STATE OF MAINE
SUPRPREME 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, Maine,

Defendant-Appellant.

On Appeal from Decision of the Superior Court (Business and Consumer Docket)

APPENDIX

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APPENDIX

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Business Court

Case Summary

Case No. BCD-CIV-2022-00044

Robert Dupuis v. Roman Catholic Bishop of Portland	§	Location: **Business Court**
	§	Judicial Officer: **McKeon, Thomas**
	§	Filed on: **06/16/2022**
	§	Case Number History: **PENSC-CIV-2022-00072**
	§	Other: **PENSC-CIV-2022-72**

Case Information

Related Cases
BCD-CIV-2022-00048 (Related Case)
BCD-CIV-2022-00049 (Related Case)
BCD-CIV-2022-00060 (Related Case)
BCD-CIV-2022-00061 (Related Case)
BCD-CIV-2022-00062 (Related Case)
BCD-CIV-2022-00063 (Related Case)
BCD-CIV-2022-00064 (Related Case)
BCD-CIV-2022-00065 (Related Case)
BCD-CIV-2022-00066 (Related Case)
BCD-CIV-2022-00067 (Related Case)
BCD-CIV-2022-00068 (Related Case)
BCD-CIV-2022-00069 (Related Case)

Case Type: Civil
Subtype: Other Personal Injury Tort
Case Status: **12/12/2022 Pending - Inactive**

Assignment Information

Current Case Assignment

Case Number	BCD-CIV-2022-00044
Court	Business Court
Date Assigned	10/12/2022
Judicial Officer	McKeon, Thomas

Previous Case Assignments

Case Number	PENSC-CIV-2022-00072
Court	Penobscot Superior Court
Date Assigned	06/16/2022
Judicial Officer	McKeon, Thomas
Reason	BCD Transfer

Party Information

		Lead Attorneys
Plaintiff	**Dupuis, Robert E**	**Bigos, Michael T** ***Retained***
Defendant	**Roman Catholic Bishop of Portland**	**Petruccelli, Gerald F** ***Retained***

Events and Orders of the Court

06/16/2022
filing document - COMPLAINT - filed
Party: Plaintiff Dupuis, Robert E
Created: 06/16/2022 1:08 PM

06/30/2022
other filing - ENTRY OF APPEARANCE - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 06/30/2022 11:39 AM

06/30/2022
motion - MOTION TO ENLARGE - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 06/30/2022 11:41 AM

07/14/2022 Granted (Judicial Officer: Anderson, William R.)
Created: 07/18/2022 11:12 AM

07/14/2022
order - COURT ORDER - entered (Judicial Officer: Anderson, William R.)
Created: 07/18/2022 11:13 AM

07/20/2022
responsive pleading - ANSWER - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 07/20/2022 3:44 PM

07/26/2022
service - ACKNOWLEDGEMENT OF SERVICE - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 07/26/2022 12:26 PM

07/27/2022 **Service Status** Requested by: Dupuis, Robert E
Roman Catholic Bishop of Portland
Issued
Anticipated Method: Acceptance of Service
Created: 07/27/2022 12:28 PM

06/16/2022 **Service Status**
Roman Catholic Bishop of Portland served

08/23/2022
letter - FROM PARTY - filed
Party: Plaintiff Dupuis, Robert E
Created: 08/24/2022 10:22 AM

09/06/2022
letter - FROM PARTY - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 09/06/2022 3:18 PM

09/16/2022
order - SPECIAL ASSIGNMENT - entered (Judicial Officer: Mullen, Robert E.)
Created: 09/21/2022 9:51 AM

10/11/2022
other filing - APPLICATION TO TRANSFER TO BCD - filed
Party: Plaintiff Dupuis, Robert E
Created: 10/11/2022 12:05 PM

10/12/2022 Sent electronically to BCD
Created: 10/12/2022 11:50 AM

10/12/2022
order - TRANSFER TO BCD ACCEPTED - entered (Judicial Officer: McKeon, Thomas)
Created: 10/12/2022 11:53 AM

10/13/2022
certify/notification - NOTICE OF ACCEPTANCE TO BCD - issued
Created: 10/13/2022 10:44 AM

11/01/2022
motion - MOTION TO ENLARGE PAGE LIMIT - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 11/02/2022 10:39 AM

11/02/2022
order - COURT ORDER - entered (Judicial Officer: McKeon, Thomas)
Created: 11/03/2022 8:31 AM

11/02/2022
Granted (Judicial Officer: McKeon, Thomas)
Created: 11/03/2022 8:32 AM

11/08/2022 **Case Management Conference**
Created: 01/01/0001 12:00 AM

11/08/2022
order - HEARING/CONFERENCE RECORD - entered (Judicial Officer: McKeon, Thomas)
Created: 11/09/2022 9:03 AM

11/17/2022
motion - MOTION FOR STAY OF PROCEEDINGS - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 11/18/2022 8:01 AM

11/22/2022
motion - MOTION FOR JUDGMENT ON PLEADINGS - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 11/23/2022 9:06 AM

11/23/2022
responsive pleading - OPPOSING MEMORANDUM - filed
Party: Plaintiff Dupuis, Robert E
Created: 11/28/2022 3:29 PM

12/08/2022
responsive pleading - REPLY MEMORANDUM - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 12/08/2022 11:34 AM

12/09/2022
motion - MOTION TO ENLARGE - filed
Party: Plaintiff Dupuis, Robert E
Created: 12/09/2022 12:45 PM

12/09/2022
Granted (Judicial Officer: McKeon, Thomas)
Created: 12/09/2022 2:27 PM

12/12/2022
order - ORDER FOR STAY OF PROCEEDINGS - entered (Judicial Officer: McKeon, Thomas)
Created: 12/13/2022 10:44 AM

12/12/2022
Granted (Judicial Officer: McKeon, Thomas)
Created: 12/13/2022 10:45 AM

01/03/2023
responsive pleading - OPPOSING MEMORANDUM - filed
Party: Plaintiff Dupuis, Robert E
Created: 01/03/2023 1:11 PM

01/24/2023
brief - REPLY BRIEF - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 01/24/2023 8:08 AM

01/31/2023
Motion for Judgment on Pleadings Hearing
Created: 01/01/0001 12:00 AM

02/13/2023
order - COURT ORDER - entered (Judicial Officer: McKeon, Thomas)
Created: 02/14/2023 10:44 AM

02/13/2023
Denied (Judicial Officer: McKeon, Thomas)
Created: 02/14/2023 10:46 AM

03/02/2023
motion - OTHER MOTION - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 03/02/2023 4:08 PM

03/02/2023
other filing - AFFIDAVIT - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 03/02/2023 4:08 PM

03/23/2023
responsive pleading - OPPOSING MEMORANDUM - filed
Party: Plaintiff Dupuis, Robert E
Created: 03/23/2023 1:13 PM

03/23/2023
other filing - AFFIDAVIT - filed
Party: Plaintiff Dupuis, Robert E
Created: 03/23/2023 1:13 PM

04/03/2023
brief - REPLY BRIEF - filed
Party: Defendant Roman Catholic Bishop of Portland
Created: 04/03/2023 3:57 PM

04/05/2023 **Oral Argument Hearing**
Created: 01/01/0001 12:00 AM

04/06/2023
order - COURT ORDER - entered (Judicial Officer: McKeon, Thomas)
Created: 04/07/2023 7:43 AM

04/06/2023
Granted (Judicial Officer: McKeon, Thomas)
Created: 04/07/2023 8:02 AM

05/04/2023
appeal - MANDATE/ORDER - filed
Created: 05/08/2023 2:41 PM

05/08/2023 appeal - RECORD ON APPEAL - sent to law court
Created: 05/08/2023 3:10 PM

05/11/2023 other filing - TRANSCRIPT - filed
Created: 05/17/2023 1:23 PM

Financial Information

	Defendant Roman Catholic Bishop of Portland		
	Total Financial Assessment		225.00
	Total Payments and Credits		225.00
	Balance Due as of 6/14/2023		**0.00**
11/23/2022	Transaction Assessment		225.00
11/23/2022	Business Court E-File Payment Type	Receipt # 2022-00049705	(225.00)
	Plaintiff Dupuis, Robert E		
	Total Financial Assessment		175.00
	Total Payments and Credits		175.00
	Balance Due as of 6/14/2023		**0.00**
06/16/2022	Transaction Assessment		175.00
06/16/2022	eFiling Payment	Receipt # 2022-00025641	(175.00)

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
LOCATION: PORTLAND
DOCKET NOS. BCD-CIV-2022-00044

ROBERT DUPUIS,

Plaintiff,

v.

THE ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant.

ORDER DENYING DEFENDANT THE ROMAN CATHOLIC BISHOP OF PORTLAND'S MOTION FOR JUDGMENT ON THE PLEADINGS

Before the court is the Motion for Judgment on the Pleadings filed under Maine Rule of Civil Procedure 12(c) by Defendant The Roman Catholic Bishop of Portland ("RCB") regarding the claims of Plaintiff Robert Dupuis ("Plaintiff").[1] The court heard argument on RCB's motion on January 31, 2023. For the following reasons, the motion is denied. The court does, however, continue the stay on discovery in anticipation of RCB's motion to report.

BACKGROUND

Plaintiff claims that he, as a minor, was the victim of sexual acts committed by adults recruited, selected, trained, supervised and retained by RCB to serve as priests, clergy, lay educators, or in other roles at RCB's parishes in the State of Maine. (Compl. ¶¶ 7-14, 32.) The instances of abuse underlying Plaintiff's claims occurred during 1961. (Compl. ¶¶ 29-40.) RCB argues that Plaintiff's allegations are insufficient to state a claim because their actionability is dependent on 14 M.R.S. § 752-C(3). This subsection was added to the statute during 2021 and

[1] Plaintiff filed a seven-count complaint asserting various theories of liability. Count I is for negligent failure to warn, train or educate; Count II for breach of fiduciary duty; Count III for fraudulent concealment; Count IV for negligent supervision; Count V for sexual assault/respondeat superior; Count VI for intentional infliction of emotional distress; and Count VII seeks punitive damages.

removes the statute of limitations for "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 amended statute's effective date. 14 M.R.S. § 752-C(3) (2022). RCB asserts that, as retroactively applied to Plaintiff's claims, the amended statute divests RCB of vested rights and violates its substantive and procedural due process rights guaranteed by the Maine State Constitution. *See* Me. Const. art. I, § 6-A.[2]

LEGAL STANDARD

A motion for judgment on the pleadings under Rule 12(c) tests the legal sufficiency of the complaint. *Cunningham v. Haza*, 538 A.2d 265, 267 (Me. 1988). When the defendant is the moving party, the motion is treated as "nothing more than a motion under M.R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted." *Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 4, 187 A.3d 609 (citation omitted). Hence, when reviewing the complaint, the court assumes the factual allegations are true, examines the complaint in the light most favorable to the plaintiff, and ascertains whether the complaint alleges the elements of a cause of action or facts entitling the plaintiff to relief on some legal theory. *Id.* (citation omitted). In cases such as this one, an affirmative defense may serve as the basis for dismissal under Rule 12(c) when the complaint itself affirmatively demonstrates the existence and the applicability of that defense. *Cunningham*, 538 A.2d at 267 (citations omitted).

DISCUSSION

RCB's Motion for Judgment on the Pleadings first takes the position that section 752-C, subsection 3, is legally precluded from retroactive application. (Mot. J. Pleadings 3, 5-21.) RCB next argues that section 752-C applies only to human defendants accused of committing the

[2] Neither party is arguing that any further record needs to be developed, as the motion can be determined based on the dates alleged in the Complaint.

"sexual acts toward minors" specified in subsection 2, but not to organizations like RCB. (Mot. J. Pleadings 3, 21-29.)

I. The constitutionality of retroactive application and section 752-C.

Statutes are presumptively valid, with reasonable doubts resolved in favor of constitutionality. *In re Evelyn A.*, 2017 ME 182, ¶ 25, 169 A.3d 914. The party asserting that a statute is unconstitutional bears the "heavy burden" of overcoming this presumption, and to do so they must "demonstrate convincingly that the statute conflicts" with the Maine State Constitution. *Irish v. Gimbel*, 1997 ME 50, ¶ 6, 691 A.2d 664.

RCB argues that it has a vested right to an immunity generated by an expired statute of limitations. Thus, RCB asserts that the legislature cannot constitutionally revive claims that expired pursuant to the statutes of limitations provided by past iterations of section 752-C, because doing so deprives RCB of its immunity from suit in violation of its substantive and procedural due process rights. Plaintiff disagrees, and the parties each present the court with a line of cases in support of their argument.

RCB claims it has a vested property interest or property right in the immunity conferred by an expired statute of limitations because such an immunity is "a thing of value that constitutes property." (Mot. J. Pleadings 6.) It relies on *NECEC Transmission LLC v. Bureau of Parks & Lands*, in which the Law Court embraced the view that "property" within the meaning of the Maine State Constitution encompasses "everything to which a man may attach a value and have a right." *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 44, 281 A.3d 618 (citation and quotation marks omitted). The Maine State Constitution protects cognizable, vested property rights from abrogation by retroactive legislation. *Id.*

However, statutes of limitation are different than property rights. They are creatures of

statute within the prerogative of the legislature. *See Myrick v. James*, 444 A.2d 987, 989-93 (Me. 1982); *see also Miller v. Fallon*, 134 Me. 145, 147, 183 A. 416, 417 (1936). *NECEC Transmission LLC* placed the vested rights doctrine and the concomitant restraint on legislative power to enact retroactive legislation in the Maine State Constitution's due process clause. *NECEC Transmission LLC*, 2022 ME 48, ¶ 42, 281 A.3d 618 (citing Me. Const. art. I, § 6-A). The Law Court, however, has not had the opportunity to extend its holding regarding vested property rights to statutes of limitations.

The other cases relied on by RCB provide support for an inference that there may be a vested property right in an expired statute of limitations. *E.g., Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816 (Me. 1980) ("No one has a vested right in the running of a statute of limitations until the prescribed time has completely run and barred the action."); *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123. However, the Law Court's discussions of vested rights in *Morrissette* and *Dobson* are dicta which are neither central nor necessary to the holdings. *See Morrissette*, 2003 ME 138, ¶¶ 11-15, 837 A.2d 123 (permitting application of a new statute to the court's modification of the level of the petitioner-employee's workers' compensation benefits when the benefits had been ordered pursuant to a prior version of the statute); *Dobson*, 415 A.2d at 816-17 (allowing the case to proceed when the amended statute merely extended the statute of limitations); *Miller v. Fallon*, 134 Me. 145, 147-148, 183 A. 416, 417 (1936) (finding the statute at issue was not intended to apply retroactively). None of these cases explain why a vested property right emerges from an expired statute of limitations. Nor do any of them locate vested rights protections in the Maine State Constitution's due process clause.

Beyond Maine law, federal precedents hold that there is neither vested right in an immunity flowing from an expired statute of limitations nor due process protection under the Fourteenth

Amendment against retroactive legislation that revives claims that expired under a prior statute of limitations. *E.g., Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-16 (1945). These cases are also not controlling here, where RCB does not claim protection under the United States Constitution. But they do have persuasive power and specifically address statutes of limitation in the context of vested rights. Indeed, the Supreme Court of the United States distinguishes between vested rights to real or personal property, which receive constitutional protection, and the benefit of an expired statute of limitations. *Campbell v. Holt*, 115 U.S. 620, 625 (1885); *Donaldson*, 325 U.S. at 311-16.

Apart from these federal cases, Plaintiff relies on a different line of cases decided by the Law Court. *Norton v. C.P. Blouin*, 511 A.2d 1056, 1060-61 & nn.5, 7 (Me. 1986); *State v. LVI Group*, 1997 ME 25, ¶ 9, 690 A.2d 960 (analyzing retroactive legislation under the Maine State Constitution's due process clause). These cases, which considered the constitutionality of economic regulation distinct from the statute at issue in this case, are imperfect as precedents. However, they provide a workable alternative standard for courts to determine when retroactive legislation works a deprivation of a party's due process rights:

1) Retroactive application of the statute must affect substantive rights, and not merely remedies;
2) The legislature must provide a clear expression of intent favoring the retroactive application; and
3) The retroactive application must not be an unconstitutional exercise of the powers conferred to the legislature by the constitutions of the United States and the State of Maine;

Norton, 511 A.2d at 1060 n.5; *LVI Group*, 1997 ME 25, ¶ 9, 690 A.2d 960. The Law Court left this analysis concerning the retroactive application of statutes intact when it decided *NECEC Transmission LLC. NECEC Transmission LLC*, 2022 ME 48, ¶ 36, 281 A.3d 618 (citing *Norton*, 511 A.2d at 1060 n.5; *LVI Group*, 1997 ME 25, ¶ 9, 690 A.2d 960).

Moreover, the United States and State of Maine constitutions are often coextensive in the context of their due process protections. *See Doe v. Williams*, 2013 ME 24, ¶ 65, 61 A.3d 718. When considering the constitutionality of social welfare legislation under the federal Constitution, courts apply the rational basis test. *E.g., Califano v. Aznavorian*, 439 U.S. 170, 174, 178 (1978). Maine applies a "substantially similar" test, under which legislation need have only a "legitimate legislative purpose furthered by rational means" to survive judicial review. *LVI Group*, 1997 ME 25, ¶ 9, 690 A.2d 960 (citing *Tompkins v. Wade & Searway Constr. Corp.*, 612 A.2d 874, 878 n.2 (Me. 1992)). Application of this standard makes sense where the determination of when causes of action expire is historically a legislative prerogative. Here, the purpose underlying section 752-C, as amended by the 130th Maine Legislature, reflects a unique and evolved societal recognition of the nature of child sexual abuse and the headwinds against victims' ability to bring their claim. RCB argues that Plaintiff's line of cases is inapplicable, because it has a vested and fundamental right to immunity arising from the expired statute of limitations. But, as noted above, *NECEC Transmission LLC* does not extend Maine's vested rights doctrine to statutes of limitations.

The parties each make compelling arguments. In consideration of the closeness of this question and the presumption favoring constitutionality, the court cannot say that RCB has overcome its "heavy burden" to "convincingly" demonstrate that section 752-C, as amended, conflicts with the Maine State Constitution. *Irish*, 1997 ME 50, ¶ 6, 691 A.2d 664.

II. Application of section 752-C to institutional defendants.

RCB also raised a related issue as to whether section 752-C may be applied to institutional or organizational defendants. Section 752-C, subsection 2, provides the basis for RCB's argument. That subsection defines "sexual acts towards minors," and links its definition directly to offenses defined by the Maine Criminal Code. 14 M.R.S. § 752-C(2) (citing 17-A § 251(c), (d) (2022)).

RCB claims that this subsection limits the statute's application to the human perpetrators of misconduct, since no organization is anatomically capable of perpetrating the specified crimes. Plaintiff counters that Section 752-C, subsections 1, removed the statutory limitation for offenses "*based upon* sexual acts towards minors," and that his claims against RCB fall within that description. 14 M.R.S. § 752-C(1), (3) (emphasis added).

