STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-23-122

ROBERT E. DUPUIS et al.

Plaintiff-Appellees,

v.

ROMAN CATHOLIC BISHOP OF PORTLAND

Defendant-Appellant.

On Report from the Superior Court
Business and Consumer Docket
Cumberland County

BRIEF OF APPELLEES, ROBERT E. DUPUIS et al.

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I. STATEMENT OF FACTS

This Appeal consolidates thirteen cases brought against the Roman Catholic Bishop of Portland (*hereinafter* "Appellant") by adult survivors of child sex abuse.

All thirteen cases were brought under Maine's "revival" statute, 14 M.R.S. § 752-C(3)(effective October 18, 2021). All survivors of child sex abuse before and after the passage of 14 M.R.S. § 752-C(3) could bring civil damages claims against the enablers and employers of perpetrators. However, until 2021, Maine's statutes of limitation set a procedural time-deadline for such survivors.

Appellant filed Motions for Judgment on the Pleadings in three of the 13 cases, pursuant to M.R. Civ. P. 12(c). In the remaining ten cases, Appellant filed Motions to Dismiss pursuant to M.R. Civ. P. 12(b)(6). In identical orders dated February 13, 2023, the court (*McKeon, J.*) denied Appellant's dispositive motions in each of the thirteen cases. *Dupuis v. Roman Catholic Bishop of Portland*, No. BCD-CV-2022-00044, at 7 (Me. B.C.D. Feb. 13, 2023).

The court granted Appellant's Rule 24(c) Motions to report. *Dupuis v. Roman Catholic Bishop of Portland*, No. BCD-CV-2022-00044 (Me. B.C.D. Apr. 6, 2023).

On April 18, 2023, this Court issued an Order Consolidating Appeals and Setting Course of Appeal, effectively granting Appellant's Motions to Report.

As of September 13, 2023, seventeen more cases have been filed in the Superior Court. All the filed cases, viewed together, illustrate: similar patterns of sex

abuse behaviors perpetrated by Diocesan employees against vulnerable children; evidence that the Diocese's premises, authority, uniforms, and programming were used by Diocesan employees to abuse children; horrific abuse perpetrated by abusing victims' trust in the Diocese, which had superior knowledge and power; and significant notice (both actual and constructive) to the Diocese about the problem of its clergy sexually abusing children prior to, during, and after the abuse. In many cases now before this Court, there is documentation that the Roman Catholic Bishop and other high-ranking officials of the Diocese received allegations of child sex abuse and elected to reassign the accused priest to a different parish—hoping to appease known victims that might sound the alarm—only to minister to a new group of vulnerable, unsuspecting families who had no indication of the significant risk of harm to their children.

More cases are expected to be filed before this Appeal is complete, all of which require discovery on wide-ranging issues of liability, compensatory damages, and punitive damages.

II. STATEMENT OF LEGAL ISSUES ON REPORT

Pursuant to M.R. App. P. 24(c) and the Superior Court's Order Granting Appellant's Motion to Report, there are only two discrete legal questions on Appeal:[1]

[1] The Diocese appears to be arguing fact-bound issues of tolling that are beyond the scope of this appeal. *See* Blue Br. 4, 40-48. Where these arguments travel outside the scope of the current Report, Appellees have omitted briefing these issues.

> 1.) Whether retroactive application of the removal of the statute of limitations after the plaintiff's claim had already been extinguished by the preexisting statute of limitations divested [Appellant] of vested rights and violates its substantive and procedural due process rights guaranteed by the Maine State Constitution, and
>
> 2.) Whether 14 M.R.S. § 752-C may be applied to institutional or organizational defendants.

Id. at 2.

III. SUMMARY OF ARGUMENT

Vested Rights

Maine law does not—and has never—recognized the expiration of a statute of limitations as creating vested rights entitled to constitutional protection. The development of Maine's vested rights doctrine—from *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275 (1823) through *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, 281 A.3d 618—has consistently recognized and protected the right of citizens to possess and protect ***property***, not ***process***.

For nearly a century, Maine law has categorically defined statutes of limitation as purely remedial in nature. They are procedural rules, not statutes conveying substantive rights. Maine's new "revival" law—14 M.R.S. § 752-C(3)—being a statute of limitation, is a "law of process." It is remedial in nature. Maine law does not recognize a vested right to the mechanics of legal process.

Civil liability for harming others is always present, and the right to recover civil damages for harms is guaranteed by the Maine and United States Constitutions for disputes over $20.00. Me. Const. art. I, § 20; U.S. Const. amend. VII. Under the 10th Amendment, states may regulate statutes of limitation. Statutes of limitation merely say when civil liabilities may be litigated. U.S. Const. amend. X.

The Maine and United States Constitutions enumerate broad legislative power to regulate civil liability. These civil liabilities are theoretically and practically never extinguished: they are all subject to short, long, or unlimited deadlines set by the legislature. Legislation will change those deadlines—depending on the exigencies of such claims as the Legislature deems appropriate when necessary to reflect the will of the people who elected the legislators.

Addressing the introduction of so-called "Blue Sky" securities legislation in the early 20th Century, the Supreme Court elegantly framed the scope of statutes of limitation:

> Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. ***He may, of course, have the protection of the policy while it exists***, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (emphasis added).

This legislative power is checked by the courts. It is the role of the Court to ensure that the substantive rights of parties are not unconstitutionally impaired. *NECEC Transmission LLC*, 2022 ME 48, ¶ 30, 281 A.3d 618 ("The effect of retroactive legislation upon existing proceedings and rights is ultimately for the courts, not the Legislature, to decide.")

It is true that Maine has always recognized as unconstitutional retroactive legislation that interferes with a vested right or creates entirely new personal liabilities on a defendant's long-past conduct. *Laboree*, 2 Me. at 294-95. However, this concept is totally distinct from legislation that affects only *procedural* rights, rather than *substantive* ones. Where no vested rights are impaired or new liabilities are created by legislation, the Legislature has acted within the limits of its constitutional authority.

For nearly two hundred years, Maine has defined statutes of limitation as remedial in nature. *See Thibodeau v. Levasseur*, 36 Me. 362, 363 (1853) (recognizing *lex fori* and not *lex loci contractus* as the limitation-bar to a contract claim because statutes of limitations affect remedy only). A statute of limitations that is intended to be retroactive affects only a litigant's potential remedies. *Thut v. Grant*, 281 A.2d 1, 6 (Me. 1971) (emphasis and quotation marks omitted). There is no title to property or property interest in a remedial process created and repealed by the Legislature. *E.g.*, *Warren v. Waterville Urban Renewal Authority*, 235 A.2d 295, 304 (Me. 1967)

(internal citations omitted) ("There is no such thing as a vested right to a particular remedy. The form of administering right and justice may be altered").

For well over a hundred years, perpetrators of child sex abuse and enabling institutions—like the Appellant—reaped the benefit of short statutes of limitation; they could avoid paying for the devastation they caused with their reputations intact. In 2021, the Maine Legislature sought to remedy this injustice by passing 14 M.R.S. § 752-C(3). While Appellant could rely on the statutory defense (remedy) while it existed, it cannot be said that it had a right—let alone one *vested*—in the mere expectation in a continuation of a limitations period for actions which, at the time of commission, were otherwise illegal. *Coffin v. Rich*, 45 Me. 507, 514-16 (1858).

Before 2021, the scope of child sex abuse in Maine and across the country and the reasons for delayed disclosure were not fully understood. Change came in 2021 as people began to understand the scope of the epidemic of child sex abuse and the fact that only a small percentage of children disclose abuse close in time to when it occurs, and Maine lawmakers passed a law to reflect an evolution in the will of the people regarding a child sex abuse survivor's access to justice in Maine. Appellant's only interest that changed with the passage of 14 M.R.S. § 752-C(3) was its expectation that it could escape civil liability for the scores of children molested by its clergy. This expectation is not, as Appellant contends, a vested property right. Under Maine law any such expectation can only be construed as a vested right where

a final judgment conveys absolute finality of the proceedings—meaning an injured party ***already pursued*** their remedies against Appellant. Without a final judgment, Appellant's interest is accurately defined as a *procedural* allowance and not incident to a final judgment conveying absolute finality. There has been no change to Appellant's substantive rights. Appellant has been on notice for well-over 150 years that the law of Maine could change a statute of limitation, and that such change is procedural. *Id.*

Constitutionality of Retroactive Legislation

Maine courts exercise authority to strike down remedial statutes if they violate substantive due process rights. Where a vested right is not affected, Maine courts will determine that legislation is constitutional if it satisfies the three-factor rational-basis test:

> I. The object of the exercise must provide for the public welfare.
> II. The legislative means employed must be appropriate to the achievement of the ends sought.
> III. The manner of exercising the power must not be unduly arbitrary or capricious.

