when the purported policy justification for the law does not apply to the sole class member.

Although impending bankruptcy is one of the purported reasons for the narrowness of the class, that reason cannot justify the narrowness of the class when Crown suggests no threat of bankruptcy in this case. In fact, in connection with a major restructuring of corporate debt in 2003, Crown reorganized itself and made itself a wholly owned subsidiary of Crown Holdings, Inc. *See* Tab D, 10-K annual report at 1.[5] Crown Holdings' 2006 Annual Report announces net sales of $6.9 billion, with more than 70% of those sales derived from operations outside of the United States. *Id.* Crown's annual interest expense on its corporate debt, net of interest income, was $352 million in 2005 and $274 million in 2006. *Id.* at 21. Crown itself estimates that "its probable and estimable liability for pending and future asbestos claims and related legal costs will range between $198 [million] and $ 247 [million]." Tab D, 10-K annual report at 55. Thus, Crown's estimate of its current and future asbestos liability is comparable to just one year of interest on its corporate debt instruments. Further, these estimates have been incorporated into the company's business

[5]Crown's 10-K annual report and 10-Q quarterly report, public filings with the federal Securities and Exchange Commission, are available under the "For Investors" menu at Crown's website, www.crowncork.com.

through a pre-tax accounting charge, which is not an amount actually paid out in cash in a particular year, but a charge taken to incorporate all payments for current and future cases. *See id.* That is why Crown can declare to the SEC and its shareholders that "resolution [of asbestos-related claims and settlements] is not expected to have a material adverse effect on the Company's financial position." *Id.* at 55. In its first-quarter SEC filing for 2007, Crown reported net sales up 12.4% over the first quarter of 2006, and reduced its estimated asbestos liability to between $194 and $243 million. Tab D, 10-Q quarterly report at 1, 10. As Crown's public filings demonstrate, a class that by definition includes only Crown is not rationally related to the objective of saving "hard-pressed successors" from bankruptcy. Crown is not on the verge of bankruptcy, and its protests that it is in dire need of rescue by the Texas Legislature are belied by its own public filings.

Finally, although the statements of a single legislator do not determine legislative intent, *AT&T*, 186 S.W.3d at 528-29; *De La Lastra*, 852 S.W.2d at 923, because the court of appeals accepted at face value the statement of Representative Nixon on the purported goals of the Crown statute (even though the facts demonstrate that rescuing Crown does not serve those goals), it should likewise have credited the remarks of Senator Ratliff, the senate sponsor of HB4, instead of dismissing them. *See* Tab A at *15-16. These remarks confirm that the statute was not simply precipitated by Crown's circumstances, which then served as the impetus for a general law affecting a substantial class and designed to effectuate public policy. *See Juliff Gardens, L.L.C. v. Tex. Comm'n on Envtl. Quality*, 131 S.W.3d 271, 282-

84 (Tex. App.—Austin 2004, no pet.). Rather, they unequivocally demonstrate that the statute was a ready-made special law designed to "rescue" Crown and Crown alone.

On April 30, 2003, the Texas Senate's State Affairs Committee held a meeting to review the Committee's substitute bill for House Bill 4. Senator Ratliff, the chair of the committee, outlined for the members the major differences between the Committee's substitute bill and the version previously passed by the House of Representatives. 3d Supp. CR 11-12 (Ex. A at 1-2) (Tab H). The Crown statute was added as Article 17 to the State Affairs Committee's substitute bill. Tab H at 13. Senator Ratliff described Article 17 to the members of the committee as follows:

> Article 17, limitations in civil actions of liabilities relating to certain mergers or consolidations. This, members, is the Crown Cork and Seal asbestos issue. What we have put in this bill is what I understand to be an agreed arrangement between all of the parties in this – in this matter.

Id. Senator Ratliff's remarks dramatically unmask the statute for what it is—a prohibited pretend class based on a private "agreed arrangement" between unspecified parties to advance Crown's private interests rather than the public welfare. This statute is precisely the type of law granting special privileges and advancing private interests that is prohibited by article 3, section 56. *See Sheldon*, 22 S.W.3d at 450; *Miller*, 150 S.W.2d at 1001.

CONCLUSION & PRAYER

This case is about the allocation of power in our system of government: how the Legislature may wield it; how the Texas Constitution limits it; and how the judiciary is bound to enforce those limits as set out in our fundamental governing compact. Perhaps no case

with such broad implications for how we govern ourselves has come before this Court in a number of years. There can be no doubt about the importance of this case to the jurisprudence of the state. And, even though it must be resolved under the Texas Constitution and this Court's precedent interpreting and applying the Texas Constitution, this case has national implications; should the Court grant review, its decision may influence other courts faced with similar challenges to the Crown statute.

John Robinson was exposed to the asbestos that caused his fatal cancer while serving his country for twenty years in the Navy. Crown did not contest its liability until the Legislature retroactively extinguished his claims. The court of appeals opinion defies the plain language of the Texas Constitution, as well as over a century of this Court's precedent holding both that article 1, section 29 excepts the provisions of the Bill of Rights from the general powers of government, and that violation of article 1, section 16 may not be justified by appeal to the police power. Mrs. Robinson's article 1, section 16 challenge to the Crown statute must be measured by the proper test for retroactive elimination of accrued claims established by this Court more than a century ago. Likewise, Mrs. Robinson's article 3, section 56 challenge must be measured by the correct test for a special law under this Court's established jurisprudence. Because the Crown statute runs afoul of both guarantees, it is unconstitutional, and the court of appeals improperly affirmed summary judgment for Crown.

For these reasons, Mrs. Robinson respectfully requests that the Court grant the Petition for Review, reverse the judgment of the court of appeals, and remand the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2007, a copy of this Petitioner's Brief on the Merits was served on the following counsel of record and parties via the following:

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