In *Boyden v. Michaud*, the trial court considered this argument in the context of a prior iteration of section 752-C. *Boyden v. Michaud*, No. CV-07-331, 2008 Me. Super. LEXIS 88, at *11-15 (May 14, 2008). The *Boyden* court looked to the "plain meaning of the phrase based upon and the focus of the statute at hand, as gleaned from the language" and held that section 752-C is intended to apply to "actions flowing from a particular type of harm, not on the nature of the party or parties causing the harm." *Boyden*, 2008 Me. Super. LEXIS 88, at *15 (citation and quotation marks omitted). This is the "harm-based approach." *Id.* (citing *Almonte v. New York Med. Coll.*, 851 F. Supp. 34, 39 (D. Conn. 1994)). The court arrived at this conclusion after reviewing the legislative history of section 752-C from 1985 through 2000, as well as jurisprudence interpreting similar legislation from other jurisdictions. *Id.* at *11-14. This court has no reason to deviate from the rationale provided in *Boyden*, notwithstanding that court's qualification of this question as "razor thin."[3] *Id.* at *15.

III. Stay on discovery.

During oral argument, RCB expressed that if the court denies its motion then it would ask the court to report the legal questions in this matter to the Law Court. *See* M.R. App. P. 24(c). The court agrees that these questions are important, given the number of related cases already

[3] The court views *Boyden* as more persuasive than *Me. Human Rights Comm'n ex rel. Pitts v. Warren*, No. KENSC-CV-20-85, 2021 Me. Super. LEXIS 153, at *3-4 (March 12, 2021). *Warren* involved a discriminatory proceeding. While child sex abuse was a factor, it was not based on that act. It was based on an unlawful eviction.

docketed.[4] Based on the representations of counsel, there is a large number of new cases anticipated. The court also acknowledges that this is a close case, and RCB raises serious challenges to the constitutionality and applicability of section 752-C. *See Boyden*, 2008 Me. Super. LEXIS 88, at *13 (suggesting a report on the corporate defendant would have been prudent). The court anticipates RCB's motion to report this issue to the Law Court, and the case is stayed while the motion is decided as long as the motion is filed within 21 days of this order.

CONCLUSION

Based on the foregoing, the entry will be: Defendant The Roman Catholic Bishop of Portland's Motion for Judgment on the Pleadings is DENIED. In the event The Roman Catholic Bishop of Portland moves to certify a question for the Law Court pursuant to M.R. App. P. 24(c), the case will be stayed until that motion is decided.

SO ORDERED.

The Clerk is requested to enter this Order on the Docket, incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

Date: 2/13/23

Thomas R. McKeon
Justice, Business & Consumer Court

Entered on the docket: 02/14/2023

[4] Thirteen cases are filed in the Business & Consumer Court. At least one other case is pending in the Superior Court.

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NOS. BCD-CIV-2022-00044

ROBERT DUPUIS,

Plaintiff,

v.

THE ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant.

ORDER GRANTING DEFENDANT THE ROMAN CATHOLIC BISHOP OF PORTLAND'S MOTION TO REPORT TO THE LAW COURT PURSUANT TO M.R. APP. P. 24(c)

Before the court is the Motion to Report to the Law Court filed by Defendant The Roman Catholic Bishop of Portland ("RCB") pursuant to Maine Rule of Appellate Procedure 24(c). RCB asks the court to report the court's decision denying RCB's Motion for Judgment on the Pleadings filed under Maine Rule of Civil Procedure 12(c).

BACKGROUND

This case is one of thirteen similar cases pending in the Business & Consumer Docket ("BCD"). Counsel represents that there are eight additional cases pending in the Superior Court for a total of twenty-one cases. In each of them, the plaintiff claims that he or she, when a minor, was the victim of sexual acts committed by adults recruited, selected, trained, supervised, and retained by RCB to serve as priests, clergy, lay educators, or in other roles at RCB's parishes in the State of Maine. In each of them, the statute of limitations had expired by 2021. In 2021, the Legislature removed the statute of limitations for "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 amended statute's effective date. 14 M.R.S. § 752-C(3) (2022). The court, based on the parties' representations, anticipates that there are many more cases to come.

RCB filed either a Motion to Dismiss or a Motion for Judgment on the Pleadings in each of the cases pending in the BCD. In its motions, RCB challenged plaintiffs' complaints regarding: (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 RCB of vested rights and violates its substantive and procedural due process rights guaranteed by the Maine State Constitution, and (2) whether section 752-C may be applied to institutional or organizational defendants.

DISCUSSION

Maine Rule of Appellate Procedure 24(c) provides:

> If the trial court is of the opinion that a question of law involved in an interlocutory order or ruling made by it ought to be determined by the Law Court before any further proceedings are taken, it may on motion of the aggrieved party report the case to the Law Court for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties without making any decision therein.

M.R. App. P. 24(c). The process should be used sparingly to avoid both piecemeal litigation and requests to the Law Court for advisory opinions. *Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2013 ME 89, ¶ 9, 81 A.3d 348. In order to determine whether the need for an interlocutory appeal overcomes the policy reasons for requiring a final judgment before appeal, the Law Court considers three factors. *Id.* They include: (1) whether the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation; (2) whether the question might not have to be decided because of other possible dispositions, and (3) whether a decision on the issue would, in at least one alternative, dispose of the action. *Id.* (quotations and citations omitted). The court balances the three factors. Failure to show one of the factors is not fatal to the report. *See id.* ¶¶ 11, 12, 14 (weighing each factor). For example, with respect to the third factor, the Law Court has described it as "relevant to the trial court in assessing whether to report

an issue." *Id.* ¶13. The court is not required to take that factor into account. *Id.* (citing *Morris v. Sloan,* 1997 ME 179, ¶ 7, 698 A.2d 1038).

1. *Whether the questions reported are of sufficient importance and doubt to outweigh the policy against piecemeal litigation.*

Here, there is no dispute as to whether the issues are of sufficient importance and doubt. The Legislature's amendment has opened the door to a multitude of cases that had been foreclosed by the statute of limitations. Both parties have indicated there likely will be more cases filed in the future. A determination of these issues may substantially impact the Superior Court and BCD dockets. They are important to the public as the Legislature's decision to lift the statute of limitations on cases relating to child victims of sex abuse could affect the rights of numerous victims as well as multiple institutions who may be liable for sexual misconduct towards children by their employees.

With respect to doubt on the statute of limitations issue, there is no Maine decision that was presented to the court whether the Maine State Constitution's due process clause protects a defendant from the retroactive removal of an expired statute of limitations. Similarly, there is no Law Court decision as to whether section 752-C applies to organizations or institutions that employ an individual who sexually abuses a minor child. One trial court decision addressing the issue suggests that the question is close and that reporting the issue would be appropriate. *Boyden v. Michaud*, Nos. CV-07-276 and -331, 2008 Me. Super. LEXIS 88, at *13 (May 14, 2008). This factor weighs heavily in favor of reporting the issues.

2. *Whether the questions might not have to be decided because of other possible dispositions.*

The second factor to consider is whether the question raised on report "might not have to be decided at all because of other possible dispositions." *Littlebrook Airpark Condo. Ass'n*, 2013 ME 89, ¶ 9, 81 A.3d 348. If, for example, fact-finding or determination of a preliminary issue

such as the statute of limitations may render the reported question moot, the question may be discharged. *Liberty Ins. Underwriters, Inc. v. Est. of Faulkner*, 2008 ME 149, ¶ 8, 957 A.2d 94 (quotations and citations omitted).

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 21 cases, these issues will need to be confronted at some point. The court finds that this factor weighs in favor of a report.

3. *Whether a decision on the issues would, in at least one alternative, dispose of the case.*

The third factor to consider is whether the Law Court's decision on the issue on report would, in at least one alternative, dispose of the case. *Littlebrook Airpark Condo. Ass'n*, 2013 ME 89, ¶ 9, 81 A.3d 348. Here, the Plaintiff argues that if the Law Court concludes that RCB is correct that either the retroactive application of the statute of limitations violates the Maine State Constitution or that the statute does not apply to institutional defendants, the Plaintiff would still be able to press their claim that RCB fraudulently concealed the cause of action. In that case, the Plaintiff would find some relief from the statute of limitations. Therefore, the Law Court's decision could not dispose of the case.

Under Maine law:

> If a person, liable to any action mentioned, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action.

14 M.R.S. § 859 (2022). The statute prevents the commencement of the limitations period until "the existence of the cause of action or fraud is discovered or should have been discovered by the plaintiff in the exercise of due diligence and ordinary prudence." *Drilling & Blasting Rock*

Specialists, Inc. v. Rheaume, 2016 ME 131, ¶ 19, 147 A.3d 824 (quotations and citations omitted).

The plaintiff does not need to anticipate a statute of limitations defense and plead fraudulent concealment. *Angell v. Hallee,* 2012 ME 10, ¶ 10, 36 A.3d 922. If a defendant prevails on a statute of limitations claim, then a plaintiff should amend the complaint if he or she has the basis to assert the fraudulent concealment. *See McAfee v. Cole,* 637 A.2d 463, 466-67 (Me. 1994). The court recognizes that some of the plaintiffs may not be able to assert that claim given the highly individual and factual basis of the "due diligence" part of that analysis. Nevertheless, the court assumes for this analysis that the cases will go forward even if the Law Court decides for RCB. This third factor weighs in favor of the Plaintiff.

As stated on the record, weighing the factors, the court concludes that the high level of importance of this matter outweighs all other factors. The matter involves two questions of law. The court believes that even though the cases may survive even if the Law Court decides for RCB, the character of the cases will be different and there is a chance that many of the potential cases may not be brought. The court recognizes that Rule 24(c) must be used sparingly. Nevertheless, the wide public impact of section 752-C, as amended, and its effect on a growing number of litigants, makes this case an exception that Rule 24(c) intends to address. Therefore, the court concludes that RCB's appeal of this court's decisions on the motions to dismiss and for judgment on the pleadings "ought to be determined by the Law Court before any further pleadings are taken." M.R. App. P. 24(c). Pursuant to Rule 24(c), the court "reports the case to the Law Court" and asks the Court to decide Defendant's appeal of this court's ruling on the motions to dismiss or for judgment on the pleadings before further proceedings are taken.

CONCLUSION

Based on the foregoing, the entry will be:

Defendant The Roman Catholic Bishop of Portland's Motion to Report to the Law Court is GRANTED.

The Clerk is requested to enter this Order on the Docket, incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

Date: 4/6/2023

Thomas R. McKeon
Justice, Business & Consumer Docket

Entered on the docket: 04/07/2023

STATE OF MAINE PENOBSCOT, SS.		SUPERIOR COURT CIVIL ACTION DOCKET NO.:
ROBERT E. DUPUIS, Plaintiff v. ROMAN CATHOLIC BISHOP OF PORTLAND, Defendant	* * * * * * * * * * * * * * *	COMPLAINT

NOW COMES Plaintiff Robert E. Dupuis, by and through counsel, and alleges as follows:

PARTIES

1. Plaintiff Robert E. Dupuis is an adult male. His date of birth is March 10, 1949.

2. Plaintiff is a resident of New London County, State of Connecticut.

3. Defendant Roman Catholic Bishop of Portland is a corporation sole imbued with ". . . the financial authority and responsibility for the local presence of the church."[1] At all times relevant to this Complaint, Defendant was, and is, a corporation sole doing business in Maine.

4. The Roman Catholic Bishop of Portland owned and operated St. Joseph Church—a Catholic church located at 429 Main Street in Old Town, Maine, formerly belonging to the "St. Joseph Parish."

5. The now-defunct St. Joseph Parish was merged with the "St. Mary Parish" in 1992, as part of the reorganization and consolidation of several local parishes into the present-day "Parish

[1] *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, ¶ 1 n.1, 692 A.2d 441, 442.

of the Resurrection of the Lord," which today serves communities in Old Town, Orono, Bradley, and the Penobscot Nation.

6. Today, the former St. Joseph Church remains under Diocesan control and is known as the "Holy Family" Church.

BACKGROUND FACTS RELEVANT TO ALL COUNTS

7. At all times relevant to this Complaint, Defendant operated St. Joseph Church as part of the now-defunct St. Joseph Parish.

8. St. Joseph Parish and St. Joseph Church were at all times relevant to this Complaint, entities affiliated with and under the guidance, control, and oversight of the Roman Catholic Bishop of Portland, the Archdiocese of Boston, the United States Conference of Catholic Bishops, and, globally, the Holy See in Rome, Italy ("the Vatican").

9. Defendant recruited, selected, trained, supervised, and retained adults to serve as priests and clergy in St. Joseph Parish and St. Joseph Church.

10. Defendant recruited, selected, trained, supervised, employed and retained Father John J. Curran ("Curran") as priest of St. Joseph Church in Old Town, Maine.

11. Curran served as the priest at St. Joseph Church from 1960 to 1962.

12. In 1962, the Roman Catholic Bishop of Portland reassigned Curran to St. Augustine Parish in Augusta, Maine.

13. On its behalf and for its benefit, Defendant authorized, permitted, and allowed Curran to counsel, communicate, interact with, and train parishioners, including Plaintiff, in morality, religion, leadership, and various life skills and religious precepts of the Catholic faith.

14. Defendant knew that as part of Curran's duties as a priest, he would be in a position of trust and confidence with parishioners, including Plaintiff.

15. Curran was specifically assigned and authorized, as an agent of Defendant and under the apparent authority thereof, to interact with Plaintiff as part of his duties as the priest and holy leader of the St. Joseph Church for the benefit of Defendant, his employer.

16. At all times relevant to this Complaint, Defendant controlled the means and methods by which priests performed their duties within the parish.

17. Defendant intended that Curran act on its behalf and subject to their control, and Curran agreed to act under the direction of Defendant, the Archdiocese, the United States Conference, and the Holy See, and even under the purported holy right of the Catholic religion, as their agent.

18. In 1961, Plaintiff was 12 years old and living in Old Town, Maine, with his parents, and five siblings.

19. At all times relevant to the events set forth in this complaint, as a member of the local Catholic community, Plaintiff was a parishioner at St. Joseph Church, where Plaintiff attended St. Joseph School.

20. Prior to the below-described events, Plaintiff was generally familiar with Curran in his role as parish leader, but had not had direct interaction with Curran.

21. In Summer 1961, Plaintiff's cousin, also approximately age 12, informed Plaintiff of an opportunity for summer employment at the Church where he worked for Curran.

22. Plaintiff expressed interest in being hired for work to help supplement his family's low income.

23. Soon thereafter, Plaintiff's cousin advised Plaintiff to contact Curran to inquire about work.

24. Plaintiff proceeded to visit the St. Joseph Rectory where he met with Curran.

25. Curran agreed to hire Plaintiff to assist with groundskeeping, banquet setup, and other miscellaneous odd jobs and tasks around the parish grounds.

26. Curran promised to pay Plaintiff on a bi-weekly basis for Plaintiff's labor.

27. Throughout the summer of 1961, Plaintiff reported to Curran and parish officials for work assignments.

28. As promised, Plaintiff was paid bi-weekly by Curran.

29. During the fall of 1961, Curran began to invite Plaintiff into what, at the time, Plaintiff believed was Curran's office for "prayer" prior to receiving his wages.

30. In reality, Curran was taking Plaintiff into a closet in which Curran had placed a stationary chair.

31. During these "prayer" sessions, and prior to paying Plaintiff his wages, Curran would engage in grooming and sexual abuse of Plaintiff.

32. Leveraging his authority and position of trust as a religious leader for Defendant, Curran induced, cajoled, groomed, and otherwise directed Plaintiff to have sexual contact, as defined in 17-A M.R.S. § 251(1)(D), with Curran, as *infra*.

33. Specifically, Curran instructed plaintiff to kneel before Curran as Curran sat in the chair.

34. Curran would ask Plaintiff about Plaintiff's family and life.

35. Curran would then say it was time to engage in prayer.

36. Curran forcefully held Plaintiff's head and face against Curran's groin and penis, over Curran's clothing.

37. Curran instructed Plaintiff to sit on Curran's lap and, so doing, Curran would hold onto Plaintiff's waist with one hand, pulling Plaintiff's body and buttocks into close contact with Curran's groin and penis, over clothing.

38. Simultaneously, Curran would use his other hand to fondle Plaintiff's penis over Plaintiff's clothing.

39. After several minutes of contact, Curran would give Plaintiff the promised wages and dismiss Plaintiff.

40. The final incident of abusive contact occurred in December 1961.

41. Following the last day of classes at St. Joseph School prior to the holiday break, Plaintiff reported to Curran's office to collect his wages.

42. Curran instructed Plaintiff to enter the closet and proceeded to abuse Plaintiff under the same abuse sequence and ritual.

43. On this occasion, Curran expressed anger that Plaintiff was not "getting hard"—meaning that Plaintiff did not have an erection while Curran was fondling Plaintiff's penis.

44. Curran scolded Plaintiff and when Plaintiff offered no response pushed Plaintiff from Curran's lap.

45. Curran cursed Plaintiff to "get the hell out of here," saying that Plaintiff had "nothing to offer [Curran]."

46. Subsequently, Plaintiff was disallowed a return to his work for the parish following the holiday break.

47. Plaintiff's peers, including his cousin, informed Plaintiff that Curran had told them Plaintiff had been fired because Plaintiff was "unreliable."

48. Plaintiff suffered immense emotional injury and became an "outcast" in his peer group in Old Town, Maine.

49. After these incidents, the Roman Catholic Bishop of Portland reassigned Curran to St. Augustine Parish, located in Augusta, Maine. On information and belief, Curran was reassigned multiple times during his career.

50. Decades later, in 2007, Plaintiff came forward and publicly shared his experience as a survivor of childhood sex abuse by Curran.

51. Plaintiff successfully petitioned the City of Augusta, Maine, to remove Curran's name from a dedication on the Water Street Bridge.

52. That same year, then-Bishop of Portland Richard Malone issued a public statement supporting the City of Augusta's decision to remove Curran's name from the bridge in light of the disclosures made by Plaintiff and other survivors of abuse by Curran.

COUNT I
NEGLIGENT FAILURE TO WARN, TRAIN, OR EDUCATE

53. Plaintiff realleges and incorporates by reference all allegations set forth in the paragraphs above.

54. Defendant knew or reasonably should have known of the risk to minor parishioners of childhood sex abuse perpetrated by members of its clergy and/or staff and/or volunteers based on actual notice of events occurring under the control of the Roman Catholic Bishop of Portland since at least 1955.

55. On information and belief, the Roman Catholic Bishop of Portland had actual notice of child sex abuse perpetrated by one of its clergy—Rev. James P. Vallely—as late as 1955, but took no action to remediate the risk Vallely posed.

56. Vallely was never removed from ministry and voluntarily retired in 1988.

57. On information and belief, the Roman Catholic Bishop of Portland's actual notice of child sex abuse perpetrated by members of its clergy increased when, in 1963, Msgr. Henry A. Boltz became the subject of inquiry regarding inappropriate contact with a teenage counselor at a Diocesan summer camp.

58. On information and belief, Most. Rev. Edward C. O'Leary, D.D., Ninth Bishop of Portland, who was Chancellor at the time—confronted the clergyman who disclosed Boltz's inappropriate contact.