See State v. L.V.I. Grp., 1997 ME 25, ¶ 9, 690 A.2d 960, 964.

As set forth *infra*, Maine's new "revival" law—14 M.R.S. § 752-C(3)—passes the rational basis test. Construction of the statute does not require a strict scrutiny analysis; assuming, *arguendo*, it did, 14 M.R.S. § 752-C(3) should also pass.

Application to Institutional Defendants

Under Maine law, legislative intent is determined by interpreting the plain language of a statute. If statutory language is unambiguous, it is applied within the plain language. When a statute is ambiguous, it is appropriate to examine legislative history and policy to determine intent.

The plain language of Maine's new "revival" law—14 M.R.S. § 752-C(3)—is clear and unambiguous. The plain language of this statute explicitly states an intention to revive expired claims "based upon" of child sex abuse. Because the language is unambiguous, no further construction is necessary. Even if, *arguendo*, it could be argued that this language is ambiguous, the legislative history underlying 14 M.R.S. § 752-C(3) confirms the Legislature's intent that the statute apply to individual perpetrators and institutional defendants who enabled and employed perpetrators.

Assuming, *arguendo*, that the language of 14 M.R.S. § 752-C(3) could be considered ambiguous, existing Maine case law has attempted to resolve this very application issue. Applying a 'harm-based' approach, the Superior Court (*Jabar, J.*) interpreted the phrase "based upon" as flowing from a particular type of harm, and not the nature of the party causing it. *Boyden v. Michaud*, No. CV-07-276, 2008 WL 4106441 (Me. Super. May 14, 2008) (internal citations omitted).

IV. **STANDARD OF REVIEW**

Reports pursuant to M.R. App. P. 24(c) are distinct from those permitted under M.R. App. P. 24(a). A Rule 24(a) Report "purports to address important or doubtful questions of law ***relating to agreed facts***." M.R. App. P. 24(a) (emphasis added). Conversely, a Report pursuant to Rule 24(c) arises ". . . when parties may not be in agreement on the report of the interlocutory ruling." M.R. App. P. 24(c). Legal questions therefore qualify for Report under Rule 24(c) only ". . . when facts are not in dispute." *Id; see NECEC Transmission LLC*, 2022 ME 48, ¶ 5, 281 A.3d 618 (limiting scope of Rule 24(c) Appeal to discrete legal issues on Report premised upon agreed facts). "If there are any material facts in dispute, the matter cannot be referred to the Law Court until the factual disputes have been resolved by a final judgment in a trial court." M.R. App. P. 24(c).

The applicable standard of review for a discrete question(s) of law on Report is *de novo*. *See NECEC Transmission LLC*, 2022 ME 48, ¶ 28 n. 12, 281 A.3d 618 Questions of law that are "fact-bound" and therefore requiring application of the abuse-of-discretion and clear-error standards are beyond the scope of a Rule 24(c) Report. *Id.*

V. **ARGUMENT**

A. **14 M.R.S. § 752-C (3) Is Remedial and Procedural and Therefore Constitutional.**

i. *There Is No Constitutionally Protected 'Vested Right' in the Expiration of a Statute of Limitations.*

a. Procedural and Remedial Nature of Statutes of Limitation

Maine law does not—and has never—recognized a vested right to/in a legal remedy. *Coffin*, 45 Me. at 514-15 ("There can be no doubt that Legislatures have the power to pass retrospective statutes, if they affect remedies only. Such is the well settled law of this State. But they have no constitutional power to enact retrospective laws which impair vested rights, or create personal liabilities"); *see also Thayer v. Seavey*, 2 Fairf. 284, 288 (1834); *Barton v. Conley*, 119 Me. 581, 584, 112 A. 670 (1921); *Miller v. Fallon*, 134 Me. 145, 183 A. 416 (1936); *Warren*, 235 A.2d at 304 ("There is no such thing as a vested right to a particular remedy. The form of administering right and justice may be altered").

Maine law defines statutes of limitation as remedial: "They are laws of process, and, where they do not extinguish the right itself, are deemed to operate on the remedy only." *Miller*, 134 Me. 145, 183 A. 416 at 417 (citing *Lamberton v. Grant*, 94 Me. 508, 518, 48 A. 127 (1901); *Lunt v. Stevens*, 24 Me. 534, 537 (1845); *Mason v. Walker*, 14 Me. 163, 166 (1837); *Laboree*, 2 Me. at 293).

"The Legislature has full power and authority to regulate and change the form of remedies in actions if no vested rights are impaired or personal liabilities created. There is no constitutional inhibition against the enactment of retroactive legislation which affects remedies only." *Thut*, 281 A.2d at 6.

Whether or not a remedial law acts to extinguish a cognizable right is determined by due process, including a final judgment:

> But if the right itself was created by statute, and existed only by virtue of its provisions, then the repeal of the statute defeats the right itself, unless already vested by a judgment.

Coffin, 45 Me. at 512 (citing *Butler v. Palmer*, 1 Hill. 324 (1841)).

"The requirements of 'due process of law' are satisfied when a remedial proceeding is available which provides for notice, opportunity for hearing and requires a judgment of some judicial or other authorized tribunal." *Warren*, 235 A.2d at 304 (*citing McInnes v. McKay*, 127 Me. 110, 141 A. 699 (1928); *Inhabitants of York Harbor Village Corp. v. Libby*, 126 Me. 537, 140 A. 382 (1928); *Randall v. Patch*, 118 Me. 303, 108 A. 97 (1919); *Bennett v. Davis*, 90 Me. 102, 37 A. 864 (1897).

In the instant Appeal, Appellant did not obtain a final judgment in matters relating to any of the Plaintiff-Appellees prior to the expiration of any applicable statute of limitations. Therefore, Appellant has no vested right for this Court to defend.

b. Maine's Vested Rights Jurisprudence

In the more than two centuries, this Court has never recognized a vested property right in the expiration of a statute of limitations. Appellant now asks this Court to roll back centuries of precedent to expand Appellant's rights despite a clear expression of the will of Maine's citizens to the contrary. The *nature* of a claimed entitlement matters greatly in assessing whether a property interest is a vested right.

This Court's recent decision in *NECEC Transmission LLC* is instructive on the nature and origins of Maine's vested rights doctrine. In that decision, this Court traced the legal history of vested rights in Maine, demonstrating that protection of a citizen's vested rights is rooted in due process guaranteed by the Maine Constitution and functions as a constitutional limitation on legislative authority. *See NECEC Transmission LLC*, 2022 ME 48, ¶¶ 33, 38, 281 A.3d 618, (citing David M. Gold, *The Tradition of Substantive Judicial Review: A Case Study of Continuity in Constitutional Jurisprudence*, 52 Me. L. Rev. 355, 364-70 (2000)).

Integral in defining vested rights, the *NECEC* Court reasoned that the Maine Constitution safeguards ". . . a person's inherent right to possess and protect property 'according to the standing laws of the State in force at the time of his acquiring it, and during the time of his continuing to possess it.'" *Id.* ¶ 41 (*citing Laboree*, 2 Me. at 275, 290).

As the Court stated plainly, "The essence of that right is due process." *Id.*

Where a vested rights challenge is raised incident to retroactive application of a statute, the *NECEC* Court has instructed that ". . . the focus of a vested rights analysis must be upon the specific entitlement that is affected by the retroactively applied legislation." *Id.* ¶ 45.

The *NECEC* opinion traces the evolution of Maine's vested rights doctrine. The Law Court ". . . first considered the legal significance of vested rights just three years after the Maine Constitution took effect, in *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 288-93 (1823)." *Id.* ¶ 38. The *NECEC* Court explained that, in *Laboree*, a statute retroactively changing the doctrine of disseisin such that it dispossessed a landowner of his ***lawfully-deeded*** estate was challenged as violating vested rights. *Id* (emphasis added). The *Laboree* Court grounded its decision in what it characterized as ". . . the spirit and true intent and meaning . . ." of Art. I, Sec. I of the Maine Constitution—that which safeguards the possession and continuing protection of one's property. *Id* (*citing Laboree*, 2 Me. at 290). In this instance, the *Laboree* Court's ability to find a constitutionally-protected vested right was characterized by the due process inherent in the acquisition of lawfully-deeded real property. As *Laboree* made clear, it is only through a final judgment:

> [Real property] cannot by a *mere act of the legislature* be taken from *one man,* and vested in *another directly;* nor can it, by the *retrospective operation* of laws be indirectly transferred from one to another; or subjected to the government of principles in a Court of Justice, which must necessarily produce that effect.

Laboree, 2 Me. at 291.