59. In 2005, the Roman Catholic Bishop of Portland acknowledged that allegations of sexual abuse against Msgr. Boltz were substantiated and that the 1963 disclosure would have been "handled differently" had it occurred contemporarily.

60. Since at least 1922, Defendant knew or reasonably should have known of the risk to minor parishioners of childhood sex abuse perpetrated by members of its clergy and/or staff and/or volunteers based on, at a minimum, constructive notice of events occurring under the control of the Roman Catholic Bishop of Portland, the Archdiocese of Boston, the United States Conference of Catholic Bishops, and the Holy See.

61. In 1922, the Holy See published canon law entitled *Crimens Solicitationis*—Latin for "the Crime of Solicitation"—to United States Conference of Catholic Bishops, and suffragan Archdioceses and Dioceses thereunder, including Defendant.

62. In 1922, the Holy See, the United States Conference of Catholic Bishops, and suffragan Archdioceses and Dioceses thereunder, and Defendant were on notice of the hazards of child sexual abuse perpetrated by its priests, officers, employees, and/or agents.

63. *Crimens Solicitationis* served as a sexual abuse prevention policy, but it was kept secret and not disclosed to Defendant's parishioners and the public.

64. The 1922 *Crimens Solicitationis* sets forth definitions for crimes prosecutable against clergy for soliciting sexual contact with penitents and children, punishable by excommunication and repentance.

65. The 1922 *Crimens Solicitationis* further defines homosexual contact as "the worst possible crime."

66. The 1922 *Crimens Solicitationis* prescribes a "secret" process and tribunal for adjudicating alleged crimes of solicitation and homosexuality, and mandates "the Secret of the Holy Office"—an oath that no party or member of the secret tribunal will disclose the contents of the inquiry to any person outside the confidentiality of the trial.

67. The 1922 *Crimens Solicitationis* instructed members of the clergy to store it in the "secret curia" and not to disclose its contents to anyone.

68. In 1962, the 1922 *Crimens Solicitationis* was modified and expanded, adding additional restrictions to the foregoing.

69. Defendant conducted secret church court trials pursuant to *Crimens Solicitationis* and Catholic canon law, investigating and adjudicating perpetrators of childhood sexual abuse.

70. Defendant kept its investigations and adjudications of its perpetrators of childhood sexual abuse secret from all of its parishioners and the public, and still keeps them secret through today.

71. Based on the foregoing, by 1922, Defendant had both actual and constructive knowledge of an unmitigated childhood sex abuse crisis in the ranks of the Catholic Church in Maine.

72. Despite its knowledge, Defendant failed to take any reasonable action to warn parishioners and/or their families of the known incidences, risks, and concerns of a growing number of sex abuse allegations against members of its clergy.

73. Despite its knowledge, Defendant unreasonably and fraudulently concealed information about the hazards of childhood sexual abuse perpetrated by its priests, officers, employees and agents by following Catholic Canon law and *Crimens Solicitationis* and kept this information secret from parishioners and the public, while at the same time promising to parishioners the benefits of Catholic faith, including salvation; promising truthful interactions from and with Defendant; asking its members to practice faith, obedience, liturgy, disciplined worship, confession, and repentance; to follow Defendant's example and promises by living a life in dedication to the Christian deity, avoiding sin and evil, and asking—as a material expression of faith, obedience, and repentance—parishioners to give Defendant monetary donations incident to the promised benefits of salvation, the upkeep of the Church, and other righteous and legitimate reasons that Defendant practices as part of its religious freedoms..

74. Beginning in 1922, if Defendant had warned parishioners and/or their families about the known incidences, risks, and concerns that make up the factual impetus for the *Crimens Solicitationis*—to wit, knowledge of a growing number of sex abuse allegations—it most likely would have prevented dozens if not hundreds or thousands of victims of abuse perpetrated by its priests, officers, employees and agents.

75. Beginning in 1922, if Defendant had developed, implemented and enforced reasonable sexual abuse prevention policies, to respond to the known incidences, risks, and concerns of a growing number of sex abuse allegations against members of its clergy, it most likely

would have prevented dozens if not hundreds or thousands of victims of abuse perpetrated by its priests, officers, employees and agents.

76. As such, Defendant breached its duty to take reasonable protective measures to protect minor parishioners from the known risk of childhood sex abuse.

77. Plaintiff experienced injury as a direct and foreseeable result of Defendant's negligent failure to warn, train, and educate parishioners, their families, and children about how to identify and avoid such a risk, as described above.

78. Defendant's negligent failure to warn, train, and educate was a direct and foreseeable cause of Plaintiff's damages, as alleged above.

COUNT II
BREACH OF FIDUCIARY DUTY

79. Plaintiff realleges and incorporates by reference all allegations set forth in the paragraphs above.

80. A special relationship existed between Defendant and Plaintiff incident to which Defendant owed a fiduciary duty to Plaintiff to protect Plaintiff from known and/or reasonably foreseeable harm and/or to warn Plaintiff of the danger of child grooming and sex abuse and remediation policies and procedures related thereto.

81. All children in a parish have a special relationship with the employees, officers and leaders of the church because of the disparity of power and control, authority, promises of eternal peace in Heaven for the faithful, suggestions of Hell in one's afterlife depending upon one's beliefs and behavior, and reputation and marketing for peace, greater good, spiritual guidance, miracles, prayer, truths required for salvation, God's plans, holiness, wisdom of the faithful, and other aspirations, notwithstanding Defendant's First Amendment rights to religious freedom.

82. Defendant's and Plaintiff's special relationship arose out of the actual placing of trust and confidence in fact by Plaintiff in Defendant and Defendant's agents.

83. Plaintiff's placement of trust and confidence in Defendant and Defendant's agents was reasonable in that Plaintiff was a minor child at the time he entrusted himself to Defendant.

84. Characteristic of Defendant's and Plaintiff's special relationship was a great disparity of position and influence between Defendant and Defendant's agents and Plaintiff.

85. Defendant's and Plaintiff's special relationship was, incident to Plaintiff's status as a minor child, distinct from Defendant's general relationships with adult members of the parish communities.

86. Facts sufficiently particular to demonstrate the existence of a special relationship between Plaintiff and Defendant and/or its agents include: that Plaintiff availed himself to Curran in his role as employer for the purposes of performing regular odd-jobs for wages around the parish; in his role as parish priest and, incident thereto, placed trust and confidence in Defendant's agent to provide instruction and directions as to contact with and expected behavior when working for Curran; that, incident his authority as an agent of Defendant, Curran induced Plaintiff to engage in sexual contacts under the guise of prayer/holy authority that formed the foundation of Plaintiff's religious faith and beliefs; and that, incident his authority as an agent of Defendant, Curran as parish priest was in a position of authority and control over Plaintiff—both in terms of the hierarchy of the Catholic faith and as an adult exercising authority over a minor child.

87. Given the presence of this special relationship between Plaintiff and Defendants and/or its agents, Defendant breached its fiduciary duty to Plaintiff when it failed to protect Plaintiff from known and/or reasonably foreseeable harm and/or to warn Plaintiff of the danger of child grooming and sex abuse and remediation policies and procedures related thereto.

88. Defendant's breach of its fiduciary duty towards Plaintiff was a direct and foreseeable cause of Plaintiff's damages, as alleged above.

COUNT III
FRAUDULENT CONCEALMENT

89. Plaintiff realleges and incorporates by reference all allegations set forth in the paragraphs above.

90. Defendant had actual or constructive knowledge of material facts—including ongoing knowledge of the clergy sex abuse crisis within all levels of the Catholic Church, including the Portland Diocese, as well as Curran's abusive propensities and history prior to Curran's abuse of Plaintiff—which triggered a duty to disclose.

91. Given the special relationship between Defendant and Plaintiff, Defendant owed Plaintiff a fiduciary duty to reveal information to prevent abuse or to afterward communicate to offer or suggest assistance for the issues arising from abuse.

92. The Defendant failed to disclose any of the hazards of abusive priests, generally, that it knew about since at least 1922.

93. The Defendant failed to disclose the known incidents of abuse that Curran perpetrated before abusing Plaintiff.

94. The conduct of Defendant as alleged above was intentionally or recklessly done.

95. The Defendant intended to induce all of its church members, including Plaintiff, to act by supporting the Church or to refrain from acting, including avoiding abusive environments and taking steps to protect oneself, in reliance on the non-disclosure.

96. Plaintiff in fact relied upon Defendant's non-disclosure to his detriment.

97. As a result of Defendant's conduct as described above, Plaintiff suffered physical and severe emotional injury and damages.

98. Defendant's fraudulent concealment was a direct and foreseeable cause of Plaintiff's damages, as alleged above.

COUNT IV
NEGLIGENT SUPERVISION

99. Plaintiff realleges and incorporates by reference all allegations set forth in the paragraphs above.

100. A special relationship existed between Plaintiff and Defendant.

101. This special relationship arose because of, among other things, the disparity of position and influence between the parties and because of Defendant's custodial relationship over Plaintiff, as part of which Defendant exercised *in loco parentis* supervision, control, and authority over Plaintiff by and through its agents, including Curran.

102. That special relationship created a duty on the part of Defendant to ensure that the children taking part in religious programs, including Plaintiff, were safe from unreasonable risks of harm posed by third persons.

103. Prior to Curran's sexual abuse of Plaintiff, Defendant knew or should have known that Curran had pursued inappropriate relationships with minor parishioners.

104. Despite this knowledge, Defendant exposed Plaintiff to an unreasonable risk of harm when they failed to properly monitor Curran's relationships and allowed Curran's pursuit of an inappropriate relationship to continue.

105. Defendant breached its duty to Plaintiff and was negligent. Its negligence included allowing Plaintiff to be exposed to the unreasonable risk of harm posed by Curran's relationship with Plaintiff, failing to warn Plaintiff and his parents of the dangers posed by Curran's relationship with Plaintiff, and by failing to implement reasonable child abuse prevention policies.

106. This special relationship arose because of, *inter alia*, the disparity of position and influence between the parties and because of Defendant's custodial relationship over Plaintiff, as part of which Defendant exercised *in loco parentis* supervision, control, and authority over Plaintiff by and through its agents, including Curran.

107. That special relationship created a duty on the part of Defendant to supervise its agent, Curran, in the manner that an ordinary, careful employer would supervise an employee to avoid harm occurring to third persons.

108. Defendant had actual or constructive knowledge of the inappropriate and abusive relationship between Curran and Plaintiff.

109. Defendant nonetheless retained Curran and failed to take reasonable measures warranted by its actual or constructive knowledge of this inappropriate relationship.

110. Defendant knew or should have known that it could control Curran as one of its priests and knew or should have known of the necessity and opportunity for exercising such control.

111. Curran engaged in predatory sexual grooming on the premises of Defendant's church at St. Andre's, directly precipitating sexual contact with Plaintiff.

112. If Defendant had properly supervised priests and clergy, including Curran, Plaintiff would not have been harmed, as described above.

113. Defendant's negligent supervision was a direct and foreseeable cause of Plaintiff's damages, as alleged above.

COUNT V
SEXUAL ASSAULT/RESPONDEAT SUPERIOR

114. Plaintiff realleges and incorporates by reference all allegations set forth in the paragraphs above.

115. Curran engaged in unlawful sexual acts and had sexual contact with Plaintiff while Plaintiff was a minor. These actions constituted tortious sexual assault, sexual abuse, and/or assault and battery.

116. The tortious conduct alleged above occurred while Curran was acting with the actual or apparent authority of Defendant.

117. This sexual abuse resulted from Curran's performance of his authorized agency duties on behalf of Defendant, which he was selected or accepted to perform.

118. Curran's performance of his authorized agency duties, which included cultivating a trust relationship with Plaintiff, was motivated by a desire to further the interests of Defendant.

119. The sexual abuse occurred substantially in the course of Curran's authorized interactions with Plaintiff as a spiritual leader and counselor, including grooming and solicitation of Plaintiff while present on Defendant's premises.

120. Curran was aided in engaging in sexual acts and having sexual contact with Plaintiff by the existence of his agency relation with Defendant.

121. Curran had contact and communication with Plaintiff on and/or purportedly on behalf of his employer, Defendant, as Defendant's agent.

122. Curran's contact, communication, and subsequent bad acts against Plaintiff were all undertaken with apparent authority incident to Curran's principal-agent relationship with Defendant in which Curran was cloaked in apparent authority to act on behalf of Defendant in having contact and communication with Plaintiff.

123. Curran's apparent authority enabled Curran the opportunity and ability to commit his bad acts, as well as his ability to conceal their commission to the extent Defendant was unaware of specific bad acts at the time they were perpetrated.

124. Curran's bad acts were committed while Curran was performing work assigned by Defendant and engaging in a course of conduct subject to Defendant's control.

125. Curran's use of his holy office, prayer, and counsel were incident to and intended by Curran to serve a purpose of Defendant—namely, the promotion and reinforcement of the Catholic faith and religious counsel and/or guidance by a parish leader to his parishioner(s).

126. Curran's abuse of his holy office, prayer, and counsel were carried out under the apparent authority of Defendant.

127. It was or should reasonably have been foreseeable to Defendant that Curran's apparent authority to use of his holy office, prayer, and counsel under the apparent authority of Defendant could be misused and/or abused by Curran.

128. Facts which demonstrate with specific particularity that Curran was acting, as Defendant's agent, under the apparent authority thereof, and in the course of duties and/or privileges of his holy office intended to serve Defendant include: Defendant's control over the content of holy religious teachings, guidance, and counsel as dictated by the Vatican, United States Conference, Archdiocese of Boston, and Roman Catholic Bishop of Portland; Curran's engagement in the distinct occupation of serving Defendant as a member of the Catholic clergy; that Curran's work duties were done customarily under Defendant's direction, with supervision by the Roman Catholic Bishop of Portland; that Defendant supplied all of the tools, instrumentalities, wardrobe, sacraments, holy artifacts and texts, and premises required for Curran's work; Curran's tenure as an agent and employee of Defendant; that, on information and belief, Curran was paid regularly by Defendant for his work, and not on a contract basis; that Curran's work was part of Defendant's regular business; that, on information and belief, both Curran and Defendant believed that they were in an employment relationship with one another, and so held their relationship out

to the public; Defendant's strict control over the general message and content of Curran's religious message, counsel, and guidance; and that, notwithstanding Defendant's rights to the free exercise of religious beliefs, Defendant operates as a business ("corporation sole").

129. As a result of Curran's sexual abuse; molestation; and breach of authority and trust in his position as priest, religious counselor, and authority figure to Plaintiff, Plaintiff has suffered severe and debilitating emotional injury, pain and suffering, physical and emotional trauma, and permanent psychological damage.

130. As an additional result and consequence of Curran's sexual abuse; molestation; and breach of authority and trust in his position as priest, religious counselor, and authority figure to Plaintiff, Plaintiff has incurred and/or will incur in the future costs for counseling, psychological, and psychiatric medical treatment.

131. In sexually abusing and molesting Plaintiff, Curran acted with actual or implied malice toward Plaintiff.

132. Defendant is liable for the bad acts of its agent which were a direct and foreseeable cause of Plaintiff's damages, as alleged above.

COUNT VI
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

133. Plaintiff realleges and incorporates by reference all allegations set forth in the paragraphs above.

134. Defendant intentionally or recklessly inflicted severe emotional distress upon Plaintiff through the conduct alleged above.

135. Defendant's conduct as alleged above was certain or substantially certain to result in severe emotional distress upon Plaintiff.

136. The conduct of Defendant as alleged above was intentionally or recklessly done, was outrageous and extreme in that it exceeded all possible bounds of decency, and is conduct that a reasonable person would regard as atrocious and utterly intolerable in both the context of a religious organization and, generally, in a civilized community.

137. As a result of Defendant's conduct as described above, Plaintiff suffered emotional distress so severe that no reasonable person could be expected to endure it.

138. Defendant's intentional infliction of emotional distress was a direct and foreseeable cause of Plaintiff's damages, as alleged above.

COUNT VII
PUNITIVE DAMAGES

139. Plaintiff realleges and incorporates by reference all paragraphs above.

140. In the actions and omissions as set forth above, Defendant acted with actual or implied malice.

WHEREFORE, as a result of the above-described contact, Plaintiff has suffered, and continues to suffer emotional distress, physical manifestations thereof, embarrassment, loss of self-esteem, disgrace, humiliation, and loss of enjoyment of life; was prevented and will continue to be prevented from performing daily activities and obtaining full enjoyment of life; and has incurred and will continue to incur expenses for medical psychological treatment, therapy, and counseling.

WHEREFORE, Plaintiff demands judgment against Defendant for compensatory damages, punitive damages, interest, costs, and such other and further relief as the Court deems just and equitable.

Dated: June 15, 2022

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STATE OF MAINE
PENOBSCOT, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: PENSC-CIV-22-0072

ROBERT E. DUPUIS,

Plaintiff,

v.

THE ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant.

ANSWER

The Roman Catholic Bishop of Portland (the "Diocese"), a corporation sole, by and through its attorneys, answers the Plaintiff's Complaint in this matter as follows:

INTRODUCTION

In response generally to the Complaint, and for purposes of context, the Diocese asserts affirmatively that The Roman Catholic Bishop of Portland is a corporation sole; i.e., an independent legal entity as a matter of both Maine State law and Canon law. The Roman Catholic Bishop of Portland is not a subsidiary of the Catholic Archdiocese of Boston, the United States Conference of Bishops or the Holy See. The Roman Catholic Bishop of Portland responds to the specific allegations in the Complaint, as it must, in its capacity as an independent legal entity with no capacity to answer for any other entity and based exclusively on its own knowledge, information and belief.

PARTIES

1. The Diocese is informed and believes that the allegations set forth in Paragraph 1 of Plaintiff's Complaint are true; therefore, the Diocese admits those allegations.

2. The Diocese is informed and believes that the allegations set forth in Paragraph 2 of Plaintiff's Complaint are true; therefore, the Diocese admits those allegations.

3. The Diocese admits that The Roman Catholic Bishop of Portland is, and has been at all relevant times, a corporation sole with the financial authority and responsibility for the presence of the Catholic Parishes in the State of Maine. The Diocese denies all other allegations in Paragraph 3 of Plaintiff's Complaint.

4. The Diocese admits that, at all relevant times, St. Joseph's Church, located at 429 Main Street in Old Town, Maine, was a church owned by the Diocese and operated within the Roman Catholic Diocese of Portland.

5. The Diocese admits the allegations set forth in Paragraph 5 of Plaintiff's Complaint.

6. The Diocese admits the allegations set forth in Paragraph 6 of Plaintiff's Complaint.

7. The Diocese admits that St. Joseph Church and St. Joseph Parish were, at all relevant times, entities affiliated with and generally under the guidance and oversight of the Diocese. The Defendant denies that it exercised day-to-day operational control over St. Joseph Church or St. Joseph Parish and denies that it knew or had reason to know the details of the day-to-day activities of the Pastor or other clergy working there. The Diocese denies the allegations in Paragraph 7 of Plaintiff's Complaint in all other respects.