More than sixty years later, in 1858, the Law Court held in *Coffin* that retroactive legislation creating entirely new liabilities on behalf of individuals not subject to a previously entered final judgment violated the vested rights of a party and was therefore unconstitutional. *Coffin*, 45 Me. 507. At issue in *Coffin* was a statute that, upon retroactive application, permitted a third-party creditor to collect corporate debt obligations rendered by a final judgment as against individual shareholders. *Id.* at 507-09.

In addition to finding the law unconstitutional for creating new liabilities, the *Coffin* Court recognized that a final judgment was "property" within the meaning of vested rights. *Id.* at 512 (quoting *Butler*, 1 Hill. 324*;* "But if the right itself was created by statute, and existed only by virtue of its provisions, then the repeal of the statute defeats the right itself, unless already vested by a judgment")).

This Court has applied Maine's vested rights doctrine on numerous occasions to prevent unconstitutional divestiture of vested rights: in real property,[2] conveyed by a final judgment,[3] to be free from *ab initio* illegal taxation,[4] filiation rights

[2] *See Laboree*, 2 Me. 275; *Beal v. Nason*, 14 Me. 344 (1837); *Adams v. Palmer*, 51 Me. 480 (1863); *Union Parish Society v. Inhabitants of Upton*, 74 Me. 5435 (1883); *Sabasteanski v. Pagurko*, 232 A.2d 524 (Me. 1967).
[3] *See Lewis v. Webb*, 3 Greenl. 326 (1825); *Inhabitants of Durham v. Inhabitants of Lewiston*, 4 Greenl. 140 (1826); *Coffin*, 45 Me. 507; *Atkinson v. Dunlap*, 50 Me. 111 (1862).
[4] *See Inhabitants of Otisfield v. Scribner*, 129 Me. 311, 151 A. 670 (1930).

accrued *upon birth* under bastardy legislation subsequently repealed,[5] and to engage in substantial construction based upon good-faith reliance on authority to transact.[6]

This Court has also applied Maine's vested rights doctrine in scores of cases in which *no such right* was found to exist in: a particular remedy,[7] particular procedure,[8] legislative conveyance of chancery powers not disturbing a final judgment,[9] right to recover debt obligations committed in execution,[10] certain bond obligations,[11] statutory appointment of agents,[12] pauper settlements,[13] a right to enforce a repealed statutory lien prior to final judgment,[14] right to sue following appointment of receivers whilst retaining all other remedies,[15] inchoate right of dower/curtsey subsequently repealed by statute,[16] right to enforce a lien created and

[5] *See Thut*, 281 A.2d 1.
[6] *See NECEC Transmission LLC*, 2022 ME 48, 281 A.3d 618.
[7] *See Oriental Bank v. Freese*, 18 Me. 109 (1841); *Read v. Frankfort Bank*, 23 Me. 318 (1843); *Colby v. Dennis*, 36 Me. 9 (1853); *Lord v. Chadbourne*, 42 Me. 429 (1856); *Grosvenor v. Chesley*, 48 Me. 369 (1859); *Barton*, 119 Me. 581, 112 A. 670; *McInnes*, 127 Me. 110, 141 A. 699; *Miller*, 134 Me. 145, 183 A. 416; *Warren*, 235 A.2d 295; *Dishon v. Oliver*, 402 A.2d 1292 (Me. 1979).
[8] *See Hawke v. Hawke*, 395 A.2d 449 (Me. 1978).
[9] *See Potter v. Sturdivant*, 4 Greenl. 154 (1826).
[10] *See Thayer*, 2 Fairf. 284.
[11] *See Morse v. Rice*, 21 Me. 53 (1842).
[12] *See Dudley v. Greene*, 35 Me. 14 (1852).
[13] *See Inhabitants of Brunswick v. Inhabitants of Litchfield*, 2 Greenl. 28 (1822); *Inhabitants of Appleton v. City of Belfast*, 67 Me. 579 (1878); *Inhabitants of City of Hallowell v. Inhabitants of City of Portland*, 139 Me. 35, 26 A.2d 652 (1942).
[14] *See City of Bangor v. Goding*, 35 Me. 73 (1852).
[15] *See Leathers v. Shipbuilders' Bank*, 40 Me. 386 (1855).
[16] *See Barbour v. Barbour*, 46 Me. 9 (1858).

revoked by statute,[17] legislatively granted office and salary,[18] legal defense,[19] statutes of repose,[20] legislative grant of license to set lobster traps,[21] purchase authority prior to final sale,[22] parole,[23] statutory age of majority,[24] application of marital statute prior to final divorce judgment,[25] and liability prescribed by statute.[26]

c. Appellant's Argument Misapplies the *NECEC* Decision

Appellant's argument misapplies this Court's recent holding in *NECEC Transmission LLC*. Appellant stretches the *NECEC* Court's narrow holding on vested rights well beyond those recognized under Maine law in attempt to create a new vested right to invalidate remedial legislation. However, no such right exists under Maine law.

In *NECEC*, this Court noted that it has applied the vested rights doctrine to those statutes that affect vested rights or create new liabilities, as opposed to merely affecting remedies for existing liabilities:

> Since *Laboree*, we have continued to frame vested rights in constitutional terms, albeit broadly and often without reference to any specific provision of the Maine Constitution. In *Coffin v. Rich*, 45 Me. 507, 514-16 (1858),

[17] *See Frost v. Ilsley*, 54 Me. 345 (1867).
[18] *See Prince v. Skillin*, 71 Me. 361 (1880); *Hammond v. Temporary Compensation Review Bd.*, 473 A.2d 1267 (Me. 1984).
[19] *See Berry v. Clary*, 77 Me. 482, 1 A. 360 (1885).
[20] *See Soper v. Lawrence Bros. Co.*, 98 Me. 268, 56 A. 908 (1903).
[21] *See State v. Cole*, 122 Me. 450, 120 A. 538 (1923).
[22] *See Guilford & Sangerville Water Dist. v. Sangerville Water Supply Co.*, 130 Me. 217, 154 A. 567 (1931).
[23] *See Still v. State*, 256 A.2d 670 (Me. 1969).
[24] *See Baril v. Baril*, 354 A.2d 392 (Me. 1976).
[25] *See Fournier v. Fournier*, 376 A.2d 100 (Me. 1977).
[26] *See Tompkins v. Wade & Searway Const. Corp.*, 612 A.2d 874 (Me. 1992).

> we relied on *Laboree* to hold that a statute making individual stockholders personally liable for corporate debts was unconstitutional as applied retroactively because it created a new liability where none had previously existed.
> We explained:
>
> > ***There can be no doubt that Legislatures have the power to pass retrospective statutes, if they affect remedies only.*** Such is the well settled law of this State. But they have no constitutional power to enact retrospective laws which impair vested rights, or create personal liabilities.
>
> *Id.* at 514-15; see *Thut v. Grant*, 281 A.2d 1, 6 (Me. 1971) ("[T]he Legislature has full power and authority to regulate and change the form of remedies in actions if no vested rights are impaired or personal liabilities created. There is no constitutional inhibition against the enactment of retroactive legislation which affects remedies only,") (*emphasis and quotation marks omitted*).
>
> We relied on *Coffin* in *Sabasteanski v. Pagurko*, 232 A.2d 524, 525-26 (Me. 1967), where we held that a statute validating deeds with certain administrative defects was unconstitutional as applied retroactively because it effectively ousted subsequent innocent purchasers of their right to property.

NECEC Transmission LLC, 2022 ME 48, ¶ 39, 281 A.3d 618 (*emphasis added*).

NECEC addresses vested rights in an area of the law that is completely different from the instant matter and is inapplicable because it involved a discrete, certified question to the Law Court—one that is entirely distinct from the one now before this Court on the instant appeal:

> Would retroactively applying sections 4 and 5 of the Initiative to the CPCN issued for the Project, as required by section 6 of the Initiative, violate the due process clause of the Maine Constitution, if NECEC undertook substantial construction consistent with and in good-faith reliance on the CPCN before the Initiative was enacted?

Id. ¶ 4.

Answering in the affirmative, the Law Court held:

> If the Legislature intends a retroactive application, the statute must be so applied unless the Legislature is prohibited from regulating conduct in the intended manner, ***and such a limitation upon the Legislature's power can only arise from the United States Constitution or the Maine Constitution.***

Id. ¶ 36 (emphasis in original; internal citations omitted).

The *NECEC* Court discussed the origin and contours of the vested rights doctrine in terms that make it clear that it applies only to property rights versus civil liability for intentional, reckless or negligent conduct:

> By the spirit and true intent and meaning of this section, every citizen has the right of "possessing and protecting property" according to the standing laws of the state in force at the time of his "acquiring" it, and during the time of his continuing to possess it. Unless this be the true construction, the section seems to secure no other right to the citizen than that of being governed and protected in his person and property by the laws of the land, for the time being. . . . The design of the framers of our constitution, it would seem, was . . . to guard against the retroactive effect of legislation upon the property of the citizens.

Id. ¶ 38 (quoting *Laboree*, 2 Me. At 288, 290).

The NECEC opinion discusses how the vested rights doctrine applies to permits authorizing construction on land, stating that "[i]n Maine and other states, the right to proceed with construction in the municipal context vests once a developer undertakes significant, visible construction in good faith and with the intent to carry construction through to completion as authorized by a validly issued building permit." *Id.* ¶ 46. The NECEC holding is narrow:

> Thus, ***in the context of large-scale infrastructure development***, we conclude that a claim of unconstitutional impairment of vested rights arises under the following conditions. First, the claimant holds a validly issued and final permit, license, or other grant of authority from a governmental entity that is not subject to any further judicial review. Second, the law under which the permit, license, or other grant of authority was issued changed thereafter and would, if applied retroactively, eliminate or substantially limit the right to proceed with ***the activity authorized by the permit. Third, the claimant undertook substantial good-faith expenditures on the activity within the scope of the affected permit prior to the enactment of the retroactive legislation, meaning that the expenditure was made (1) in reliance on the affected permit or grant of authority, (2) before the law changed, and (3) according to a schedule that was not created or expedited for the purpose of generating a vested rights claim.***

Id. ¶ 47 (footnote omitted; emphasis added).

The *NECEC* Court's holding as to vested rights is not analogous to the instant matter because the narrow holding is limited to "large-scale infrastructure development," and a specific stage of governmental permitting. This distinction is obvious: *NECEC* involved the loss of non-speculative economic opportunity

following substantial investments in real property and a utilities infrastructure construction project whereas, in the instant cases, Appellant seeks to rely on its expectation not to be sued for damages that it caused to countless innocent children at the hands of its agents and employees, who, collectively and individually, it knew posed an unreasonable danger. There are no factual similarities between *NECEC* and this matter such that the Court should expand the *NECEC* holding.

NECEC is further distinguished because: (1) there is no property right implicated in the legal questions now before this Court; (2) the retroactive elimination of expired statutes of limitation affects only the remedies, and does not create any new liabilities; and (3) there is no reliance interest that the Court is required to protect. More specifically, there is no "reliance" arising out of the sex abuse of a child (or failure to prevent it when the defendant knew or should have known the risk)—and the expiration of a statute of limitations related thereto—that can be elevated to a constitutional property right. For the Court to adopt the Appellant's argument, the Court would have to recognize a new property right in a remedy—a departure from well-settled Maine law.

d. *Dobson* & *Morrissette* Are Distinguishable.

Appellant further cites to a cohort of cases to support its argument that Maine recognizes a vested right in the immunity from suit that results from a lapsed statute

of limitations and that amendments thereto may not revive expired claims. Each of Appellant's cited cases is distinguishable from the instant matter.

Appellant's use of the term "immunity from suit" is a misnomer. Being time-barred is not the same as being "immune from suit" even though the practical effect may be the same. A time-bar is not "immunity" and even if it was, there is no such thing as a property interest in "immunity from suit." Appellant's argument relies on a new, unsupported assertion that immunity is a "thing of value" to which property rights attach. At best, Appellant is conflating freedom from liability and debt with property rights. Today, Appellees' suits are mere unliquidated claims that could be won or lost. Expectations regarding financial exposure, liability, or the outcome of a lawsuit is not a "thing of value" or property that the Constitution protects. Appellant's hope and expectation to be free from a final judgment in a nascent lawsuit is not property.

Conversely, there is no "new liability" when an expired claim is revived by the Legislature extending or removing a statute of limitation.

Dobson v. Quinn Freight Lines, Inc., 415 A.2d 814 (Me. 1980) is distinct because (1) it involved a *statute of repose* (not limitation) and (2) because there was no clear and unambiguous legislative intent to impose the statute retroactively. Unlike *Dobson*, the instant matter implicates ample evidence demonstrating the Legislature's intent to remove ***all time barriers*** for survivors of childhood sex abuse

in enacting 14 M.R.S. §752-C (3), and there is clear legislative intent for 14 M.R.S. §752-C (3) to apply retroactively. *Dobson* is distinguishable because the Court found no legislative intent to apply the new limitations period retroactively, unlike the Legislature's clear language in 14 M.R.S. §752-C (3). *See infra*.

The law at issue in *Dobson* was, by function of its plain language, a statute ***of repose***[27]—not of limitation. *Dobson*, 415 A.2d at 815. The law in *Dobson* provided for the filing of claims within two years of the date of a work incident but tolled that same period in instances of physical or mental incapacity, or for mistake of fact as to causation. *Id.* However, the key provision considered by the *Dobson* Court was the last sentence of the statute: "No petition of any kind may be filed more than 10

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[27] "A statute of repose is a statute barring any suit that is brought after a specified time since the defendant acted . . . ." *Baker v. Farrand*, 2011 ME 91, ¶ 16 n.4, 26 A.3d 806 (quotation marks omitted). It "effect[s] a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S.Ct. 2042, 2049 (2017) (quotation marks omitted).

> . . . [A] statute of repose is confirmed by the language of the statute, which 'reflects the legislative objective to give a defendant a complete defense to any suit after a certain period.' *Id.*; *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 8, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014); *Nat'l Auto Serv. Ctrs. v. F/R 550, LLC*, 192 So.3d 498, 510 (Fla. Dist. Ct. App. 2016). In particular, the term "extinguished" used in section 3580 sets an outer limit on the right to bring an action, rather than merely barring the remedy. *See Nat'l Auto Serv. Ctrs.*, 192 So.3d at 510.

State v. Tucci, 2019 ME 51, ¶¶ 12-13, 206 A.3d 891, 895–96.

years following an accident." *Id.* This, of course, is clearly intended to be a statute of repose—an affirmative extinguishment of statutory benefit claims at a specific time regardless of the timing of the claim's accrual or any applicable tolling remedies.

There has never been such a statute of repose for claims arising out of childhood sexual abuse in Maine. Therefore, at the time Appellees were each abused as children decades ago, there was no law in Maine providing for the extinguishment of claims based on a certain number of years having passed since the abuse. There was never an expressed or implied finality to time limits applying to liability for child sex abuse.

Morrissette v. Kimberly-Clark Corp., 2003 ME 138, 837 A.2d 123 and each of the other workers' compensation cases (including *Dobson*) are likewise inapplicable here. The statutory schema for Workers' Compensation matters implicates substantive and procedural issues in which disputes are resolved in a purely administrative tribunal system. Put most simply, the Maine Workers' Compensation Act (*hereinafter* "WCA"), through its many revisions, is just that: a distinct, *statutory* no-fault injured workers' benefits administrative system. With every statutory change, the WCA essentially creates a new contract with Maine employers and workers' compensation insurers. Changes to the WCA alter those "contracts." Changes in the workers' compensation system are distinct from the civil

justice system for traditional tort law claims, which are protected by the 7th Amendment to the U.S. Constitution, and Art. I, Sec. 20 of the Maine Constitution—which guarantees private parties the right to trial by jury. The Maine WCA—the statutory framework on which the *Dobson* Court's (and the other cited decisions) analysis is premised—is removed from the common law, and therefore, *inter alia*, inapposite.

Dobson and its cohort cases like *Morrissette* are further distinguished from the instant matter by the legislative history and intent of each amendment respectively at issue. In *Dobson*, neither the plain language of the WCA nor the legislative history of the amendment thereto suggested the Legislature's intent for retroactive application. *See Dobson*, 415 A.2d at 816-17 ("In the present case, ***there being no evidence of a contrary legislative intent***, we hold that amended version of section 95 applies to Dobson's claim") (emphasis added).

e. Federal & State Precedent Support Constitutionality

This Court may consider precedent from federal and other state jurisdictions as persuasive authority to support its findings.

For nearly a century, federal jurisprudence has recognized that the federal constitution guarantees no vested right in the expiration of a statute of limitations; legislatures may revive previously barred claims. *Chase Sec. Corp.*, 325 U.S. 304. In *Chase*, the Supreme Court rejected an attempt to overrule this precedent, stating

"where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, ***may repeal*** or extend a statute of limitations, even after right of action is barred thereby, ***restore to the plaintiff his remedy, and divest the defendant of the statutory bar.***" *Id.* at 312 (internal citations omitted; emphasis added). The Court further stated of statutes of limitation:

> They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. ***They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual.*** He may, of course, have the protection of the policy while it exists, but ***the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.***

Id. at 314 (footnote omitted; emphasis added).

The Court concluded: "Whatever grievance appellant may have at the change of policy to its disadvantage, it had ***acquired no immunity*** . . . that has become a federal constitutional right." *Id.* at 316 (emphasis added).