8. The Diocese incorporates its response to Paragraph 7 of Plaintiff's Complaint as if set forth herein. The Diocese admits that the Roman Catholic Bishop of Portland is, and has been at all relevant times, a corporation sole with financial authority and responsibility for the presence of the Catholic church in the State of Maine. The Diocese affirmatively states that the

Roman Catholic Bishop of Portland is an independent legal entity as a matter of Maine law and Canon law and that it is not a subsidiary of the Archdiocese of Boston, the United States Conference of Catholic Bishops, or the Holy See. The Diocese denies all other allegations set forth in Paragraph 8 of Plaintiff's Complaint.

9. The Diocese incorporates by reference its responses to Paragraphs 7 and 8, *supra*, and answers further that it has, at all relevant times, recruited, selected, trained, supervised, and/or retained some of the adult priests and clergy who have worked in the St Joseph Parish and St. Joseph Church. The Diocese denies all other allegations set forth in Paragraph 9 of Plaintiff's Complaint.

10. The Diocese admits that Father John J. Curran ("Fr. Curran") was a priest at St. Joseph Church. The assertion that Fr. Curran is an employee of St. Joseph Church sets forth a legal conclusion to which no response is required. To the extent a response is required, the Diocese denies the legal conclusion. All other allegations set forth in Paragraph 10 of Plaintiff's Complaint are denied.

11. The Diocese admits the allegations set forth in Paragraph 11 of Plaintiff's Complaint.

12. The Diocese admits the allegations set forth in Paragraph 12 of Plaintiff's Complaint.

13. The Diocese admits its ordained priests, including Fr. Curran's, work was expected to include counseling, communicating, and interacting with and educating parishioners in morality, religion and religious precepts of the Catholic faith.

14. The Diocese expected that Fr. Dupuis like, all ordained priests, would be in a position of trust and confidence with some parishioners. The Diocese had no such expectation specifically with respect to Plaintiff.

15. One or more of the allegations set forth in Paragraph 15 of Plaintiff's Complaint state legal conclusions to which no response is required. The Diocese admits that ordained priests and clergy were expected to interact with parishioners generally, but the Diocese denies all other allegations contained in Paragraph 15 of Plaintiff's Complaint.

16. The Diocese incorporates its response to Paragraphs 7 and 8 of Plaintiff's Complaint herein. The Diocese denies the remaining allegations set forth in Paragraph 16 of Plaintiff's Complaint.

17. The Diocese admits that it intended that Fr. Curran would act on its behalf in ministering to parishioners within the scope of his religious vocation. The Diocese denies that it intended that Fr. Curran do so subject to the Diocese's control, although the Diocese expected Fr. Curran would carry out his ministry in a way that was consistent with his status as a minister of religion who had been commissioned with the Holy Orders of the Catholic church. All other allegations are denied in Paragraph 17 of Plaintiff's Complaint.

18. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 18 of Plaintiff's Complaint.

19. The Diocese is informed and believes that the allegations set forth in Paragraph 19 of Plaintiff's Complaint are true; therefore, the Diocese admits those allegations.

20. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 20 of Plaintiff's Complaint.

21. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 21 of Plaintiff's Complaint.

22. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 22 of Plaintiff's Complaint.

23. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 23 of Plaintiff's Complaint.

24. The Diocese admits that at some point in time Plaintiff met Fr. Curran, however, the Diocese lacks sufficient information to admit or deny the date of the meeting or the reason for the meeting.

25. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 25 of Plaintiff's Complaint.

26. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 26 of Plaintiff's Complaint.

27. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 27 of Plaintiff's Complaint.

28. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 28 of Plaintiff's Complaint.

29. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 29 of Plaintiff's Complaint.

30. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 30 of Plaintiff's Complaint.

31. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 31 of Plaintiff's Complaint.

32. One or more of the allegations set forth in Paragraph 32 of Plaintiff's Complaint state legal conclusions to which no response is required. The Diocese lacks sufficient information to admit or deny the remaining allegations set forth in Paragraph 32 of Plaintiff's Complaint.

33. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 33 of Plaintiff's Complaint.

34. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 34 of Plaintiff's Complaint.

35. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 35 of Plaintiff's Complaint.

36. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 36 of Plaintiff's Complaint.

37. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 37 of Plaintiff's Complaint.

38. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 38 of Plaintiff's Complaint.

39. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 39 of Plaintiff's Complaint.

40. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 40 of Plaintiff's Complaint.

41. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 41 of Plaintiff's Complaint.

42. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 42 of Plaintiff's Complaint.

43. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 43 of Plaintiff's Complaint.

44. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 44 of Plaintiff's Complaint.

45. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 45 of Plaintiff's Complaint.

46. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 46 of Plaintiff's Complaint.

47. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 47 of Plaintiff's Complaint.

48. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 48 of Plaintiff's Complaint.

49. The Diocese admits that Fr. Curran was reassigned more than one time in his career, but denies he was reassigned after he was assigned to the St. Augustine Parish. The Diocese affirmatively states Fr. Curran was not reassigned after the Diocese became aware of allegations of sexual abuse.

50. The Diocese admits that decades later in 2007, Plaintiff openly accused Fr. Curran of sexually abusing him.

51. The Diocese admits that the City of Augusta removed Fr. Curran's name from a dedication on the Water Street Bridge, but the Diocese lacks sufficient information to admit or deny the other allegations set forth in Paragraph 51 of Plaintiff's Complaint.

52. The Diocese admits that it didn't object to the City of Augusta removing Fr. Curran's name from the dedication on the Water Street Bridge.

COUNT I
NEGLIGENT FAILURE TO WARN, TRAIN, OR EDUCATE

53. The Diocese repeats and realleges its responses to Paragraphs 1 to 52 in Plaintiff's Complaint as if they were fully set forth herein.

54. The Diocese denies the allegations set forth in Paragraph 54 of Plaintiff's Complaint.

55. The Diocese denies the allegations set forth in Paragraph 55 of Plaintiff's Complaint.

56. The Diocese admits the allegations set forth in Paragraph 56 of Plaintiff's Complaint and further answers affirmatively that after the Diocese became aware of allegations against Fr. Vallely, which was after he retired, the Diocese restricted Fr. Vallely from public ministry.

57. The Diocese denies the allegations set forth in Paragraph 57 of Plaintiff's Complaint.

58. The Diocese is without knowledge sufficient to form a belief about whether the interaction alleged in Paragraph 58 of Plaintiff's Complaint ever occurred (the allegation includes no date) or, if so, who or what it may have involved (the allegation asserts only that Bishop O'Leary "confronted" an unidentified member of the clergy). For these reasons, the Diocese denies the allegations in Paragraph 58 of Plaintiff's Complaint.

59. The Diocese admits that, in 2005, its investigator concluded that there was information found during the investigation of allegations against Msgr. Boltz that supported the

allegations. The Diocese otherwise denies all allegations set forth in Paragraph 59 of Plaintiff's Complaint.

60. The Diocese denies the allegations set forth in Paragraph 60 of Plaintiff's Complaint.

61. The document referenced in Paragraph 61 of Plaintiff's Complaint speaks for itself and, therefore, no response is required. To the extent a response is required, the Diocese denies the same.

62. The document referenced in Paragraph 62 of Plaintiff's Complaint speaks for itself and, therefore, no response is required. To the extent a response is required, the Diocese denies the same.

63. The document referenced in Paragraph 63 of Plaintiff's Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required, the Diocese states that the document referenced in Paragraph 63 of Plaintiff's Complaint speaks for itself and no response is required. The Diocese denies all other allegations set forth in Paragraph 63 of Plaintiff's Complaint.

64. The document referenced in Paragraph 64 of Plaintiff's Complaint speaks for itself to which no response is required.

65. The document referenced in Paragraph 65 of Plaintiff's Complaint sets forth a legal conclusion to which no response is required.

66. The document referenced in Paragraph 66 of Plaintiff's Complaint speaks for itself to which no response is required. To the extent a response is required, the Diocese denies the same.

67. The document referenced in Paragraph 67 of Plaintiff's Complaint speaks for itself to which no response is required. To the extent a response is required, the Diocese denies the same.

68. The Diocese admits that, in 1962, Pope John XXIII approved a document entitled *Crimen Sollicitationis*, which restated and expanded upon a document of the same title that had been created in 1922. In all other respects, the Diocese denies the allegations set forth in Paragraph 68 of Plaintiff's Complaint.

69. The Diocese denies the allegations set forth in Paragraph 69 of Plaintiff's Complaint.

70. The Diocese denies the allegations set forth in Paragraph 70 of Plaintiff's Complaint.

71. The Diocese denies the allegations set forth in Paragraph 71 of Plaintiff's Complaint.

72. The Diocese denies the allegations set forth in Paragraph 72 of Plaintiff's Complaint.

73. The Diocese denies the allegations set forth in Paragraph 73 of Plaintiff's Complaint.

74. The allegations set forth in Paragraph 74 of Plaintiff's Complaint are not allegations of fact or legal conclusions, but rather are predictions of potential future consequences based on facts that did not occur. Therefore, no response is required. To the extent a response is required, the Diocese denies the same.

75. The allegations set forth in Paragraph 75 of Plaintiff's Complaint are not allegations of fact or legal conclusions, but rather are predictions of potential future

consequences based on facts that did not occur. Therefore, no response is required. To the extent a response is required, the Diocese denies the same.

76. The Diocese denies the allegations set forth in Paragraph 76 of Plaintiff's Complaint.

77. The Diocese denies the allegations set forth in Paragraph 77 of Plaintiff's Complaint.

78. The Diocese denies the allegations set forth in Paragraph 78 of Plaintiff's Complaint.

COUNT II
BREACH OF FIDUCIARY DUTY

79. The Diocese repeats and realleges its responses to Paragraphs 1 to 78 in Plaintiff's Complaint as if they were fully set forth herein.

80. The allegations set forth in Paragraph 80 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required the Diocese denies the same.

81. The allegations set forth in Paragraph 81 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required, the Diocese denies the same.

82. The allegations set forth in Paragraph 82 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required, the Diocese denies the same.

83. The allegations set forth in Paragraph 83 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required, the Diocese denies the same.

84. The allegations set forth in Paragraph 84 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required, the Diocese denies the same.

85. The allegations set forth in Paragraph 85 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required the Diocese denies the same.

86. The allegations set forth in Paragraph 86 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required the Diocese denies the same. The Diocese lacks sufficient information to admit or deny the specific allegations in Paragraph 86 of Plaintiff's Complaint regarding interactions between the Plaintiff and Fr. Curran.

87. The Diocese denies the allegations set forth in Paragraph 87 of Plaintiff's Complaint.

88. The Diocese denies the allegations set forth in Paragraph 88 of Plaintiff's Complaint.

COUNT III
FRAUDULENT CONCEALMENT

89. The Diocese repeats and realleges its responses to Paragraphs 1 to 88 in Plaintiff's Complaint as if they were fully set forth herein.

90. The Diocese denies the allegations set forth in Paragraph 90 of Plaintiff's Complaint.

91. The Diocese denies the allegations set forth in Paragraph 91 of Plaintiff's Complaint.

92. The Diocese denies the allegations set forth in Paragraph 92 of Plaintiff's Complaint.

93. The Diocese denies the allegations set forth in Paragraph 93 of Plaintiff's Complaint.

94. The Diocese denies the allegations set forth in Paragraph 94 of Plaintiff's Complaint.

95. The Diocese denies the allegations set forth in Paragraph 95 of Plaintiff's Complaint.

96. The Diocese denies the allegations set forth in Paragraph 96 of Plaintiff's Complaint.

97. The Diocese denies the allegations set forth in Paragraph 97 of Plaintiff's Complaint.

98. The Diocese denies the allegations set forth in Paragraph 98 of Plaintiff's Complaint.

COUNT IV
NEGLIGENT SUPERVISION

99. The Diocese repeats and realleges its responses to Paragraphs 1 to 98 in Plaintiff's Complaint as if they were fully set forth herein.

100. The allegations set forth in Paragraph 100 of Plaintiff's Complaint state a legal conclusion to which no response is required. To the extent a response is required, the Diocese denies the same.

101. The allegations set forth in Paragraph 101 of Plaintiff's Complaint state a legal conclusion to which no response is required. To the extent a response is required, the Diocese denies the same.

102. The allegations set forth in Paragraph 102 of Plaintiff's Complaint state a legal conclusion to which no response is required. To the extent a response is required, the Diocese denies the same.

103. The Diocese denies the allegations set forth in Paragraph 103 of Plaintiff's Complaint.

104. The Diocese denies the allegations set forth in Paragraph 104 of Plaintiff's Complaint.

105. The Diocese denies the allegations set forth in Paragraph 105 of Plaintiff's Complaint.

106. The allegations set forth in Paragraph 106 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required the Diocese denies the same.

107. The allegations set forth in Paragraph 107 of Plaintiff's Complaint state one or more legal conclusions to which no response is required.

108. The Diocese denies the allegations set forth in Paragraph 108 of Plaintiff's Complaint.

109. The Diocese denies the allegations set forth in Paragraph 109 of Plaintiff's Complaint.

110. The Diocese denies the allegations set forth in Paragraph 110 of Plaintiff's Complaint.

111. The Diocese denies that Fr. Curran was assigned to St. Andre's Parish and, therefore, denies the allegations set forth in Paragraph 111 of Plaintiff's Complaint.

112. The allegations set forth in Paragraph 112 of Plaintiff's Complaint are not allegations of fact or legal conclusions, but rather are predictions of potential future consequences based on facts that did not occur. Therefore, no response is required. To the extent a response is required, the Diocese denies the same.

113. The Diocese denies the allegations set forth in Paragraph 113 of Plaintiff's Complaint.

COUNT V
SEXUAL ASSAULT/RESPONDEAT SUPERIOR

114. The Diocese repeats and realleges its responses to Paragraphs 1 to 113 in Plaintiff's Complaint as if they were fully set forth herein.

115. One or more of the allegations set forth in Paragraph 115 of Plaintiff's Complaint states a legal conclusion to which no response is required. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 115 of Plaintiff's Complaint.

116. The Diocese denies the allegations set forth in Paragraph 116 of Plaintiff's Complaint.

117. The Diocese denies the allegations set forth in Paragraph 117 of Plaintiff's Complaint.

118. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 118 of Plaintiff's Complaint.

119. The allegations set forth in Paragraph 119 of Plaintiff's Complaint state one or more legal conclusions to which no response is required. To the extent a response is required, the Diocese lacks sufficient information to admit or deny those allegations. The Diocese denies that any sexual abuse that may have occurred was within Fr. Curran's scope of employment as a priest within the meaning of Maine law.

120. The Diocese denies the allegations set forth in Paragraph 120 of Plaintiff's Complaint.

121. The Diocese admits that Fr. Curran interacted with the Plaintiff, at times, in his role as a parish priest within the Diocese but states that the remaining allegations set forth in Paragraph 121 of Plaintiff's Complaint state a legal conclusion to which no response is required.

122. The Diocese denies the allegations set forth in Paragraph 122 of Plaintiff's Complaint.

123. The Diocese denies the allegations set forth in Paragraph 123 of Plaintiff's Complaint.

124. The Diocese denies the allegations set forth in Paragraph 124 of Plaintiff's Complaint.

125. The Diocese is without knowledge sufficient to form a belief about what Fr. Curran intended; therefore, the Diocese denies the allegations about that subject set forth in Paragraph 125 of Plaintiff's Complaint. The Diocese admits that a purpose of the Church is to promote and reinforce the Catholic faith and religious counsel and/or guidance by a parish leader to parishioners.

126. The Diocese denies the allegations set forth in Paragraph 126 of Plaintiff's Complaint.

127. The Diocese denies the allegations set forth in Paragraph 127 of Plaintiff's Complaint.

128. The Diocese denies that the facts alleged in Paragraph 128 of Plaintiff's Complaint demonstrate that Fr. Curran was acting as the Diocese's actual or apparent agent at any time in any way that is relevant to the claims asserted by the Plaintiff. The Diocese admits

exercising some control over the content of holy religious teachings within the Diocese of Portland; the Diocese admits that Fr. Curran was a member of the Catholic clergy in the Diocese of Portland at relevant times; with respect to allegations regarding the relationship between the Diocese and Fr. Curran and the degree of oversight exercised by the Diocese over Fr. Curran the Diocese repeats its responses to Paragraphs 7 and 8 of Plaintiff's Complaint as if set forth herein. The Diocese admits that it provided some of the tools and instrumentalities employed by Fr. Curran in his ministries and that it provided premises where Fr. Curran ministered to parishioners. The Diocese denies that it provided Fr. Curran's wardrobe. The Diocese does not understand what is meant by the terms "holy artifacts" and "texts" in Paragraph 128 of Plaintiff's Complaint and, therefore, denies the allegations that relate specifically to those terms. The Diocese admits that, as a priest in the Diocese of Portland, Fr. Curran was paid regularly for his work as a priest, and Fr. Curran and the Diocese understood and represented to the public that Fr. Curran was ministering to parishioners on the Bishop's behalf. In all other respects, the allegations in Paragraph 128 of Plaintiff's Complaint are denied.

129. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 129 of Plaintiff's Complaint.

130. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 130 of Plaintiff's Complaint.

131. The Diocese lacks sufficient information to admit or deny the allegations set forth in Paragraph 131 of Plaintiff's Complaint.

132. The Diocese denies the allegations set forth in Paragraph 132 of Plaintiff's Complaint.

COUNT VI
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

133. The Diocese repeats and realleges its responses to Paragraphs 1 to 132 in Plaintiff's Complaint as if they were fully set forth herein.

134. The Diocese denies the allegations set forth in Paragraph 134 of Plaintiff's Complaint.

135. The Diocese denies the allegations set forth in Paragraph 135 of Plaintiff's Complaint.

136. The Diocese denies the allegations set forth in Paragraph 136 of Plaintiff's Complaint.

137. The Diocese denies the allegations set forth in Paragraph 137 of Plaintiff's Complaint.

138. The Diocese denies the allegations set forth in Paragraph 138 of Plaintiff's Complaint.

COUNT VII
PUNITIVE DAMAGES

139. The Diocese repeats and realleges its responses to Paragraphs 1 to 138 in Plaintiff's Complaint as if they were fully set forth herein.

140. The Diocese denies the allegations set forth in Paragraph 140 of Plaintiff's Complaint.

141. Each and every allegation of the Plaintiff's Complaint not previously expressly admitted is denied.

ADDITIONAL DEFENSES AND AFFIRMATIVE DEFENSES

1. Plaintiff's claims are time barred pursuant to the applicable statute of limitations (14 M.R.S. § 752).

2. Plaintiff's claims are time barred because 14 M.R.S. § 752-C does not apply to actions other than actions against a natural person.

3. Plaintiff's claims are time barred because to the extent 14 M.R.S. § 752-C is deemed applicable to parties other than natural persons, as said application would violate the Diocese's due process rights under U.S. Const. Am. V, U.S. Const. Am. XIV, and Me. Const. Art. I, § 6-A.

4. Plaintiff's claims are barred by the First Amendment of the U.S. Constitution.

5. Plaintiff's claims are barred by Article 1, § 3 of the Constitution of the State of Maine.

6. In whole or in part, the Plaintiff's Complaint fails to state a claim for which relief can be granted.

7. One or more of Plaintiff's claims are barred by the Doctrine of Laches.

8. One or more of Plaintiff's claims are barred by the Doctrine of Charitable Immunity.

9. One or more of Plaintiff's claims may be barred by the Doctrine of Equitable Estoppel.

10. Plaintiff's claim for fraudulent concealment fails because Plaintiff has failed to allege fraudulent conduct with sufficient particularity (M.R.Civ.P. 9(b)).

11. The Diocese cannot be held liable for compensatory damages, upon theories of vicarious or derivative liability, based on the intentional and/or criminal misconduct of a natural person.

12. The Diocese cannot be held liable for punitive damages, upon theories of vicarious or derivative liability, based on the intentional and/or criminal misconduct of a natural person.

WHEREFORE, Defendant demands judgment in its favor on the Complaint along with an award of its costs and such other and further relief as the Court shall deem just and equitable.

Dated: July 20, 2022

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STATE OF MAINE
CUMBERLAND, SS

BUSINESS AND CONSUMER DOCKET
CIVIL ACTION
DOCKET NO: BCD-CIV-2022-00044

ROBERT E. DUPUIS,

Plaintiff,

v.

THE ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS WITH INCORPORATED MEMORANDUM OF LAW

I. INTRODUCTION

This is a Motion for Judgment on the Pleadings pursuant to M.R. Civ. P. 12(c). It ought to be granted for the reasons set forth in the incorporated memorandum below. The fundamental premise of this Motion is that the only material fact is not only not disputed, but it is alleged in the Complaint.

Robert Dupuis was born on [redacted] 1949[1] (Complaint, ¶ 1; Answer, ¶ 1) and alleges that he was abused in 1961. He turned 21 (then the age of majority in Maine) in 1970, at which point the statute of limitations for the only available civil action based on the alleged abuse (an action for battery against the person he says abused him) was two years. Under 14 M.R.S. § 853, that statute expired on [redacted], 1972, two years after Mr. Dupuis reached the age of majority. At no time prior to the expiration of Mr. Dupuis's statute of limitations was an action for sexual abuse based on an employer's

[1] This motion is one of three motions filed in three related cases (BCD-CIV-2022-00044, BCD-CIV-2022-00048, and BCD-CIV-2022-00049). The motions are identical except for the second paragraph, which sets forth the material information unique to the Plaintiff in each case.

negligent supervision of the perpetrator ever recognized in Maine law. Because the latest possible time when any available statute of limitations could begin to run was the date on which Mr. Dupuis reached the age of majority, this date, rather than any date on which abuse is claimed to have occurred, is the only material fact for purposes of determining when the statute of limitations expired. Unless Plaintiff's legal argument is accepted, any claim he could have made for damages related to sexual abuse to which he was subjected as a minor has been time-barred since 1972. Primarily for that reason, but also for other reasons more fully explained below, the Diocese is entitled to judgment on the pleadings.

Analytically the motion for judgment on the pleadings is identical to a motion for failure to state a claim upon which relief can be granted, except that it comes after the pleadings have been closed. The Law Court has held, in both connections, that such a motion may be granted with respect to matters that are technically affirmative defenses whenever the pleadings on their face show that an affirmative defense must necessarily, as a matter of law, succeed. *Cunningham v. Haza*, 538 A.2d 265, 267 (Me. 1988); 2 Harvey & Merritt, *Maine Civil Practice* § 12:14 at 432 (3d, 2021-2022 ed. 2021). In such a circumstance, obviously, the Complaint fails to state a claim upon which relief (as a matter of law) can be granted. This Motion squarely places before the Court on an undisputed factual record two questions of law. The first is whether 14 M.R.S.A. §752-C, Subsection 3, as most recently amended, is legally precluded from retroactive applicability notwithstanding the Legislature's manifest intent that it be retroactive in its operation. The second is whether 14 M.R.S.A. §752-C in any of its iterations is now or

ever has been applicable to any defendant, except a human defendant who is accused of committing the specified criminal acts that define the scope of the Statute.

Obviously, if the legislation cannot legally be applied retroactively, Defendant is entitled to judgment forthwith without any of the expense and disadvantages of having to litigate the matter further. Equally obviously, if the legislation applies only to claims against a natural person who is accused of having committed the defined sexual misconduct, and not to organizations with whom some affiliative relationship is alleged, then the legislation has no applicability to this Defendant and the action has long been barred by 14 M.R.S.A. §752. These issues are addressed in turn below.

II. THE JURISPRUDENTIAL CONTEXT

Before specifically demonstrating that retroactivity is precluded here, it is essential to have in mind multiple principles and rules of law that broadly and consistently reinforce and secure several fundamental characteristics of justice: protection of reliance interests, stability, predictability, consistency, and finality. These pervasive and enduring principles and rules preclude isolated, arbitrary, inconsistent actions on the same matter. They especially preclude unfairly belated attempts to undo governmental actions such as statutes of limitations upon which parties have relied to their detriment.

These principles and rules travel under various names in various settings, but they are all ultimately grounded in the same set of values. They include, perhaps among other things, constitutional prohibitions against *ex post facto* laws, or bills of attainder, or double jeopardy, or impairments of contract, and especially deprivations of due process. *See, e.g., State v. Letalien*, 2009 ME 130, 985 A.2d 4 (*ex post facto*)(barring retroactive

application of amendment to sex offender registration law); *Doe XLVI v. Anderson*, 2015 ME 3, 108 A.3d 378 (bill of attainder); *State v. Dechaine*, 572 A.2d 130, 136 (Me. 1990) (double jeopardy)(barring dual murder convictions for single homicide); *Hoag v. Dick*, 2002 ME 92, ¶ 1, 799 A.2d 391 (impairment of contract)(barring retroactive application of Uniform Premarital Agreement Act to agreement executed prior to effective date), *Danforth v. State Dep't of Health & Welfare*, 303 A.2d 794, 798 (Me. 1973) (due process)(requiring appointment of counsel for indigent parent in termination of parental rights proceeding).

Belated changes in the rules are uniformly understood to be the antithesis of the process that is due. Such changes are precluded by familiar principles and rules of finality ranging from *stare decisis* to *res judicata* to collateral estoppel. They are addressed in equity proceedings in laches and equitable estoppel. And they operate as promissory estoppel in damage actions at law and in specific performance suits in equity. *See McGarvey v. Whittredge*, 2011 ME 97, ¶ 54, 25 A.3d 620 (*stare decisis*); *Beegan v. Schmidt*, 451 A.2d 642, 643–644 (Me. 1982) (*res judicata*, collateral estoppel); *Baxter v. Moses*, 77 Me. 465, 478 (Me. 1885) (laches); *Dept. of Health & Human Servs. v. Pelletier*, 2009 ME 11, ¶ 17, 964 A.2d 630 (equitable estoppel); *Chapman v. Bomann*, 381 A.2d 1123, 1127 (Me. 1978) (promissory estoppel).

The central point has long been that material belated changes of position to the detriment of another, by private actors or by the government itself, are fundamentally unfair and are prohibited without substantial justification, if permitted at all. Where the detriment is loss of a vested legal right, including the right to an immunity, or retroactive

imposition of a liability, or retroactively changing the rules to allow or assure an unfair trial retroactivity amounts to a denial of substantive and procedural due process.

III. RETROACTIVITY

Statutory law is seldom operational or applicable retroactively, and retroactivity is legally possible only if retroactive operation or application will not materially impair or divest legal rights that had become vested before the statute became effective, or impose liabilities, or unfairly change the rules of litigation. Stated otherwise, legislation in Maine is generally applicable or operational only prospectively, but may be applicable or operational retroactively if, but only if, its retroactive effect *does not* violate or divest the vested legal rights of the affected party, and *does not* impose or *create* liability, and *does not* impose new and unfair litigation disadvantages. Retroactivity here is at odds with all this settled law. *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶¶ 38-42, 281 A.3d 618; *Coffin v. Rich*, 45 Me. 507, 514-16 (1858); *see MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 22, 40 A.3d 975; 1 M.R.S. § 302.

There are several inquiries or issues at work here. They relate to both substantive and procedural due process under two constitutions. It is not to be assumed that the questions are identically addressed and resolved by the State and Federal Constitutions. It is important separately to consider the extent to which the Constitution of Maine protects its citizens from retroactive legislation creating new liabilities, or divesting vested rights, or depriving defendants of a fair judicial proceeding. As to each of the Constitutions, there are two separate constitutional questions, both broadly denominated as due process issues. The first is the denial of substantive due process to deprive a

defendant of a vested property interest or property right in an immunity and thereby impose a liability retroactively. As Chief Justice Stanfill's Opinion in *NECEC Transmission LLC v. Bureau of Parks and Lands* clearly and correctly announced, in Maine, property broadly encompasses anything of value in the sense employed by James Madison and Professor Cooley long ago. 2022 ME 48, ¶ 44, 281 A.3d 618 ("James Madison viewed property as embracing 'everything to which a man may attach a value and have a right.'"). There cannot seriously be any doubt that the immunity conferred by the expiration of a statute of limitations is a thing of value that constitutes property which may not constitutionally be taken. *See Campbell v. Holt*, 115 U.S. 620, 630-31 (1885) (Bradley, J. dissenting) ("an immunity from prosecution in a suit, whether by reason of a statutory bar or otherwise, is as valuable a right to one party as the right to prosecute that suit is to the other . . . ."); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 419 (3rd ed. 1874) ("But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."). Maine's Constitution protects these valuable interests of every citizen who has ever been at risk for litigation as to which the statute of limitations has expired.

Maine law is clear that legislation imposing or creating liability may not do so retroactively. If this law is operational, the Diocese will be defending a large but currently unknowable number of cases that have been time-barred for two decades or longer demanding, in the aggregate, tens of millions of dollars. It is a matter of high

school bookkeeping that tens of millions of dollars in claims are liabilities, at least contingent ones.

Additionally, here, the only viable theory of liability is negligent supervision, a tort that did not exist before 2005. *See Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 39, 871 A.2d 1208. Thus, retroactivity here is doubly offensive. All viable actions were barred years before this action existed. Imposition of liabilities is not possible retroactively. Me. Const. Art. I, § 11; *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981); *see Lewis v. Webb*, 3 Me. 326, 335 (1825) (holding that a special resolve passed by the legislature in 1824 to give appellants a new right to appeal could not apply retroactively because the appellants had missed their original appeal deadline for a probate court debt judgment against him from 1819).

It is a related but separate inquiry whether the rules of judicial proceedings may be changed retroactively to deprive prospective defendants of a fair opportunity to defend themselves. The answer to that question, intuitively obviously, must be no. It is not at all clear that the Supreme Court of the United States has addressed that procedural due process question as a matter of federal law, given that Court's emphasis on vested rights in the property side of the analysis. Regardless of any federal jurisprudence concerning the United States Constitution, however, Maine people are protected by the Maine Constitution not only from having the Legislature retroactively create liabilities that are susceptible of litigation, but from doing so at a time and in a way that materially adversely affects the prospective defendant's opportunity to mount a successful defense to the retroactively operational liability

And, as noted elsewhere in this submission, in addition to constitutional-level prohibitions against retroactivity here, there are equitable doctrines which may properly be employed in these circumstances on this record to invalidate this legislation on its face because it is not seriously to be doubted that any defendant's litigation opportunity has been seriously prejudiced by the passage of several decades and the inevitable changes of circumstances occurring during those decades. Whether that is a matter of constitutional magnitude or not, it is fundamentally inequitable and fundamentally unjust to subject any citizen to such a process. In other circumstances, this analysis may work only on an as-applied case-by-case basis, but here, the 2000 legislation eliminated all statutes of limitations in such cases not then already barred, meaning cases that had accrued years before that. In other words, a statute purporting to remove an expired limitations bar on cases that have been barred for decades is facially void.

A. MAINE CONSTITUTION

The Maine Constitution historically provided Maine citizens with their only source of rights in nonfederal matters from its adoption in 1820 until the Fourteenth Amendment to the federal Constitution was ratified in 1868. *See Baron v. Baltimore*, 32 U.S. 243, 247-49 (1833). Even then, after the Fourteenth Amendment was added, the U.S. Supreme Court only gradually incorporated the guaranties of the federal Bill of Rights to apply to the states through a series of rulings starting in the early 20th Century and occurring mostly in the 1950s and 1960s. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-

incrimination); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press).

Although Maine has not developed its constitutional case law under its state constitution in recent decades as robustly as some other states have developed their bodies of state constitutional law[2], the Law Court has nonetheless been clear that due process protections under the Maine Constitution are often much greater than those under the federal Constitution.

For example, in *State v. Newell,* 277 A.2d 731, 733-38 (Me. 1971), the Law Court held that an indigent defendant charged with certain misdemeanors has a right to court-appointed counsel under the Maine Constitution's right-to-counsel provision, though the U.S. Supreme Court extended that right under the federal Constitution only for felonies, not misdemeanors, *see Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Powell v. Alabama*, 287 U.S. 45 (1932). Similarly, in *State v. Collins*, 279 A.2d 620 (Me. 1972), the Law Court found the Maine Constitution requires prosecutors to prove the voluntariness of a defendant's confession to a higher standard (beyond a reasonable doubt) than under the federal Constitution (preponderance of the evidence). In *Danforth v. State Department of Health & Welfare,* 303 A.2d 794, 795-96 (Me. 1973), the Law Court held that due process entitles a parent to a court-appointed counsel when their parental rights to child custody are challenged, though the U.S. Supreme Court has never extended that right

[2] *See* Richard S. Price, *Linde's Legacy: The Triumph of Oregon State Constitutional Law, 1970-2000*, 80 Alb. L. Rev. 1541 (2017); Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 868 (2007); Jamesa J. Drake, *Reviving Maine's State Constitutional Protection Against Unreasonable Searches and Seizures*, 68 Me. L. Rev. 321, 345 (2016)

under the federal Constitution. As further example, in *State v. Sklar*, 317 A.2d 160, 165-66 (Me. 1974), the Law Court held that the Maine Constitution requires that even criminal defendants accused of so-called "petty crimes" punishable by less than six months in jail have a right to a jury trial whereas the federal Constitution extends the right of a jury trial only to defendants accused of more serious offenses.

During the decades leading up to full incorporation by the end of the 1960s, however, the Law Court was not grounding many decisions on the state constitution. *See* Marshall J. Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 Vt. L. Rev. 61, 68-69 (1988). Then, the U.S. Supreme Court in 1972 expressly invited state high courts to develop state constitutional standards that go beyond the rights extended to individuals by the federal Constitution. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). That same year, the Law Court appears to have accepted *Lego*'s invitation with its ruling in *Collins*, above. 297 A.2d at 625-27. In *Lego*'s wake, Justice Brennan of the U.S. Supreme Court urged a revival of state constitutionalism in his influential article. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the U.S. Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.").

More recently, state constitutional scholars in Maine, too, have cautioned against deference to federal constitutional law and have urged more robust constitutionalism under the state constitution. Marshall J. Tinkle, *The Maine State Constitution* 20 (2d ed. 2013); Jamesa J. Drake, *Reviving Maine's State Constitutional Protection Against Unreasonable Searches and Seizures*, 68 Me. L. Rev. 321, 324 (2016)

Here, as discussed at length in the Law Court's recent decision in *NECEC Transmission LLC v. Bureau of Parks & Lands*, the "vested rights" limitation in Maine's case law is consistent with the original understanding under the Maine Constitution. *NECEC Transmission LLC*, 2022 ME 48, ¶¶ 38-42, 281 A.3d 618 ("Constitutional protection of vested rights properly resides in Maine's due process clause."). Maine's legislature has broad, sweeping power, but that power is not boundless and is limited by the state and federal constitutions. *See* Me. Const. Art. IV, Pt. 3, § 1 ("The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States."); *Jones v. Me. State Highway Comm'n*, 238 A.2d 226, 230 (Me. 1968); *Laughlin v. Portland*, 111 Me. 486, 489, 90 A. 318, 319 (1914). That original legislative power and the constitutional right to due process, as set forth in the original Declaration of Rights, Me. Const. Art. I, and the later addition of § 6-A in 1963, confirms due process as an expansive principle. *See Sklar*, 317 A.2d at 165-67; Marshall J. Tinkle, *The Maine State Constitution* 46 (2d ed. 2013).

The Law Court has long recognized that "governmental fair play is the essence of due process." *Sklar*, 317 A.2d at 166 n.6 (quoting *State v. Munsey*, 152 Me. 198, 201, 127 A.2d 79 (1956); *In re John M. Stanley*, 133 Me. 91, 95, 174 A. 93 (1934)) (internal quotation marks omitted). That historical standard encompasses limitations on the power of the Legislature and the authority of the judiciary to enforce those limitations. *Id*. at 165-67. Regarding the questions of law at issue here, the due process guarantee is a prohibition of legislative acts that retrospectively divest a person of vested rights lawfully acquired under pre-existing law. *NECEC Transmission LLC*, 2022 ME 48, ¶ 38, 281 A.3d 618 ("[T]he protection of vested rights has been rooted in the Maine Constitution since Maine became a state.") (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)).

A vested right is defined as:

> [S]omething more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, *or a legal exemption from a demand made by another*. (Emphasis added.)

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 415 (3rd ed. 1874). A ripened statute of limitation defense is a "legal exemption from a demand." *Id*. The Law Court has not previously addressed the exact situation where the Maine Legislature sought to restore a right of action, with its corresponding liability, *after* the limitation period had elapsed and the limitation defense had ripened. However, the Law Court has held that a

cause of action still within the limitation period, and thus vested, could not be retroactively extinguished by legislation reducing the statute of limitations. *Miller v. Fallon*, 134 Me. 145, 148-153, 183 A. 416, 417-419 (1936) (holding that the six-year statute of limitations for a medical malpractice cause of action that had accrued in 1929 and would run until 1935 could not be retroactively reduced from six years to two years by a 1931 law). The principle holds true here that revival of a time-barred claim is an impermissible interference with a vested right, in violation of due process guarantees under the Maine Constitution.