Consistent with established Supreme Court precedent, Maine federal jurisprudence has long recognized that "no one has a vested right to rely upon the statute of limitation to defeat a debt or other personal obligation. ***The Legislature***

***which gives the right may take it away, even after the bar has become complete.*"** *Rockland & Rockport Lime Corp*, v. *Ham*, 38 F.2d 239, 241 (D. Me. 1930) (citing *Campbell v. Holt*, 15 U.S. 621 (1885) (emphasis added)).

Maine law is consistent with *Chase Sec. Corp.* and the unambiguous language of the U.S. Supreme Court about the nature of statutes of limitation should guide this Court: *Their shelter has never been regarded as . . . what used to be called a 'natural' right of the individual. [The Diocese] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.*

Appellant's legal arguments, if adopted, would effectively roll back nearly a century of well-settled precedent in which the Supreme Court has expressly denounced a vested property right in the expiration of a statute of limitations. Appellant's Brief features historico-legal philosophy in the absence of supportive primary authority. Ironically enough, James Madison—perhaps the staunchest and most prolific federalist in American political history, and the source to whom Appellant wishes to attribute authority on the nature of property—advocated on behalf of the centralized federal authority. Should this Court adopt Madisonian property theory as a basis for defining vested rights, Appellees urge that it also consider the importance of federal jurisprudence informing the instant matter, which

favors the Appellees.

The passage of other states' CSA time-limitations reform laws have accelerated in recent years and should be considered here. These recent enactments can be fairly categorized as either an extension, a "window opening" for a specified period, or an "open window" with no end date.

Earlier this year, the Supreme Court of Vermont ruled that a child sex abuse "open window" statute of limitations removal law did not abrogate the due process clause of the Vermont Constitution. *A.B. v. S.U. et al*, 2023 VT 32, 298 A.3d 573. Vermont's statute is in the same category as Maine, and considered virtually identical.

The facts underlying Vermont's *A.B.* decision are nearly identical to the instant Appeal. In 1990, Vermont extended a three-year statute of limitations to six-years for claims based on childhood sex abuse. *Id.* ¶ 2. In 2019, the Vermont Legislature eliminated the limitations period. *Id.* ¶ 3. The 2019 enactment contained a retroactivity provision reviving previously expired claims based upon child sex abuse:

> . . . [T]his section shall apply retroactively to childhood sexual abuse that occurred prior to the effective date of this act, irrespective of any statute of limitations in effect at the time the abuse occurred.

Id (internal citation omitted).

In 2020, A.B. filed suit against a perpetrator's employer, alleging injuries arising out of child sex abuse that occurred in 1983. *Id* ¶ 4. Prior to the 2019 enactment, plaintiff's claims had already expired under the applicable statute of limitations. *Id.* In lieu of an answer, defendants filed dispositive motions under Vermont Rule of Civil Procedure 12(b)(6). *Id* ¶ 5. Defendants argued that the 2019 enactment violated the Due Process Clause of the Vermont Constitution by violating an alleged property interest in an expired limitations period. *Id.* ¶¶ 4, 6.

The Court acknowledged that state constitutions "may provide greater protection than analogous provisions in the U.S. Constitution," and distinguished Vermont law as controlling authority. *Id.* ¶¶ 10, 12. Finding federal constitutional analyses to be merely "logical, persuasive and consistent" with Vermont's interpretation of its constitution, the Court nevertheless held that defendants did not have a property interest protected by the State Constitution. *Id* ¶ 15.

The Court reasoned that its jurisprudence had "described limitations periods in statutes as creating a remedy and not a substantive right." *Id* ¶ 16 (internal citations omitted). Specifically, the Court opined:

> Because a limitations statute is a legislated bar to a remedy and does not create a right to be free of suit, the expired limitations period does not endow a tortfeasor with a "vested right" subject to the protections of Article 4 of the Vermont Constitution. The Legislature created the time limit on the remedy in the first place and can remove that limit without violating Article 4.

Id.

The Vermont Court distinguished its holding from cases in which a statute was ***not*** one of general application, but instead divested a litigant in a ***particular action*** of a right to an ***existing judgment***, which would be unconstitutional. *Id* ¶ 18. The Vermont Supreme Court's dicta on that point is consistent with this Court's recent holding and dicta in *NECEC*.

Absent proof to the contrary, Maine courts presume that the common law of another State is the same as that of Maine. *Stout v. Burgess*, 144 Me. 263, 278, 68 A.2d 241, 251 (1949). Judicial notice of another State's statutory scheme is independent of this common law presumption. *Id.*

Appellant summarily dismisses the overwhelming number of states and federal courts interpreting survivor-conscious legislation similar to 14 M.R.S. §752-C(3) in favor of abuse survivors. Appellant's self-serving dismissal should be rejected. Since 2002, a majority of states and territories have enacted and/or amended legislation that allow survivors to bring claims. These statutes generally fall into two categories: opening a window for expired civil claims, like Maine (27 states and territories) and extending and/or lifting statutes of limitation for civil claims (17 states and territories). (A. 102-03).

More recently, since 2021, nine states and territories have either eliminated statutes of limitation for civil child sex abuse claims (five states and territories), extended statutes of limitation for civil child sex abuse claims (five states and

territories), and/or opened a window reviving expired civil child sex abuse claims (seven states and territories). *Id.* at 103.

To strike down 14 M.R.S. § 752-C(3) would be to leave Maine as an island in a sea of states that have elected to expand child sex abuse survivors' access to justice for worthy public policy reasons.

Instead, Maine's survivor-conscious law is heralded as a national model for legislative best practices. As of June 2022, Maine, Guam, the Northern Mariana Islands, and Vermont were assessed an "A+" or "Best" ranking regarding their laws for reviving civil statutes of limitation by Child USA and the Sean P. McIlmail Statute of Limitations Research Institute. CHILD USA, THE SEAN P. MCILMAIL STATUTE OF LIMITATIONS RESEARCH INSTITUTE, HISTORY OF CHILD SEX ABUSE STATUTES OF LIMITATION REFORM IN THE UNITED STATES: 2002 TO 2021, 163 (JUNE 21, 2022).

ii. *14 M.R.S. § 752-C(3) Is Subject to—and Satisfies—the Rational Basis Test for Constitutionality.*

Whether a statute's retroactive application unconstitutionally impairs vested rights is a distinct question from whether retroactive legislation is unconstitutional.

Retroactivity and vested rights are, of course, distinct legal concepts.[28,29] This distinction is significant because it is not the retroactive nature of a statute that *de facto* renders it unconstitutional or determines the existence of a vested right.[30] Finding a vested right and testing the constitutionality of retroactive legislation are distinct analyses. Therefore, when a fundamental right—such as vested rights—are not at issue, Maine courts apply a rational basis review to test the constitutionality of a statute.

a. Constitutionality of Retroactive Legislation

In testing the constitutionality of retroactive legislation, Maine law first differentiates between retroactive legislation affecting damages remedies versus substantive rights. In regards to the former, Maine follows the rules articulated by the United States Supreme Court holding that "[t]he rule in the courts of the United

[28] *Black's Law Dictionary* defines "retroactivity" as "[t]he quality, state, or condition of having relation or reference to, or effect in, a prior time; specif., (of a statute, regulation, ruling, etc.) the quality of becoming effective at some time before the enactment, promulgation, imposition, or the like, and of having application to acts that occurred earlier." RETROACTIVITY, Black's Law Dictionary (11th ed. 2019).

[29] *Black's Law Dictionary* defines the "vested-rights doctrine" as "[t]he rule that the legislature cannot take away a right that has been vested by a social compact or by a court's judgment; esp., the principle that it is beyond the province of Congress to reopen a final judgment issued by an Article III court." VESTED-RIGHTS DOCTRINE, Black's Law Dictionary (11th ed. 2019).

[30] "There can be no doubt that Legislatures have the power to pass retrospective statutes, if they affect remedies only. Such is the well settled law of this State. But they have no constitutional power to enact retrospective laws which impair vested rights, or create personal liabilities." *NECEC Transmission LLC*, 2022 ME 48, ¶ 39, 281 A.3d 618 (quoting *Coffin*, 45 Me. at 514-15).

States, in respect to pleas of the statute of limitations, has always been that they strictly affect the remedy, and not the merits." *Dalton v. McLean*, 137 Me. 4, 14 A.2d 13, 15 (1940) ("a retroactive provision is valid only when it relates to a remedy and not to a substantive right,"; citing *Miller*, 134 Me. 147, 183 A. 416; *Coffin*, 45 Me. 507); *see Campbell*, 115 U.S. at 626 (1885).

Specifically regarding statutes of limitation, the Supreme Court has reflected:

> Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through the mere lapse of time is *per se* an offense against the Fourteenth Amendment.

Chase Sec. Corp., 325 U.S. at 315-16.