B. MAINE CASE LAW

For almost 200 years and since just three years after Maine became a state, Maine law has recognized that retrospective laws are unconstitutional and void if they create personal liabilities or impair vested rights. *See Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 295 (1823) ("[S]o far as [a statute] is *retrospective*, and has *altered the common law*, it is *unconstitutional*, and cannot be carried into effect; because *such* operation would impair and destroy *vested rights* ...."') (emphasis in original); *Coffin,* 45 Me. at 515 (holding that retrospective application of a statute making individual stockholders personally liable for debts contracted during a time when there was no law that made them personally liable was unconstitutional because it created a new liability); *Berry v. Clary*, 77 Me. 482, 485-86, 1 A. 360 (1885); *Bowman v. Geyer*, 127 Me. 351, 355, 143 A. 272, 274 (1928) ("[I]f the legislative intent to give a statute a retrospective operation is plain, such intention must be given effect, unless to do so will violate some constitutional provision."); *Inhabitants of Otisfield v. Scribner*, 129 Me. 311, 151 A. 670,

671 (1930) ("There can be no doubt that Legislatures have the power to pass retrospective statutes, if they affect remedies only. But they have no constitutional power to enact retrospective laws which impair vested rights or create personal liabilities."); *Thut v. Grant*, 281 A.2d 1, 6 (Me. 1971) (same); *Merrill v. Eastland Woolen Mills, Inc*., 430 A.2d 557, 560 n.7 (Me. 1981) ("The legislature has no constitutional authority to enact retroactive legislation if its implementation impairs vested rights or imposes liabilities that would result from conduct pre-dating the legislation."); *NECEC Transmission LLC*, 2022 ME 48, ¶¶ 33, 41, 281 A.3d 618 (holding that "Maine's vested rights doctrine is a constitutional limitation on [retroactive] legislative authority," which is rooted in the Maine Constitution's due process clause). Thus, a retrospective law is unconstitutional when it "creates a new obligation or imposes a new duty," *Coffin*, 45 Me. at 515, because the legislature does not have the power to declare or change what the law *was*—only what it will be going forward, *Proprietors of Kennebec Purchase*, 2 Me. at 278.

The unmistakable point of Maine retroactivity jurisprudence may be restated summarily as follows. No liability may be imposed retroactively, by clear analogy to the constitutional prohibition against *ex post facto* criminal legislation. This Defendant's balance sheets before and after the enactment of the purportedly retroactive law, if it is retroactive, must necessarily show contingent liabilities that were not in the financials previously. Retroactive application of any statute with the consequence of exposing a party to future liability for completed activities is prohibited. There are no exceptions to that proposition in Maine law. If a potential but contested liability exists at the time of

enactment, legislation may to some degree modify the menu of available judicial remedies concerning that existing liability. However, Maine law clearly and explicitly prohibits the imposition of present or future liabilities for old events. Me. Const. Art. I, § 11; *Merrill*, 430 A.2d at 560 n.7; *see Lewis*, 3 Me. at 335. It is not necessary to know precisely how many claims seek exactly how much money to know that millions of dollars are in the balance here.

To the extent that the term "vested rights" is key to the analysis, this Defendant's vested right in the statute of limitations context is the vested right to plead the affirmative defense of the statute of limitations that expired decades ago, and to retain the benefit of an immunity not only from liability, but also from litigation about an asserted liability. Maine law has long recognized that a defendant has a vested right in the immunity from suit that results from a lapsed statute of limitations, and as such, "amendments to the statute of limitations may be applied retroactively to extend the statute of limitations, but *not* to revive cases in which the statute of limitations has expired." *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, ¶ 15, 837 A.2d 123 (emphasis in original); *see also Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816-17 (Me. 1980) ("No one has a vested right in the running of a statute of limitations *until the prescribed time has completely run and barred the action.*") (Emphasis added); *Rutter v. Allstate Auto Ins.*, 655 A.2d 1258, 1259 (Me. 1995) ("[A]mendments to [the workers' compensation law] are procedural and may be applied retroactively to extend the statute of limitations *as long as the employee's claim was not extinguished on the effective date of the amendment.*") (Emphasis added); *Miller v. Fallon*, 134 Me. 145, 183 A. 416, 417 (1936);

Danforth v. L.L. Bean, Inc., 624 A.2d 1231, 1231 (Me. 1993); *Harvie v. Bath Iron Works Corp.*, 561 A.2d 1023, 1025 (Me. 1989). These precedents are binding in Maine courts and require the granting of this motion.

The vested right to be free from litigation and its aggravations, as well as the vested right to be free from the asserted liability itself, cannot be taken from a defendant after it has vested, and the moment of vesting is indisputably the date when the former statute of limitations ran. On that date, the plaintiff loses the right of action against the defendant, and with it, the remedy for the barred cause of action. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 423 (3rd ed. 1874). Thus, the legislature cannot retroactively change the remedy for a cause of action that no longer exists. *Id.*[3] In other words, remedies do not exist except potentially in civil actions that are litigable. It is not a modification of a remedy to impose one where no action lies at the effective date of the law. This point is explicitly made clear by the predecessor of the current iteration of §752-C which expressly limited its applicability to matters where the statute of limitations had not expired because the Legislature then correctly understood that its retroactivity would be incompatible with fundamental principles of justice and due process of law. Cases allowing changes to remedies available in pending cases or potential cases that are not yet barred are distinguished. *See Merrill*, 430 A.2d at 561;

[3] "He who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases, the right is gone; and to restore it would be to create a new contract for the parties, – a thing quite beyond the power of legislation." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 429-30 (3rd ed. 1874).

Read v. Frankfort Bank, 23 Me. 318, 321 (1843); *Oriental Bank v. Freeze*, 18 Me. 109 (1841).

Although these cases involve demands for substantial money damages, this is not only about the money. The issue is more broadly about whether history can be rewritten because a current generation regrets what occurred in real time in a former generation. That is simply outside the authority of any legislative branch of any democratically elected government.

Operationally, these cases present additional substantial concerns. The argument presented above would apply if a case had been commenced only a day or two after the expiration of the statute of limitations. This case, and the others being argued with it, all have been commenced decades following the expiration of the applicable statute of limitations. That may be determined from the fact of Plaintiff's date of birth. The only cases purportedly revived by this enactment were all barred more than 20 years ago, some more than thirty or forty.

It is axiomatic that materially changing the rules of engagement for trials after the fact is a denial of the customary process that is due. Delaying trials until important defense witnesses are dead is most obviously a denial of procedural due process. That is no less true where witnesses have faded memories or are otherwise unavailable or ineffective.

In every one of these cases, it cannot be doubted that many or even all the witnesses who might have participated in the defense of these claims have died or become so incapacitated as to be unavailable. Because this statute affects only cases that

were barred in or before, maybe long before, 2000, even living witnesses are at a major disadvantage in defending an organization from claims that someone in the organization failed to intercept the abuser in time. Before there was a due process clause or even a United States Constitution, the English Chancery Court, whether through laches or estoppel or through other lines of analysis, has recognized the fundamental unfairness, that is to say the lack of due process, in compelling any defendant to litigate a stale case, at least in circumstances in which the defendant's ability to present an effective defense is obviously materially prejudiced as a result of events occurring during the passage of time, as distinguished from the mere passage of time and its inherent potential for memories to fade, or for documentary evidence to be lost or innocently destroyed, or the like.[4] But when the key witnesses whose acts or omissions are central to the liability analysis are dead because decades have passed, it is fundamentally an unfair adjudication, i.e., a denial of procedural due process. Whether one then puts that procedural due process right through the linguistic formula to satisfy the phrase "vested rights" *both* to retain an immunity with its associated right to plead the affirmative defense *and* the related but not

[4] *See Smith v. Clay*, 3 Bro. C. C. 646, 29 E.R. 743, 745 (1767) ("A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing."); I William W. Story, *Commentaries on Equity Jurisprudence, As Administered in England and America* § 64.a, 72-73 (4th ed., Boston, Charles C. Little & James Brown 1846) ("Equity always discountenances laches; and holds, that laches is presumable in cases, where it is positively declared at law. Thus, in cases of equitable titles in land, Equity requires relief to be sought within the same period, in which an ejectment would lie at law; and, in cases of personal claims, it also requires relief to be sought within, the period, prescribed for personal suits of a like nature.") (collecting cases); *see also Costello v. United States*, 365 U.S. 265, 283 (1961) (defining laches as a defense which "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.").

identical vested right to have a fair trial is immaterial as a matter of litigation logic or language.

This Plaintiff and every other similarly situated plaintiff have been well aware of the grounds for suit since the date of the first event. Every one of them who was a minor at the time has had additional time, after attaining the age of majority, to present the claim. In all these cases, decades have passed since the action became time barred and during those decades, witnesses have literally died. Again, we emphasize that this is a Rule 12(c) Motion and the specific details of the dates of death of individual diocesan officials would turn this into a summary judgment motion and down the slippery slope to discovery. For the time being, the point remains that it is intuitively obvious that retroactive applicability of *any* statute to lift a statute of limitations with respect to *any* circumstances several decades after the statute has run, must inevitably disadvantage any defendant, and is therefore prohibited as a matter of due process law. The amendment of Section 752-C in 2000 eliminated any limitations bar for cases not then barred. The retroactivity language of the enactment presently at issue is constitutionally void on its face, given the judicially noticeable chronological juridical fact of the 2000 amendment to the then-effective statute. That means definitively that the recent amendment can apply *only* to cases already barred for more than 20 years.

This Motion must be granted in the Superior Court because Maine law requires it. It is for another day whether the Law Court will effectuate a sea change in Maine law. It is enough to support this Motion that the only proper reading of multiple authorities over multiple decades of Maine case law is that this legislation cannot be applied retroactively.

Additionally, as in most legal analysis, it is useful to consider the alternative. The Plaintiff's argument here necessarily means that *every* statute of limitations affecting *every* action against *every* defendant is necessarily *always* tentative because *every* statute of limitations is susceptible of repeal retroactively at any time. This Plaintiff cannot prevail on this Motion unless the Legislature has the authority to obliterate at *any* time, *any* statute of limitations, in *any* class of cases against *any* class of defendants. Such destabilizing and arbitrary authority is not to be presumed and nothing anywhere in the text or history of Maine's jurisprudence purports to give any such authority to the Maine Legislature. Although this legislation conspicuously affects the Roman Catholic Church, which presents separate and additional religious liberty and equal protection issues if this litigation goes forward, the essential point at this juncture, is to have clearly in mind that, if this legislation is permissible, the Legislature in another year can repeal other statutes of limitations. It is difficult to imagine that the Legislature would approve retroactive elimination of statutes of limitations to permit customers to sue banks two decades and more after transactions have been completed and statutes of limitations concerning those transactions have run. However, approval of this statute would be precedent for others exactly like it.

To summarize, whatever arguments the Plaintiffs might want to make can have no effect in any Maine Court except the Law Court because the settled Maine law is clear. To the extent that Plaintiffs mean to urge the Law Court to change its settled course and rely upon decisions from other jurisdictions, that argument must necessarily be postponed until the likely appeal of these cases. Briefly, however, the position of the Defendant is

simply this. Decisions in other states or in federal courts that impose liabilities that did not exist at the statute's enactment or decisions that imposed the burdens of litigation after those burdens have been foreclosed by the expiration of a statute of limitations are all simply wrong. Decisions allowing retroactivity that are not wrong do not impose new liabilities or new litigation burdens, but only make adjustments in *how* otherwise permissible litigation should occur or be resolved. In short, changes in the law about *how* litigation might be conducted may be retroactively applicable, although not all of them will be, but changes in the law concerning *whether* litigation is even possible cannot be applied retroactively and, where they have been, those decisions are wrong.

IV. APPLICABILITY

There is an additional but not entirely separate question of whether §752-C has any applicability to any defendant other than a defendant who has personally committed the specific acts that are defined as crimes in the criminal code and that identify the relevant torts in the statutory text of §752-C. The Plaintiffs obviously will present their own arguments on the point, but it seems fair to anticipate an argument essentially that the action against the Diocese is "based on" those defined behaviors if they were committed by persons affiliated with the Diocese. For the reasons to be stated below, that argument is wrong.

Before addressing those points, it is to be emphasized that they also circle back to the previous argument. In simplest terms, the human actor who sexually abused a minor will have no need for a statute of limitations after that human actor has died. Therefore, although the fairness of stripping that human actor of the safe harbor of a statute of

limitations is still constitutionally and otherwise questionable, at least as a matter of evidence and civil procedure, it is not as devastating because the human actor can still show up and testify to defend the case. After the human actor has died *and* after senior diocesan officials of the era have also died, the organization is at a devastatingly more unfair disadvantage in attempting to defend the case at all.

Returning to the point of the proper reading of the statutory words, the correct reading is that it does not matter what *action* is being brought *against the human actor*, if it is "based on" the behaviors *by the human actor* identified in the criminal code. This dovetails with the history because, initially, the only cause of action available to a victim of sexual abuse by an adult, was against the abuser for battery. The problem being addressed in 1985, when the legislature first enacted § 752-C, was that the battery statute of limitations is only two years. If organizations had any liability for negligent supervision, a point to be addressed below, that statute of limitations was always six years under §752 and sensibly and logically remains a six-year statute of limitations under §752 because it was never two years. The 1985 law changed the two-year limitations period for civil actions against individuals who had committed sexual battery against minors, whatever the theory of recovery, to six years. Accordingly, only the human abuser is affected by §752-C in any of its several iterations and changes.

The legislative history of §752-C may be summarized step-by-step as follows. Until 1985, a minor who had been subjected to sexual abuse by an adult, almost certainly had no path to judicial relief except an action in battery against the offending adult. The

statute of limitations on that action was two years. The first version of 14 M.R.S. §752-C was enacted and became effective in 1985, providing:

> Actions based upon sexual intercourse or a sexual act, as defined in Title 17-A, chapter 11, with a person under the age of majority shall be commenced within 6 years after the cause of action accrues.

Its obvious purpose was to provide a six-year limitations period for sexually abusive battery or abuse of a minor. It is also the origin of the phrase "based upon." The only defendant in contemplation when those words were written was the human abuser. There was no recognized action for negligent supervision until twenty years later. The legislation made no mention of retroactivity, and it made no mention of liability of organizations. Quite obviously, however, the cross reference to the criminal law means that the law was directed at persons who were accused of those crimes. Organizations do not commit those crimes.

In 1989, the Legislature amended §752-C only to add a discovery rule with respect to the harm, providing:

> Actions based upon sexual intercourse or a sexual act, as defined in Title 17-A, chapter 11, with a person under the age of majority shall be commenced within 6 years after the cause of action accrues, or within 3 years of the time the person discovers or reasonably should have discovered the harm, whichever occurs later.

That statute became effective on September 30, 1989. It again made no mention of retroactivity or liability for organizations for the sexual activities of affiliated individuals, but the incorporation of the criminal code's definitions again plainly implies that the statute is entirely about the criminal sexual behavior of human actors.

In 1991, the Legislature doubled the six-year statute of limitations to twelve years and doubled the six-year additional clause for the discovery feature of the statute. Significantly, that same session law contained language important for this part of the analysis. Section 2 of the Session Law was headed, "Application." Subsection 1 of Section 2 stated that the 1991 legislation would be applicable to "[a]ll actions based upon sexual intercourse or a sexual act occurring after the effective date of this Act." The second subsection of Section 2 said that the legislation applied to 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. A plainer rejection of retroactivity, and therefore a stronger case for vesting, can hardly be imagined.

The 1993 legislation restated the specific cross-reference to the criminal code but otherwise made no changes.

The 1999 legislation repealed Section 752-C as it had most recently been amended in 1993 and replaced it with the language that was in effect from August 11, 2000, until the current iteration of Section 752-C was enacted and pursuant to which these cases have been brought. The language of the 1999 legislation, effective in 2000, first eliminated any statute of limitations for the defined conduct and restated the defined conduct with specific reference to Title 17-A, further reinforcing the inference that the defendants as to whom the statute of limitations had been eliminated were only those defendants who were the human perpetrators of the sexual crimes. These serial amendments and the specific language of the several session laws supports the conclusion that the difference introduced in 1985 was to make clear that all actions, whatever the theory or label,

including battery, that an individual victim may have against an individual perpetrator were subject to the statute of limitations change being made. There is nothing in the legislative history or the text to suggest that the Legislature intended or even anticipated that liability of organizations for the sexual behavior of human actors was under discussion. The 1999 legislation also had, in the Session Law, the application language mentioned above in connection with the earlier statute. The 1999 law, effective in 2000, applied to all actions based on sexual acts or sexual contact occurring on or after the effective date of that law and all actions for which the claim had not yet been barred by the previous statute of limitations in force on the effective date of the act. Explicitly excluded from the lifting of the statute of limitations in 2000 were, even as to the human actors, claims based upon the specified criminal activity if they had already been time barred under earlier statutes of limitations.

Every time the Legislature explicitly precluded retroactivity it only strengthened the case for denying it here. The "vestedness" of the Diocese's immunity was reinforced each time.

In context, it becomes clear that the original legislative activity in 1985 was to add four years to the relevant statute of limitations for battery. The "based on" language contextually and historically comes into play obviously to remove the presumed limitation to battery and thus enable litigation against the human wrongdoer on any legal theory, including particularly intentional or negligent infliction of emotional distress, on the sensible grounds that the emotional consequences of such crimes are often more important than the physical injuries. In other words, the "based on" phraseology in its

chronological context was used to broaden the range of torts (beyond battery) for which an action might be brought against the human perpetrator, and not to expand the universe of defendants against whom an action could be brought.

There is no Law Court decision that addresses the applicability of § 752-C to organizational defendants. The Superior Court, in *Boyden v. Michaud*, Nos. CV-07-276 & CV-07-331, 2008 Me. Super. LEXIS 88 *13-15, 15 n.6 (May 14, 2008), only highlights the closeness of the question. After oral argument, weeks went by before Justice Jabar's opinion appeared in which the Justice characterized the question as "razor thin." *Id*. at *13. It was evident at the time that Justice Jabar was wrestling with the question, and it is not the Defendant's position that the answer is blindingly obvious. Even if characterized as close, however, read in the historical context, the phrase "based on" more comfortably fits with the idea that the Legislature was concerned about being certain that human actors could not avoid responsibility on broader evolving tort theories of liability and damages for emotional harms than to sweep up every youth serving organization including churches in a perpetual dragnet of liability long after the possibility of successful defense had been lost to the passage of time. Nothing in the legislative history explicitly states an intention to relax any statute of limitations against organizations.[5]

[5] *See* 14 M.R.S. §752-C (1985), amended by P.L. 1989, ch. 292, amended by P.L. 1991, ch. 551, § 1, affected by P.L. 1991, ch. 551, § 2, amended by P.L. 1993, ch. 176, § 1, repealed and replaced by P.L. 1999, ch. 639, § 1, affected by P.L. 1999, ch. 639, § 2, amended by P.L. 2021, ch. 301, § 1 (effective June 21, 2021); *see also* Maine State Legislature, Legislative History Collection 119th Legislature, LD 2453 / HP1747, http://lldc.mainelegislature.org/Open/Meta/LegHist/119/lh119-LD-2453.pdf; 115th Legislature, LD 1086 / HP0752, http://lldc.mainelegislature.org/Open/Meta/LegHist/115/lh115-LD-1086.pdf; 114th Legislature, LD 282 / HP0202, http://lldc.mainelegislature.org/Open/Meta/LegHist/114/lh114-LD-0282.pdf; 112th Legislature, LD 607 / HP0427, http://lldc.mainelegislature.org/Open/Meta/LegHist/112/lh112-LD-0607.pdf.

The point to be made in this Motion in these cases, and applicable to all cases, is that the legislation itself is not fairly read as applicable to any organization, given the historical context, but that if it is to be read that way, that reading is then disqualified because the organization has a vested right in its affirmative defense of the statute of limitations which cannot be taken away because a modern Legislature has a different sense of what the law should have been years ago.