Applying these precedents, this Court has previously concluded that "[a]n individual does not have a vested right in a particular procedure . . . and a statutory enactment affecting procedure rather than substance will govern previously accrued causes of action that have not yet been filed." *E.g., Heber v. Lucerne-in-Maine Vill. Corp.*, 2000 ME 137, ¶ 10, 755 A.2d 1064, 1067.

The conclusion to be drawn, then, is that where a statute is *procedural* in nature, it may be retroactively applied without further analysis. Where, however, a statute of limitations affects *substantive* rights, as is alleged in the instant case, further analysis is required.

Under Maine law, ". . . all statutes will be considered to have a prospective operation only, ***unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used***." *Miller*, 134 Me. 145, 183 A. at 417 (emphasis added). In instances where the legislative history or some other indicia of intent make clear that legislation is clearly intended to apply retroactively, Maine courts must next address whether the retroactive law violates a specific provision of the Maine or federal constitutions. *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1061 (Me. 1986) ("If the Legislature intends for a statute to apply retroactively . . . the statute will be so applied unless a specific provision of the state or federal constitution is demonstrated to prohibit such action by the Legislature").

In order to determine whether retroactive legislation runs afoul of the State or federal constitutions, the Law Court has directed Maine to apply a rational basis test, as follows:

> I. The object of the exercise must provide for the public welfare.
> II. The legislative means employed must be appropriate to the achievement of the ends sought.
> III. The manner of exercising the power must not be unduly arbitrary or capricious.

See L.V.I. Grp., 1997 ME 25, ¶ 9, 690 A.2d 960.

This rational basis test has been regularly applied to test the constitutionality of retroactive legislation both in Maine and nationally. *See Norton*, 511 A.2d 1056 (retroactive asbestos legislation valid under Maine Constitution); *Tompkins*, 612

A.2d 874 (Me. 1992) (retroactive economic legislation valid under Maine Constitution); *L.V.I. Grp.*, 1997 ME 25, 690 A.2d 960 (retroactive legislation defining corporations as "employers" for severance pay liabilities upheld as valid under the Maine Constitution); and *Chase Sec. Corp.*, 325 U.S. 304 (retroactive blue sky legislation valid under federal constitution).

Applied to 14 M.R.S. §752-C(3), it is clear that the law is procedural/remedial in nature. Even assuming, *arguendo*, that this statute could be said to affect substantive rights, it nevertheless passes the rational basis test because legislative intent for retroactive application is clear, as further discussed *infra*. Here, *L.V.I. Grp.* is instructive: (I) the object of 14 M.R.S. §752-C(3) *does* consider and provide for the public welfare and the public's interest in prosecuting claims arising out of child sex abuse; (II) the legislative means employed—namely reviving previously time-barred claims of living survivors—is an appropriate legal mechanism for achieving the ends sought; and (III) the manner for exercising the power to legislate—via legislation—is neither arbitrary nor capricious.

Civil statutes of limitation represent a legislative balancing of adverse interests: the interest of injured persons in obtaining compensation for their injuries and the interest of defendants in not having to defend cases after the passage of a specified period. Ideally, the nature of the injury, the identity of the plaintiff, and gravity of the harm must factor into the determination of the length of a statute of

limitation governing a particular type of claim. Here—just like in other similar limitations reform legislation, such as asbestos claims and "Blue Sky" laws—where the harm or extent of the harm may not be known for decades, the ability of the injured person to recognize, understand, and take action to seek compensation for the harm must be taken into account when determining a reasonable time period to seek justice.

As ideas of the proper balancing of the opposing interests of children and their abusers evolved, the Maine Legislature repeatedly lengthened the statute of limitations for bringing suit against those responsible for the sex abuse of children, and eventually abolished it altogether. In so doing, the Legislature codified the will of Maine's citizens that the balance should be struck based on the social science and data about delayed disclosures of child sexual assault and the lifelong impacts of the harm to both the survivors and the general public. Ultimately, after much consideration of all viewpoints—including Appellant's—the Legislature determined the appropriate statute of limitations was one without a specific age or year limit. Finally, with 14 M.R.S. §752-C (3), the Legislature has recognized that the injustice of barring claims under previous arbitrary periods of limitation should be remedied and revived even those previously barred claims, giving all victims of childhood sexual abuse the right to a remedy against abusers and their enablers. As with all

statutes of limitation, it is distinctly within the province of the Legislature to strike this balance subject only to whatever limitations may exist on the legislative power.

As stated by an experienced, accomplished constitutional law professor, author, and expert on the topic:

> In sum, there are as many reasons for carving out exceptions to limitations periods as there are for enforcing them. The courts have the power to exercise discretion and flexibility in enforcing limitations periods, ***and the legislature has the power to eradicate them altogether. The shelter of statutes of limitations is not guaranteed and has come into law by legislative grace, not as a natural right.***

Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 Geo. Wash. L. Rev. 68, 92 (2005) (emphasis added).

In child sex abuse cases, the Legislature has successively lengthened the time allowed for pursing a remedy as the understanding of the nature, prevalence, seriousness, and long-lasting effects of child sex abuse has evolved. Among the considerations which inform legislators' evolving understanding about the nature of child sex abuse is that abusers commit their offenses against vulnerable children whose ability to perceive and meaningfully react to the abuse is limited by their immaturity, lack of power, fear, shame, concealment and, many times, threats from abusers and their enablers. Meanwhile, abusers fully understand and exploit their child victims' vulnerabilities:

> Unfortunately, however, CSA survivors are hostage to their own thought processes, implanted by their abusers, and from which they may never be totally released. Indeed, the mental and emotional dysfunction suffered by such victims may virtually prevent them from seeking relief against their tormentors until the period of limitations has long since expired. ***To place the passage of time in a position of priority and importance over the plight of CSA victims would seem to be the ultimate exaltation of form over substance, convenience over principle.***

Petersen v. Bruen, 792 P.2d 18, 24 (Nev. 1990) (emphasis added).

In 2015, Connecticut held that a similar amendment to its statute of limitations governing childhood sex abuse that revived previously barred claims was constitutional:

> Although statutes of limitation generally operate to prevent the unexpected enforcement of stale claims . . . one object of § 52–577d is to afford a plaintiff sufficient time to recall and come to terms with traumatic childhood events before he or she must take action . . . . ***The defendant's assertion that he is now unexpectedly exposed to liability was an express purpose of the statute. We see no injustice in retroactively applying § 52–577d as amended so as to effect that purpose.***

Doe v. Hartford Roman Catholic Diocesan Corp., 119 A.3d 462, 515 (Conn. 2015) (*quoting Roberts v. Caton*, 619 A.2d 844, 849 (Conn. 1993)). Further, "Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage, or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years

later . . . ." *Id*. (*quoting* M. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 Brook. L. Rev. 397, 404-405 (2014)).

The Supreme Court, the Law Court, and Maine's federal district court have all held that retroactive application of a statute is constitutional where it creates no new liabilities. *See Terry v. Anderson*, 95 U.S. 628, 633 (1877) ("If the legislature may prescribe a limitation where none existed before, ***it may change one what has already been established***."); *Rockland & Rockport Lime Corp*, 38 F.2d at 241 (D. Me. 1930) (citing *Campbell*, 115 U.S. 621 (1885) and holding that the Legislature has the constitutional authority to divest vested rights that otherwise defeat a debt or personal obligation, ***even after the statute of limitations has run***); *Norton,* 511 A.2d 1056 (Me. 1986).[31]

In *Norton*, the Court held that retroactive application of a statute was permissible under the contract clause of the Maine Constitution. As the *Norton* Court also states:

> It is clear that no federal due process violation occurs simply because a statute creates liability based on events pre-dating its enactment. In *Usery v. Turner Elkorn Mining Co.,* 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), the Supreme Court reviewed a statute creating employer liability to sufferers of black lung disease who had left employment prior to the passage of the statute. In ruling the statute valid, the Court stated:

[31] Although subsequently distinguished by *DeMello v. Dep't. of Env. Protection*, 611 A.2d 985 (Me. 1992), *Norton* remains good law for the cited proposition in Plaintiff's Opposition.

> [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.
>
> The Court went on to state that although the justifications for prospective legislation may not always suffice to support retroactive legislation, ***retroactive application is permitted so long as a rational and non-arbitrary basis exists for making the statute retrospective.*** In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717 (1984), the Court reaffirmed that ***retroactive legislation need only address a legitimate legislative purpose by rational means to comport with the requirements of due process***, explicitly rejecting a contention that retroactive legislation requires stricter scrutiny than is afforded by the rational relation test.

Id. at 1062 n.7 (internal citations omitted).