As mentioned above, the point is reinforced by the fact that organizations had no recognized liability on any theory for the secret sexual misconduct of affiliated individuals, obviously not within the scope of the individual's duties at any time the several amendments to the statute of limitations occurred (1985-2000). The baseline for discussion is that it has forever been the law and, unless the Law Court overrules centuries of settled law, it will continue to be the law that no organization has vicarious liability for the secret criminal misconduct of an employee or other affiliate outside the scope of that person's duties. *Restatement (Second) of Torts* § 317(b)(i)-(ii). The organization is vicariously liable only for the supervisory negligence of its managers, if liable at all.

The liability of organizations indeed was not clearly settled until very recently. *See Fortin*, 2005 ME 57, ¶ 39, 871 A.2d 1208 (recognizing the tort of negligent supervision under Maine law for the first time); *see generally*, Simmons, Zillman & Furbish, *Maine Tort Law* § 9.37 at 9-116 to 9-119 (2018 ed. 2017). The Law Court first addressed the scope-of-employment doctrine as set forth in *Restatement (Second) of Agency* § 228, in this context in *McLain v. Training & Dev. Corp*., 572 A.2d 494, 497-98 (Me. 1990), but

McLain did not "answer the question of whether an employer's negligent supervision of an employee violates a duty the employer owes to those harmed by the employee." *Fortin*, 2005 ME 57, ¶ 39, 871 A.2d 1208. "On five occasions since *McLain* was decided, however, [the Law Court] made it clear that [it had] not yet adopted or rejected a cause of action for negligent supervision by an employer." *Id*. (citing those five cases: *Korhonen v. Allstate Ins. Co.*, 2003 ME 77, ¶ 12 n.4, 827 A.2d 833, 837; *Mahar v. StoneWood Transp.*, 2003 ME 63, ¶ 10, 823 A.2d 540, 543; *Napieralski v. Unity Church of Greater Portland,* 2002 ME 108, ¶ 6, 802 A.2d at 392; *Hinkley v. Penobscot Valley Hosp.*, 2002 ME 70, ¶ 16, 794 A.2d 643, 647; *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, ¶ 9, 692 A.2d at 443-44. It was not until *Fortin* that the Law Court expressly adopted the formulation of the negligent supervision tort as set forth in *Restatement (Second) of Torts* § 317. *Id*.

The chronology of this history of Law Court decisions is acutely relevant to the impropriety of retroactivity here. As late as 2003, no organization had liability for negligent supervision and this statute's asserted retroactivity exposes organizations to tort liabilities *that did not exist at the time of the criticized acts or omissions and did not exist when these actions were barred*. This is doubly problematic on the basic point that the Law Court has made as recently as last summer, that retroactivity may not impose a new liability for completed events.

If liability of an organization may be predicated upon failure to observe some applicable standard of care in selecting, training, retaining, or overseeing the activities of the human actor, that only highlights the fundamental intrinsic unfairness, that is to say

lack of due process, in submitting any organization, not just a church, to litigation, decades after a human actor has allegedly committed a crime that was certainly being done secretly, on the theory that persons in authority in the organization knew about it, or more to the point knew about the actor's earlier crimes, and failed to prevent this one. These actions, on any theory of liability, even against the perpetrator, were time-barred at least 20 years ago *and years before the Law Court recognized a tort duty or tort liability named "negligent supervision."* It is not legally possible to subject any organization to litigation and liability decades after any action on any theory was barred and years after the only plausible tort theory was first recognized.

SUMMATION

If this statute is determined to be retroactively applicable, even if subject to case-by-case equitable disallowance, there is a large but unknown number of potential cases reaching back decades against all youth serving organizations. In every one of those cases to a material degree, although the details may differ, the organization will be at a substantial disadvantage in effectively defending against these claims, particularly if the human perpetrator has died, and particularly if the supervisory personnel of the organization have died, moved away, or become incapacitated. That is why the vested right of any organization in its affirmative defense of the statute of limitations and its vested right to not have new liabilities imposed upon it for past conduct of anyone, especially others, precludes retroactive applicability to this legislation. The Motion must be granted under all applicable Maine law.

Respectfully submitted,

Dated: November 22, 2022

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NOTICE

Matter in opposition to this Motion must be filed not later than twenty-one (21) days after the filing of this Motion, unless another time is provided by the Maine Rules of Civil Procedure or set by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the Motion, which may be granted without further notice or hearing.

STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER DOCKET
CIVIL ACTION
DOCKET NO.: BCD-CIV-2022-00044

ROBERT E. DUPUIS,

Plaintiff

v.

ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND INCORPORATED MEMORANDUM OF LAW [M.R. Civ. P. 12(c)]

NOW COMES Plaintiff Robert E. Dupuis, by and through counsel, and makes his opposition to Defendant's Rule 12(c) Motion for Judgment on the Pleadings.

I. INTRODUCTION

No one in Maine has ever had the right to sexually abuse children.

Defendant asks this Court to find a "vested right" to be free from liability for childhood sexual abuse it is alleged to have facilitated, failed to prevent, and/or to which it has otherwise contributed.[1, 2]

[1] In support of its position, Defendant argues that the "fundamental premise" of its Motion is that ". . . the only material fact is not only not disputed, it is alleged in the Complaint,"—that being the ". . . date on which [Plaintiff] reached the age of majority . . . ." (Def.'s Mot. Jud. Pleadings 1-2.) Whether Defendant disputes facts alleged in Plaintiff's Complaint is irrelevant to the 12(c) analysis given this Court's standard of review. Nevertheless—as to Defendant's comments on dispute of fact—Plaintiff's Complaint alleges fraudulent concealment and tolling—and there are numerous disputed facts as to these claims alone such that dismissal is not appropriate at this stage.

[2] The Court should consider that Defendant's ***own*** code of conduct recognizes that laws may apply retroactively

> Cannon 9: Laws regard the future, not the past, *unless they expressly provide for the past.*
>
> > Retroactive laws "should be made only for pressing reasons or when the benefits are appreciable, especially for the common good, to extend a favor, or to conform obsolete structures and institutes to a new juridical reality...."

John P. Beal, James A. Coriden, Thomas J. Green, New Commentary on the Code of Canon Law, Commissioned by the Canon Law Society of America (Paulist Press, 2000), p. 62.

Plaintiff's counterarguments are summarized as follows:

I. **14 M.R.S. §752-C (3) is constitutional.**

a. 14 M.R.S. §752-C (3) is statutory law created under authority reserved to the Maine Legislature by the federal constitution; and

b. 14 M.R.S. §752-C (3) is statutory law created under authority reserved to the Legislature by the Maine constitution.

i. *NECEC* is inapplicable;

1. 14 M.R.S. §752-C (3) does not create new liabilities;

2. 14 M.R.S. §752-C (3) changes the damages remedies under Maine law for previously illegal and/or tortious activity;

ii. *Dobson*, *Morrissette*, *et al* are distinguishable; and

iii. The Court Should Defer to the Legislature.

1. Establishment of Statutes of Limitation is a Legislative Function

II. **14 M.R.S. §752-C applies to legal entities—without exception—who are a contributing cause to child sex abuse.**

a. The plain language of 14 M.R.S. §752-C is clear and allows for claims against non-human, institutional defendants; and

b. The Legislature intended for civil claims to be brought against legal entities or others.

III. **Plaintiff's fraudulent concealment claims survive regardless of the constitutionality of 14 M.R.S. §752-C (3).**

IV. **12(c) dismissal is inappropriate where alleged facts support tolling for mental health disability.**

For all of the reasons stated herein, Defendant's Motion must fail.

II. STANDARD OF REVIEW

The standard of review for 12(c) analysis tests the legal sufficiency of the Complaint. *Cunningham v. Haza*, 538 A.2d 265, 267 (Me. 1988) (*internal citations omitted*). In effect, a Rule 12(c) Motion ". . . is nothing more than a motion under M.R. Civ. P. 12(b)(6) to dismiss the

(Cont. from page 1, FN 2):

Defendant's arguments against retroactivity ring hollow—especially when held against its own recognition of the need for retroactive application of law ***to benefit the greater good***. This ideology is identical to that of the Maine Legislature in enacting 14 M.R.S. §752-C (3). Defendant has made numerous public statements in the past (some recently) about the societal interest in preventing sex abuse and access to healing for survivors thereof.

complaint for failure to state a claim upon which relief can be granted." *Id* (*internal citations omitted*); *see* Field, McKusick & Wroth, *Maine Civil Practice* § 12.14 (2d ed. 1970).[3]

Maine courts "resolve[] a defense motion for judgment on the pleadings by ***assuming that the factual allegations are true, examining the complaint in the light most favorable to plaintiff, and ascertaining 'whether the complaint alleges the elements of a cause of action or facts entitling the plaintiff to relief on some legal theory***.'" *Id.* (quoting *Robinson v. Wash. Cty.*, 529 A.2d 1357, 1359 (Me. 1987)). This is a low threshold favoring adjudication of plaintiffs' cognizable claims—giving the people their "day in court," so to speak.

Maine courts have been clear that "[u]nder any circumstances, however, 'a complaint should not be dismissed for insufficiency ***unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim***.'" *Id.* (quoting *Richards v. Ellis,* 233 A.2d 37, 38 (Me.1967) (quoting 2A Moore's Federal Practice ¶ 12.08) (2d ed.)) (*emphasis added*).

Defendant's Motion must be denied under this applicable standard of review, based on facts pleaded in the Complaint, viewed in a light most favorable to Plaintiff. Put plainly, Plaintiff's Complaint pleads multiple "statement[s] of fact[] which could be proved in support of the claim." *Id.*

If, however, Defendant's Motion is granted, the appellate court must review the underlying Motion *de novo* and may affirm only so long as it determines that, as before, Plaintiff would not be entitled to relief under ***any set*** of alleged facts. *See George v. NYC Dep't of City Plan.*, 436 F.3d 102, 103 (2d Cir. 2006).

[3] Unrelated equitable concepts such as *ex post facto* laws and principles of *res judicata* are immaterial and superfluous to the discrete legal question at hand and should be disregarded.

III. ARGUMENT

I. 14 M.R.S. §752-C (3) is Constitutional.

a. *14 M.R.S. §752-C (3) is statutory law created under authority reserved to the Maine Legislature by the federal constitution.*

It is settled law that the federal constitution guarantees no vested right in the expiration of a statute of limitations that would prevent the legislature from reviving a claim previously barred. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). In *Donaldson*, the Supreme Court rejected an argument to overrule 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.***" *Donaldson,* 325 U.S. at 312 (*internal citations omitted*; *emphasis added*). In reaffirming that prior holding, the Court 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.

b. ***14 M.R.S. §752-C (3) is statutory law created under authority reserved to the Legislature by the Maine constitution.***

Procedural and substantive due process rights guaranteed by the Maine constitution are co-extensive with the protections of the federal constitution. *Doe v. Williams*, 2013 ME 24, ¶¶ 61, 65, 61 A.3d 718. Thus, ***there is no constitutional basis— federal or State—for the proposition that the expiration of a statute of limitations creates vested rights in a defendant.*** It is only if the Law Court were to hold—contrary to its pronouncements to date[4]—that (1) Maine's constitutional due process protections exceed those under the federal constitution, and (2) that they include a vested rights rule ***applicable to statutes of limitation***, that the statute could be adjudged invalid. Maine has explicitly articulated a vested right doctrine that applies in a context inapplicable to this case (*see* discussion of *NECEC Transmission LLC v. Bureau of Parks and Lands*, 2022 ME 48, 281 A.3d 618, *infra*). Nationally, a majority of states have interpreted their state constitutions such that survivor-conscious legislation remains in effect, as discussed *infra*.

It would be a remarkable departure from constitutional separation of powers for a Maine court to overrule the authority and the clear and unambiguous intent of the Maine Legislature.[5] Defendant's arguments underestimate how significant a constitutional crisis such a ruling could cause.

The Law Court presumes constitutionality of legislative enactments:

> When legislation comes under judicial scrutiny for determination of its constitutional validity, we must have in mind that all acts of the

[4] Consistent with established Supreme Court precedent, the Law Court 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).

[5] "Under Article IV, Part Third, Section 1, of the Constitution of Maine, the Legislature has 'full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.' This is an express recognition by the framers of our Constitution that the legislative power is plenary except as it may have been circumscribed expressly or inferentially by the constitution of the state or nation." *Ace Tire Co., inc. v. Municipal Officers of City of Waterville*, 302 A,2d 90, 96 (Me. 1973).

> Legislature, including special and private laws, are presumed to be constitutional, that this presumption is one of great strength and that the burden of showing constitutional infringement rests on the party who claims that the legislative enactment is unconstitutional.
>
> Before legislation may be declared in violation of the Constitution, ***that fact must be established to such a degree of certainty as to leave no room for reasonable doubt.***

Orono-Veazie Water Dist. v. Penobscot Cnty. Water Co., 348 A.2d 249, 253 (Me. 1975) (*emphasis added*).

Only in those limited instances where an ". . . act of the Legislature falls clearly beyond the limits of constitutional authority . . ." is the presumption of constitutionality extinguished. *See Maine Pharmaceutical Association v. Board of Commissioners*, 245 A.2d 271 (Me. 1968).

i. NECEC *is inapplicable.*

NECEC Transmission LLC v. Bureau of Parks and Lands, 2022 ME 48, 281 A.3d 618, 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:

> 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?

Answering in the affirmative, the Law Court held that Maine's "vested rights doctrine" arises from the due process clause of the Maine Constitution:

> 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.***

NECEC, 2022 ME 48, ¶ 36, 281 A.3d 618 (*emphasis in original*; *internal citations omitted*).

The *NECEC* Court then 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 *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 288, 290 (1823)].

The Court 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. Applying this aspect of the vested rights doctrine, the Court ultimately holds:

> 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*).

NECEC's holding is inapplicable to the instant matter because it is plainly limited to "large-scale infrastructure development," and narrowly tailored to governmental permitting. This distinction is clear: *NECEC* involved the loss of non-speculative economic opportunity *following* substantial investments therein whereas, in the instant matter and related cases, Defendant seeks to rely on its expectation not to be sued for discrete damages it caused Plaintiff and others to suffer at the hands of its employees, during the course of their employment, on Defendant's premises.

NECEC may be further distinguished because: (1) no property right is involved; (2) the retroactive elimination of expired statutes of limitation affects only the remedy, and does not create any new liability; and (3) there is no reliance interest that the law will protect. There is no "reliance" arising out of the sex abuse of a child that can be elevated to a constitutional property right, as Defendant's arguments suggest. Here, for the Court to adopt the Defense's argument, the Court would be recognizing a property right in employers and perpetrators being able to sexually abuse children.

1. *14 M.R.S. §752-C (3) does not create new liabilities.*

The Supreme Court, Maine's federal district court, and the Law 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***."); *Ham*, 38 F.2d at 241 (D. Me. 1930) (citing *Holt*, 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 v. C.P. Blouin, Inc.,* 511 A.2d 1056 (Me. 1986).[6]

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

In *Blouin*, the Court held that retroactive application of a statute was permissible under the contract clause of the Maine Constitution. As the *Blouin* 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:
>
> > [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.

Blouin, 511 A.2d 1056, 1062 n.7 (Me. 1986) (*internal citations omitted*).

Applied to the instant matter, these constitutional principles find no footing in an argument that 14 M.R.S. §752-C (3) creates new liabilities against Defendant. As discussed *infra*, the operative effect of legislation like 14 M.R.S. §752-C (3) is a constitutionally permissible one: legislative modification of damages remedies.

2. *14 M.R.S. §752-C (3) changes the damages remedies under Maine law for previously illegal and/or tortious activity.*

If anything, *NECEC* further distinguishes the instant matter from established jurisprudence. In *NECEC*, the Law Court noted that it has applied the vested rights doctrine to bar only those statutes that 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), 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, 2022 ME 48, ¶ 39, 281 A.3d 618 (*emphasis added*).

ii. Dobson, Morrisette, et al *are distinguishable.*

Defendant 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. (Def.'s Mot. Judg. Pleadings 15-16) Each is distinguishable from the instant matter.

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 (such intent is clear and unambiguous by the plain text of 14 M.R.S. §752-C (3)). 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). This demonstrates clear legislative intent for 14 M.R.S. §752-C (3) to apply retroactively. Where in *Dobson* the Court found no legislative intent to apply the new limitations period retroactively, the Legislature's clear language in 14 M.R.S. §752-C (3) is entirely distinguished.

The law at issue in *Dobson* was essentially a statute ***of repose***[7]—not of limitation. *Id.*, 415 A.2d at 815 (Me. 1980). 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*

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[7] "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.

Court was the last sentence of the statute. *Id.* ("No petition of any kind may be filed more than 10 years following an accident.") This, of course, is a statute of repose—an affirmative extinguishment of all legal claims regardless of the claim's accrual or any applicable tolling.

There has never been such a statute of repose for claims arising out of childhood sexual abuse in Maine. Therefore, at the time Plaintiff was abused decades ago, there was no law in Maine providing for the extinguishment of claims based on a certain number of years having passed since an incident of abusive contact. Rather, Maine jurisprudence has always allowed tolling for childhood sexual abuse claims on the basis of age, mental incapacity, etc.

Morrissette v. Kimberly-Clark Corp., 2003 ME 138, 837 A.2d 123 and each of the other workers' compensation cases (including *Dobson*) are inapplicable. 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 Article I, Section 20 of the Maine Constitution—which guarantees private parties the right to trial by jury for disputes over $20.00. 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 (Me. 1980) ("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.")

iii. *The Court Should Defer to the Legislature.*

Defendant argues that Plaintiff's claim for negligent supervision, specifically, is ". . . offensive" because ". . . negligent supervision [is] a tort that did not exist before 2005." (Def.'s Mot. Judg. Pleadings 7).[8] This argument ignores the adaptive nature of the common law with respect to judicial recognition of torts and the will of the legislature to modify the same.

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.*

The Supreme Court has long held that causes of action based in the common law are dynamic and may be modified by application of State legislation. *New York Cent. R. Co. v. White*,

[8] Recognition of causes of action are distinct from accruals of the same. Court recognition of a cause of action gives legal effect to remedies for an injury that has already accrued. Here, the Legislature understood that the causes of action of negligent supervision and others existed in 2021 when it passed 14 M.R.S.§752-C (3), and therefore intended for claimants not to be limited by time in pursuing vicarious liability claims. Defendant's argument that claimants must be time barred for claims accruing before judicial recognition of a cause of action of negligent supervision in 2005 is flawed and must be rejected. Defendant cites no authority to support its argument.

Even if this Court were to find that damage claims before recognition of cause of action are limited, Plaintiff's claims should also not be barred because his injuries are permanent in their effects and continue to accrue every day. Such a result would not likely change the outcome because evidence of the *entire* injury would be admissible, pursuant to *Henriksen v. Cameron*, 622 A.2d 1135, 1143 (Me. 1993) (holding as admissible evidence of domestic violence, even though it was committed outside of the six-year limitations period for an action for intentional infliction of emotional distress; it is not an abuse of discretion to admit damages evidence outside of the statute of limitations for the purposes of establishing, *inter alia*, intent or reasonable belief).