Applied to the instant matter, these constitutional principles belie Appellant's position that 14 M.R.S. §752-C (3) creates new liabilities against it. As discussed *supra*, the operative effect of legislation like 14 M.R.S. § 752-C(3) is a constitutionally permissible one: legislative modification of damages remedies. While it is not necessary for the Court to apply any test to this remedial, procedural statute at all, in fact the rational basis test under Maine law is satisfied by 14 M.R.S. §752-C(3). The statute is constitutional.[32]

[32] The procedural/remedial rights implicated by 14 M.R.S. §752-C(3) do not rise to the level of a strict scrutiny analysis. Assuming, *arguendo*, strict scrutiny did apply, 14 M.R.S. §752-C(3) would pass that higher test as well. By way of example, not even the constitutionality of the Sex Offender Registration and Notification Act ("SORNA"), which necessarily had the effect of depriving registrants of fundamental

B. Maine's "Revival" Statute (14 M.R.S. § 752-C (3)) Applies to Institutional Defendants.

i. *The Language of 14 M.R.S. § 752-C(3) Is Unambiguous.*

Under Maine law, ". . . all statutes will be considered to have a prospective operation only, ***unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used***." *Miller*, 134 Me. 145, 183 A. at 417 (emphasis added).

When interpreting a statute, Maine courts review *de novo* "to effectuate the legislative intent." *Wawenock, LLC v. Dep't of Transportation*, 2018 ME 83, ¶ 7, 187 A.3d 609, 612 (*citing MaineToday Media, Inc.*, 2013 ME 100, ¶ 7, 82 A.3d 104; *see In re Wage Payment Litig.*, 2000 ME 162, ¶ 4, 759 A.2d 217 ("If the plain meaning of the text does not resolve an interpretative issue raised, we then consider the statute's history, underlying policy, and other extrinsic factors to ascertain legislative intent,"); *State v. Coombs*, 1998 ME 1, ¶ 9, 704 A.2d 387 (characterizing *de novo* review as "independent review for conclusions of law"); *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 773–74 (Me. 1996) (determining legislative intent without any evidentiary presentations); *see also Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 189 (Ak. 2007) ("We also apply our independent judgment to questions of statutory interpretation and adopt the rule of

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rights to privacy and to bear arms, needed to meet the increased burden of the strict scrutiny standard. *Doe I v. Williams*, 2013 ME 24, 61 A.3d 718 (confirming constitutionality).

law that is most persuasive in light of precedent, reason and policy,") (internal quotation marks omitted).

Maine courts turn to the plain language of the statute as "[t]he first and best indicator of legislative intent . . . ." *Wawenock* , 2018 ME 83, ¶ 7, 187 A.3d 609; *see Est. of Stone v. Hanson*, 621 A.2d 852, 853 (Me. 1993) ("Our main objective in construing a statute is to give effect to the will of the Legislature."); *Adoption of Patricia S.*, 2009 ME 76, ¶ 11, 976 A.2d 966 ("In determining the Legislature's intent, Maine courts look first to the plain language of the statute,"). In considering the plain language, Courts "consider the entire statutory scheme in order to achieve a harmonious result." *Klein v. Univ. of Maine Sys.,* 2022 ME 17, ¶ 7, 271 A.3d 777, 780. "Only if the meaning of a statute is not clear do Maine courts look beyond the words of the statute to examine other potential indicia of the Legislature's intent, such as the legislative history." *A.S. v. LincolnHealth*, 2021 ME 6, ¶ 15, 246 A.3d 157 (internal citation omitted). Where the plain language of a statute is unambiguous, the courts interpret the statute according to its unambiguous language, unless so doing would work a result that is "illogical or absurd." *Id.* (*citing MaineToday Media, Inc*, 2013 ME 100, ¶ 6, 82 A.3d 104).

Statutory language is considered ambiguous when it can reasonably be interpreted in more than one way and comport with the actual language of the statute. *Id.* (*citing Me. Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 35,

923 A.2d 918.) In instances of ambiguous language, Maine courts interpret the statute's meaning based on legislative history and other indicia of legislative intent. *Id.*

Before 2021, the text of 14 M.R.S. §752-C read:

> §752-C. Sexual acts towards minors
>
> **1.** No limitation. Actions based upon sexual acts toward minors may be commenced at any time.
>
> 2. Sexual acts toward minors defined. As used in this section, "sexual acts toward minors" means the following acts that are committed against or engaged in with a person under the age of majority:
>
> A. Sexual act, as defined in Title 17-A, section 251, subsection 1, paragraph C; or
>
> B. Sexual contact, as defined in Title 17-A, section 251, subsection 1, paragraph D.
>
> **Sec. 2 Application.** This Act applies to the following actions based upon a sexual act or sexual contact with a person under the age of majority:
>
> 1. All actions based on a sexual act or sexual contact occurring on or after the effective date of this Act; and
>
> 2. All actions for which the claim has not yet been barred by the previous statute of limitations in force on the effective date of this Act.

14 M.R.S. §752-C (1999).

The text of 14 M.R.S. §752-C, in pertinent part, now reads as follows:

> §752-C. Sexual acts towards minors

> **1.** No limitation. ***Actions based upon sexual acts toward minors may be commenced at any time.***
>
> 2. Sexual acts toward minors defined. As used in this section, "sexual acts toward minors" means the following acts that are committed against or engaged in with a person under the age of majority:
>
> C. Sexual act, as defined in Title 17-A, section 251, subsection 1, paragraph C; or
>
> D. Sexual contact, as defined in Title 17-A, section 251, subsection 1, paragraph D.
>
> 3. Application. ***This section applies to all actions based upon sexual acts toward minors regardless of the date of the sexual act and regardless of whether the statute of limitations on such actions expired prior to the effective date of this subsection.***

14 M.R.S. §752-C (2021) (*emphasis added*).

In enacting subsection (3) of 14 M.R.S. § 752-C, the Maine Legislature revived previously barred sex abuse claims of minors explicitly and in clear terms. The statutory language is unambiguous and avails itself to a plain meaning. Thus, no resort to legislative history is necessary. *Klein,* 2022 ME 17, ¶ 7, 271 A.3d 777.

ii. *The Legislative Intent of 14 M.R.S. § 752-C(3) Is Unambiguous.*

Even if the Court disagrees that the language is clear and unambiguous, the legislative history and intent of P.L. 2021, c. 301 is clear that the new language was intended to apply to non-perpetrator defendants, such as employers who fail to exercise reasonable care in protecting children from sex abuse, as set forth in the

committee materials and Senate debate that this Court would review. *See Corinth Pellets, LLC v. Arch Specialty Ins. Co.*, 2021 ME 10, ¶ 32, 246 A.3d 586 (legislative history includes committee actions); *Wawenock*, 2018 ME 83, ¶¶ 13 – 15, 187 A.3d 609 (legislative history is not a subject of judicial notice or evidentiary proof; a court may consider all aspects of legislative process and materials in the same manner that it considers legal precedent and is not confined to what parties have submitted).

The 130th Legislature Joint Standing Committee on Judiciary heard extensive testimony from even the opponents of the legislation—including this very Appellant—who argued that any new statute of limitations should not apply to institutions like the Diocese of Portland, who enable child sex abuse. *See, e.g.,* An Act to Promote Justice for Victims of Childhood Sex Abuse and An Act to Provide Access to Justice for Victims of Child Sexual Abuse: Hearing on LDs 688 & 589 Before the J. Standing Comm. on Judiciary, 130th Legis. 8 (2021) (written testimony of Bruce C. Gerrity, Esq., Preti Flaherty, on behalf of the Roman Catholic Diocese of Portland and the American Property Casualty Insurers Association). The Committee considered these arguments from Appellant and its cohorts[33] and rejected them.

[33] The Diocese's admission to the Legislature that the statute would apply to the Diocese in 2021 should estop it from arguing otherwise today.

The Legislature has indicated, in both the explicit terms of the statute's language and in the legislative history, a clear intent to apply the new statute of limitations to employers and other enablers of child sexual abuse for rationally-based purposes, including, but not limited to: improving public health, increasing access to mental health care for survivors, medical expense reimbursement, compensation for injuries, reducing public health care costs, preventing chronic disease associated with adverse childhood experiences, and preventing future child sexual abuse.

iii. *Even If the Statute Is Ambiguously Drafted, Maine Jurisprudence Supports A 'Harm-Based' Approach to Application.*

Finally, assuming *arguendo*, if this Court finds the language and legislative record underlying 14 M.R.S. §752-C(3) to be ambiguous, Maine jurisprudence supports application of a 'harm-based' approach to interpreting the "based upon" language contained therein. *Boyden*, No. CV-07-276, 2008 WL 4106441 (Me. Super. May 14, 2008). Of course, as set forth *supra*, both the statutory language and the legislative intent are unambiguous.

Appellant mischaracterizes the opinion in *Boyden* to support its position. (Blue Br. 40). In *Boyden*, the Court decided ***this exact question*** of whether a statute with "based upon" language could apply to an institutional defendant in favor of survivors of child sex abuse. The Court adopted the "harm based approach" as set forth in *Almonte v. N.Y. Med. Coll.*, 851 F. Supp. 34 (1994):

> This court finds from the plain meaning of the phrase "based upon" and "the focus of the statute at hand, as gleaned from the language, is on actions flowing from a particular type of harm, not on the nature of the party or parties causing the harm." As stated in *Almonte,* this is a "harm-based approach."

Boyden, No. CV-07-276, 2008 WL 4106441 (Me. Super. May 14, 2008) (internal citations omitted; emphasis added).

The *Boyden* Court explained why a statute applying only to perpetrators would be wholly inconsistent with the legislature's intent to keep courthouse doors open longer for child sexual abuse survivors:

> [I]t may take years for a victim to come to terms with the sexual abuse, the Legislature implicitly understood that it may take as much time to identify those responsible for the abuse: It is only logical that the abuse and the abuser must be identified before the chain of responsibility can be discovered. Thus ***were the [Connecticut sex abuse statute of limitations] limited to actions against perpetrators only, many if not most non-offender prospective defendants would, for all practical purposes, be rendered immune from suit. Such a result is both contrary to public policy and inconsistent with the Legislature's intent to broaden remedies available to victims of sexual abuse through the extended limitations period.***

Id. (internal citations omitted; emphasis added).

Under a statutory construction analysis, the plain language of 14 M.R.S. §752-C is clear: "Actions based upon sexual acts toward minors may be commenced at any time" without qualification as to the meaning of "based upon sexual acts towards minors." The statute defines sexual acts plainly and unambiguously. Justice Jabar's

decision in *Boyden* showed that the "based upon" language is unambiguous and was never appealed for good reason.

To the extent the plain and unambiguous language of and legislative record underlying 14 M.R.S. §752-C(3) is unclear, the *Boyden* Court's application of the 'harm-based' approach supplies well-reasoned persuasive authority.

C. Legal Questions of Tolling and Agency Are "Fact-Bound" and Beyond the Scope of the Instant Appeal on Report (M.R. App. P. 24(c)).

Appellant's brief impermissibly seeks to inject into the instant Appeal legal questions of tolling for fraudulent concealment and/or mental health tolling.

Pursuant to the Rules, only two discrete legal questions in the instant matter meet the criteria for Report under Rule 24(c): constitutionality and application. All portions of Appellant's Brief serving analysis of legal questions of tolling should be disregarded and/or stricken from the record where only two such discrete legal questions were Reported, and only two such discrete legal questions are on Appeal under Rule 24(c)—neither of which address the "fact-bound" issue of tolling.

As to constitutionality and application, there is no dispute on the material facts underlying either of these "pure" questions of law. *Dupuis*, No. BCD-CV-2022-00044 at 4 (Me. B.C.D. Apr. 6, 2023). Indeed, the Superior Court recognized this ***as a causative factor weighing in favor of*** its Order Granting Appellant's Motion to Report:

> With respect to the issues on report, there is no additional fact-finding necessary. The parties agreed at oral argument on the underlying motion that the issue could be decided on the record. Both issues are purely questions of law. Unless there are defense verdicts in all [of the] cases, these issues will need to be confronted ***at some point***. The court finds that this factor weighs in favor of a report.

Id (emphasis added).

Where Defendant-Appellant enjoyed the benefit of blocking all discovery and establishing a limited record of agreed-upon facts for the purposes of securing this Appeal, it should similarly be estopped from now attempting to travel beyond the permissible scope of the discrete questions this Court may answer. [34, 35]

[34] The Appellant Diocese also raised whether Maine law recognized causes of action during the dates of accrual of several plaintiffs' cases. First—that issue is not before the Court and should not be addressed. On the merits, however, ample Maine law exists to find the Diocese liable on agency theories. *See, e.g.*, *Easler v. Downie Amusement Co.*, 125 Me. 334, 133 A. 905 (1926) (recognizing employer liability for notice and negligently failing to warn and protect spectators, including a 12-year old boy, from group of off-duty, off-hours employees' dangerous ball games near its circus operation); *Ames v. Jordan*, 71 Me. 540 (1880) (recognizing validity of action sounding in negligent selection); *Pollard v. Maine Cent. R. Co.*, 87 Me. 51, 32 A. 735 (1894) (employer's failure to anticipate bad acts of employee insufficient to demonstrate acts beyond scope of employment). If agency theories properly come before this Court, it may also consider the efficacy of modernizing elements of liability for entities that enable sex abuse, given recent trends. *See Brown v. Delta Tau Delta et al*, 2015 ME 75, 118 A.3d 789 (recognizing cause of action sounding in premises liability against non-possessory entity who facilitated abuse); *Fortin v. the Roman Catholic Bishop of Portland*, 2005 ME 57, 871 A.2d 1208 (recognizing fiduciary relationship between diocese and parishioner as giving rise to duty to protect from substantial harm upon reasonable belief thereof); *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, 692 A.2d 441 (recognizing cause of action sounding in negligent supervision); Restatement (Second) of Agency, §§ 315(b), 317 (1958); Restatement (Third) of Agency, § 7.08 (2006). Recognition of such causes of action can give rise to liability from the date of accrual. *See, e.g. Fortin*, 2005 ME 57, 871 A.2d 1208 (recognizing tort of negligent supervision in 2005, for 1992 accrued cause of action. This footnote illustrates how important it is for the Court to only decide the issues on report. Other issues are fact-bound and would require separate briefing, if any ever get back to this Court.

[35] In its argument, Appellant also raises P.L. 2023, ch. 351, which retroactively amends charitable immunity statute. This Court should disregard such argument and consideration of the charitable immunity statute because it does not involve an issue on Report and is therefore beyond the scope of these limited proceedings.

Legal questions of statutory tolling for fraudulent concealment, mental health impairment, or otherwise are "fact-bound" questions premised upon disputed facts as-yet addressed—and as reserved—by the Superior Court. This Court has been explicit that "fact-bound" questions requiring application of the abuse-of-discretion and clear-error standards are beyond a Rule 24(c) Report. *NECEC Transmission LLC*, 2022 ME 48, n. 12, 281 A.3d 618. Because analysis of these "fact-bound" legal questions would require application of the abuse-of-discretion and clear-error standards, they are beyond the scope of a Rule 24(c) Report.

CONCLUSION

Maine jurisprudence holds no support for creating a vested right out of an expired statute of limitations. Appellant has no "vested right" in the running of the statute of limitations contained in any iteration of 14 M.R.S. § 752-C, but a mere removal of its expectation of freedom from liability that it enjoyed for several decades "by legislative grace." *Chase Sec. Corp.*, 325 U.S. at 314; *see Norton*, 511 A.2d at 1063.

Separately, 14 M.R.S. § 752-C(3) passes constitutional scrutiny for testing retroactive legislation. Maine's new "revival" law promotes the public welfare, is effected by appropriate legislative means, and is neither arbitrary nor capricious.

The plain language of 14 M.R.S. § 752-C(3) is unambiguous. Whether by the plain language of the statute, its legislative history, or application of a 'harm-based'

construction, there is clear evidence of the Maine Legislature's intent for 14 M.R.S. § 752-C(3) to apply both to natural human and institutional entities alike. There are no legal issues on Report beyond those of constitutionality and application.

WHEREFORE, Plaintiff-Appellees seek a ruling from this Court AFFIRMING the Superior Court's orders and direct judgment on the issues of constitutionality and application, as on Report under M.R. App. P. 24(c), confirming there are no other issues on appeal, and remanding to the Superior Court for discovery and further proceedings.

Respectfully Submitted,

Dated: September 13, 2023

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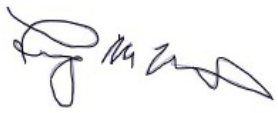

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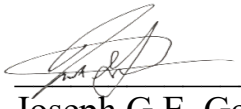

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CERTIFICATE OF SERVICE

I, Michael T. Bigos, Esq., hereby certify that two copies of the Brief of Appellees Robert E. Dupuis *et al* are being served upon counsel at the addresses set forth below by email on September 13, 2023 and personal delivery on September 14, 2023:

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. BCD-23-122

ROBERT E. DUPUIS, et al.,
Plaintiff-Appellees

v.

ROMAN CATHOLIC BISHOP OF PORTLAND,
Defendant-Appellant.

CERTIFICATE OF SIGNATURE AND COMPLIANCE

I am filing the electronic copy of a brief with this certificate. I will file the paper copies as required by M.R. App. P. 7A(i). I certify that I have prepared (or participated in preparing) the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits set by Order of this Court (dated July 10, 2023), and conform to the form and formatting requirements of M.R. App. P. 7A(g).

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