243 U.S. 188, 197–99 (1917) ("It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion,").

In *White*—an employment case—the Court held that the common law could not be adjudged "unalterable by legislation." *Id.* Applied to the instant matter—which implicates concepts of vicarious liability in the employment context—it is a remarkably illustrative opinion that stands for the principle that the common law persists—and causes of action accrue—even before they are explicitly recognized under jurisprudential adoption of common law principles:

> The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized.
>
> But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. [As an example, t]he common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; an[d] the nature and extent of the duty may be modified by legislation, ***with corresponding change in the test of negligence.*** Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance.
>
> The fault may be that of the employer himself, or—most frequently—that of another for whose conduct he is made responsible according to the maxim respondeat superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,—in disobedience, it may be, of the employer's positive and specific command,—the employer is answerable for the consequences. ***It cannot be that the rule embodied in the maxim is unalterable by legislation.***
>
> ***The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception*** that the probability of a fellow workman's negligence is one of the natural

> and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases [date back to the mid-19th Century]. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. ***It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.***

Id.

Defendant summarily dismisses as "simply wrong" the growing number of states and federal courts interpreting survivor-conscious legislation similar to 14 M.R.S. §752-C (3). (Def.'s Mot. Judg. Pleadings 21). Defendants' editorial opinion 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),[10]

[10] These include Arizona (ARIZ. REV. STAT. ANN. § 12-514; 2019 Ariz. Legis. Serv. Ch. 259 (H.B. 2466)); Arkansas (ARK. CODE ANN. § 16-118-118; 2021 Ark. Acts 1036 (S.B. 676)); California (CAL. CIV. PROC. CODE § 340.1; S.B. 1779, 2002 Sen., Reg. Sess. (Cal. 2002); CAL. CIV. PROC. CODE § 340.1; A.B. 218, 2019 Gen. Assemb., Reg. Sess. (Cal. 2019)); Colorado (COLO. REV. STAT. ANN. § 13-20-1202. (no SOL); 2021 Colo. Legis. Serv. Ch. 442 (S.B. 21-088)); Connecticut (CONN. GEN. STAT. §§ 52-577d (2002)); Delaware (DEL. CODE ANN. tit 10, § 8145(b); S.B. 29, 144th Gen. Assemb. Reg. Sess. (Del. 2007); DEL. CODE ANN. tit 18, § 6856; H.B. 326, 145th Gen. Assemb. Reg. Sess. (Del. 2010)); Georgia (GA. CODE ANN. § 9-3-33.1 (2015); 2015 Ga. Laws 97 (H.B. 17)); Hawai'i (HAW. REV. STAT. § 657-1.8 (2012); S.B. 2588, 2012 Gen. Assemb. Reg. Sess. (Haw. 2012); HAW. REV. STAT. § 657-1.8 (2014); SB 2687, 2014 Gen. Assemb. Reg Sess. (Haw. 2014); Haw. Rev. Stat. § 657-1.8 (2018); 2018 Haw. Sess. Laws 98 (S.B. 2719)); Kentucky (KY. REV. STAT. ANN. § 413.249(7)(b) (2021); 2021 Ky. Rev. Stat. & R. Serv. Ch. 89 (H.B. 472)); Louisiana (LA. STAT. ANN. § 9:2800.9 (2021); 2021 La. Sess. Law Serv. Act 322 (H.B. 492)); Maine (ME. REV. STAT. ANN. tit. 14, § 752-C (2021); 2021 Me. Legis. Serv. Ch. 301 (H.P. 432)); Massachusetts (MASS. GEN. LAWS ch. 260, § 4C (2014); 2014 Mass. Legis. Serv. Ch. 145 (H.B. 4126)); Michigan (MICH.COMP. LAWS ANN. §§ 600.5805 (2018), 600.5851 (2018), 600.5851b (2018); 2018 Mich. Legis. Serv. P.A. 183 (S.B. 872)); Minnesota (MINN. STAT. ANN. § 541.073 (2013); 2013 Minn. Sess. Law Serv. Ch. 89 (H.F. 681)); Montana (MONT. CODE ANN. § 27-2-216 (2019); 2019 Mont. Laws Ch. 367 (H.B. 640)); Nevada (NEV. REV. STAT. ANN. § 11.215; 2021 Nev. Legis. Serv. Ch. 288 (S.B. 203)); New Jersey (N.J. STAT. ANN. 2A:14-2A and 2A:14-2B; A.B. 3648, 218th Leg., Reg. Sess., (N.J. 2018)); New York (2020 N.Y. Sess. Laws, Exec. Order 202.29; N.Y.C. ADMIN. CODE § 10-1105); North Carolina (N.C. GEN. STAT. § 1-17 (2019); 2019 N.C. Sess. Laws 1243 (S.L. 2019-245)); Oregon (OR. REV. STAT. ANN. § 12.117 (2010)); Rhode Island (9 R.I. GEN. LAWS § 9-1-51 (2019); 2019 R.I. Pub. Laws Ch. 19-83 (19-H 5171B)); Utah (UTAH CODE ANN. § 78B-2-308 (2016); 2016 Utah Laws Ch. 379 (H.B. 279)); Vermont (VT. STAT. ANN. tit. 12, § 522 (2019); 2019 Vt. Legis. Serv., No. 37 (H. 330)); and West Virginia (W. VA. CODE ANN. § 55-2-15(a) (2020); 2020 W. Va. Acts Ch. 2 (H.B. 4559)). Territories include Washington D.C. (D.C. CODE §§ 12-301 (2019); 2018 D.C. Sess. L. Serv. 22-311 (Act 22-593)); the Northern Mariana Islands (7 N. MAR. I. CODE § 2515 (2021); 2021 N.M.I. Pub. L. No. 22-12 (H.B. 22-2, SDI)); and Guam (7 GUAM CODE ANN. § 11306 (2011); Pub. L. No.31-06 (2011); 7 GUAM CODE ANN. § 11301.1(b) (2016); Bill No. 326-33, I Liheslaturan Guahan, 2016 Reg. Sess. (May 23, 2016); Pub. L. 33–187:2 (Sept. 23, 2016)).

and extending and/or lifting statutes of limitation for civil claims (17 states and territories).[11]

More recently, since 2021, nine states and territories have either eliminated statutes of limitation for civil child sex abuse claims (five states and territories),[12] extended statutes of limitation for civil child sex abuse claims (five states and territories),[13] and/or opened a window reviving expired civil child sex abuse claims (seven states and territories).[14]

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

[11] These include Alaska (ALASKA STAT. ANN. § 09.55.650 (1990); ALASKA STAT. ANN. §§ 09.10.140 (1990), 09.10.170 (1990), 25.20.010 (1990); ALASKA STAT. ANN. §§ 09.10.065 (2003), 09.10.140 (2003), 25.20.010 (2003); ALASKA STAT. ANN. § 09.10.065 (2013)); Arizona (ARIZ. REV. STAT. ANN. §§ 12-542, 12-502 (2002); ARIZ. REV. STAT. ANN. § 12-514 (2019); ARIZ. REV. STAT. ANN. § 12-722 (2021); 2021 Ariz. Legis. Serv. Ch. 76 (H.B. 2116)); Colorado (COLO. REV. STAT. ANN. § 13-80-103.7 (1990); COLO. REV. STAT. ANN. §§ 13-80-101 (1990), 13-80-102 (1990); COLO. REV. STAT. ANN. § 13-80-103.7 2021); 2021 Colo. Legis. Serv. Ch. 28 (S.B. 21-073); COLO. REV. STAT. ANN. § 13-20-1202 (2021); 2021 Colo. Legis. Serv. Ch. 442 (S.B. 21-088)); Connecticut (CONN. GEN. STAT. § 52-577d; CONN. GEN. STAT. §§ 52-577d-e (2002)); Delaware (DEL. CODE ANN. tit 10, §§ 8107 (2002); DEL. CODE ANN. tit 10, § 8145(a) (2007); DEL. CODE ANN. tit 18, § 6856 (2010); DEL. CODE ANN. tit. 11, § 787(i)(3)(b) (2014)); Florida (FLA. STAT. ANN. § 95.11 (9) (2010)); Illinois (ILL. COMP. STAT. 5/13-202.2 (2014)); Louisiana (LA. STAT. ANN. § 9:2800.9 (2021); 2021 La. Sess. Law Serv. Act 322 (H.B. 492)); Maine (ME. REV. STAT. ANN. tit. 14, § 752-C (2000)); Minnesota (MINN. STAT. ANN. § 541.073 (2013)); Nebraska (NEB. REV. STAT. § 25-228 (2012); NEB. REV. STAT. § 25-228 (2017)): Nevada (NEV. REV. STAT. ANN. § 11.215 (2017); NEV. REV. STAT. ANN. § 11.215 (2021); 2021 Nev. Legis. Serv. Ch. 288 (S.B. 203)): New Hampshire (N.H. REV. STAT. ANN. § 508:4-g (2005); N.H. REV. STAT. ANN. § 508:4-g (2008); N.H. REV. STAT. ANN. § 508:4-g (2020); N.H. REV. STAT. ANN § 507-B:7(II) (2020)); Utah (UTAH CODE ANN. §§ 63G-7-201 (2019), 63G-7-403(2)(b) (2019), and 63G-7-401(1)(b) (2019)); and Vermont (VT. STAT. ANN. tit. 12, § 522 (2019); 2019 Vt. Legis. Serv., No. 37 (H. 330)). Territories include the Northern Mariana Islands (2021 N.M.I. Pub. L. No. 22-12 (H.B. 22-2, SDI) and Guam (7 GUAM CODE ANN § 11301.1(a) (2016)).

[12] These includer Arizona (ARIZ. REV. STAT. ANN. § 12-722; 2021 Ariz. Legis. Serv. Ch. 76 (H.B. 2116).); Colorado (COLO. REV. STAT. ANN. § 13-80-103.7 (2021); 2021 Colo. Legis. Serv. Ch. 28 (S.B. 21-073); COLO. REV. STAT. ANN. § 13-20-1202 (2021); 2021 Colo. Legis. Serv. Ch. 442 (S.B. 21-088)); Louisiana (LA. STAT. ANN. § 9:2800.9 (2021); 2021 La. Sess. Law Serv. Act 322 (H.B. 492)); Nevada (NEV. REV. STAT. ANN. § 11.215 (2021); 2021 Nev. Legis. Serv. Ch. 288 (S.B. 203)); and the Northern Mariana Islands (2021 N.M.I. Pub. L. No. 22-12 (H.B. 22-2, SDI) enacted such laws in 2021.

[13] *Id.* Arkansas (ARK. CODE ANN. § 16-118-118 (2021); 2021 Ark. Acts 1036 (S.B. 676)); Kentucky (KY. REV. STAT. ANN. § 413.249 (2021); 2021 Ky. Rev. Stat. & R. Serv. Ch. 89 (H.B. 472)); Nevada (NEV. REV. STAT. ANN. § 11.215 (2021); 2021 Nev. Legis. Serv. Ch. 288 (S.B. 203)): New York (N.Y. C.P.L.R. § 212 (2021); 2021 N.Y. Sess. Laws Ch. 311 (S. 672). No. Int. 2372- 2021, N.Y. City Council (2021); N.Y.C. ADMIN. CODE, § 10-1105 (Am. L.L. 2022/021, 1/9/2022, eff. 1/9/2022)); and the Northern Mariana Islands (2021 N.M.I. Pub. L. No. 22-12 (H.B. 22-2, SDI) enacted such laws in 2021.

[14] *Id.* Arkansas (5 ARK. CODE ANN. § 16-118-118 (2021); 2021 Ark. Acts 1036 (S.B. 676)); Colorado (COLO. REV. STAT. ANN. § 13-20-1202. (2021); 2021 Colo. Legis. Serv. Ch. 442 (S.B. 21-088)); Kentucky (KY. REV. STAT. ANN. § 413.249(7)(b) (2021); 2021 Ky. Rev. Stat. & R. Serv. Ch. 89 (H.B. 472)); Louisiana (LA. STAT. ANN. § 9:2800.9 (2021); 2021 La. Sess. Law Serv. Act 322 (H.B. 492)); Maine (ME. REV. STAT. ANN. tit. 14, § 752-C (2021); 2021 Me. Legis. Serv. Ch. 301 (H.P. 432)); Nevada (NEV. REV. STAT. ANN. § 11.215 (2021); 2021 Nev. Legis. Serv. Ch. 288 (S.B. 203)); and the Northern Mariana Islands Islands (2021 N.M.I. Pub. L. No. 22-12 (H.B. 22-2, SDI) enacted such laws in 2021.

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.[15]

1. Establishment of Statutes of Limitation is a Legislative Function

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 given the challenges of defending cases where memories have faded, witnesses become unavailable, etc. 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, as must the ability of the injured person to recognize, understand, and take action to seek compensation for the harm.

In sex abuse cases, the Legislature has successively lengthened the time allowed for pursing a remedy as the understanding of the nature, prevalence, and serious and long-lasting effects of child sex abuse has evolved. Among the considerations which inform the evolving understanding 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.***

[15] 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).

Petersen v. Bruen, 106 Nev. 271, 281, 792 P.2d 18, 24 (1990) (*emphasis added*).

As the Supreme Court of Connecticut reasoned in holding that an amendment to a statute of limitations governing childhood sex abuse, increasing the limitations period from two to seventeen years, could validly revive a previously barred claim:

> 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.***

Roberts v. Caton, 619 A.2d 844, 849 (1993) (*footnote and internal citations omitted*; *emphasis added*). *See also Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 515 (2015) ("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 . . . .") (quoting M. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 Brook. L. Rev. 397, 404-405 (2014)).

As ideas of the proper balancing of the opposing interests of children and their abusers evolved, the Maine Legislature successively lengthened the statute of limitations—eventually abolishing it altogether—recognizing that the balance should be struck entirely in the favor of exploited children and entirely against those abusers and institutional defendants who contributed to the abuse. Finally, with 14 M.R.S. §752-C (3), the Legislature has recognized that the injustice of barring claims under previous periods of limitation must also be remedied and has revived 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 elegantly put by one commentator:

> 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) (*footnote omitted; emphasis added*).

II. 14 M.R.S. §752-C Applies to Legal Entities—without Exception—Who Are a Contributing Cause to Child Sex Abuse.

a. *The plain language of 14 M.R.S. §752-C is clear and allows for claims against non-human, institutional defendants.*

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 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. v. State*, 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.*

The text of 14 M.R.S. §752-C 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:
>
> 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.
>
> 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. Thus, no resort to legislative history is necessary or appropriate. *Klein,* 2022 ME 17, ¶ 7, 271 A.3d 777. Simply stated, the statute is unambiguous.

Defendant mischaracterizes Justice Jabar's opinion in *Boyden v. Michaud*, No. CV-07-276, 2008 WL 4106441 (Me. Super. May 14, 2008) to support its position. (Def.'s Mot. Judg. Pleadings 26).

In *Boyden*, the Court described ***the question*** as "razor thin," but then adopted the "harm based approach" in the opinion of *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*).

The *Boyden* Court explained:

> [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. Justice Jabar's decision in *Boyden* showed that the "based upon" language is unambiguous.

b. The Legislature intended for claims to be brought against legal entities or others.

Here, the Legislature intended for 14 M.R.S. § 752-C to apply to non-human institutional defendants. Regarding Defendant's position that the statute unfairly prejudices institutional defendants, it is more certainly the case that abuse survivors have been in a devastatingly unfair disadvantage.

In this case—and several related cases filed in 2022—several alleged perpetrators are alive. Two former Bishops and the current Bishop are living. Defendant also maintains document archives so detailed as to include students' parochial school report cards dating back to at least the 1960s and personnel files by past diocesan officials that are hugely probative and vast in proving Plaintiff's claims. These, of course, will similarly allow the Defendant to prove its defenses.

The legislative intent of 14 M.R.S. §752-C is clear, as set forth in the committee materials and Senate debate. *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 (*holding* that 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).

Before the enactment of 14 M.R.S. §752-C, the Committee on Judiciary was presented with extensive arguments from the opponents of the legislation that the statute would violate a defendant's supposed "vested rights" in an expired statute of limitations, as reflected in the records of the Maine State Law and Legislative Reference Library. *See* 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 and rejected these vested rights arguments—presented in a fully briefed, three-page document with cited authority—and nevertheless passed the legislation.

The Senate debate on the amendment also makes the legislative intent clear. *See* Legislative Record – Senate, Tuesday, June 15, 2021 at S-1040 – S-1041, remarks of Senator Keim advocating rejection of the bill, noting that the AG had suggested the possibility of a due process challenge at a committee work session, S-1040, and remarks of Senator Diamond:

> Thank you, Mr. President. Ladies and gentlemen of the Senate, I'll be brief but this bill does more than maybe we realize. This bill sends the message that the State of Maine is serious. You abuse a child, and even if you did it 40 years ago, this message coming from this bill is you can't hide, you can't hide behind a calendar, you can't hide behind anything because we're coming at you and I'm really pleased and proud that this bill reached this Senate in the way that it has with this kind of a report. It's very important. We need to have a reputation that this is not going to be acceptable and there's no place for you to hide

Id. at S-1041.

This applies not only to individual perpetrators of abuse, but to their employers as well. In addition to lobbyist testimony by Attorney Gerrity, the Legislature considered and dismissed Defendant's "vested rights" arguments. The Legislature clearly had the opportunity and knowledge to consider the impact that 14 M.R.S. §752-C (3) would have on institutional defendants, as well, and nevertheless acted to pass the bill.

The Legislature has indicated, in both the explicit terms of the statute's language and in the legislative history, a clear intent to revive cases previously barred with the public, 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. Plaintiff's Fraudulent Concealment Claims Survive Regardless of the Constitutionality of 14 M.R.S. §752-C (3).

Regardless of the constitutionality of section 752-C (3), Plaintiff's fraudulent concealment claims should proceed. Fraudulent concealment tolls the otherwise applicable statute of limitations. 14 M.R.S. §859.

Under Maine law, vicarious liability for fraudulent concealment is distinct from vicarious liability for an employee's sexual misconduct. *Picher v. Roman Cath. Bishop of Portland*, 2009 ME 67, ¶ 31, 974 A.2d 286, 296. Vicarious liability for fraudulent concealment in sex abuse claims is based on actions of a principal's agent(s)—other than the alleged perpetrator—for fraudulently concealing from a survivor of sex abuse ". . . the propensity of [the alleged perpetrator] to commit sexual misconduct." *Id.*

In *Picher*, the Court declined to rule on the vicarious liability of Defendant where Defendant had not preserved any such argument for appeal. *Id.* On remand, however, the Court

identified the issue as a central one for the trial court and *sua sponte* cited the Restatement (Third) of Agency §§ 7.07-7.08 (2006) for guidance. *Id* at ¶ 32.

> Claims for fraudulent concealment arise out of discrete elements:
> (1) A failure to disclose;
> (2) A material fact;
> (3) Where a legal or equitable duty to disclose exists;
> (4) With the intention of inducing another to act or to refrain from acting in reliance on the non-disclosure; and
> (5) Which is in fact relied upon to the aggrieved party's detriment.

Id at ¶ 30 (*internal citations omitted*).

In instances where, as here, a "special relationship" (fiduciary relationship) existed between Plaintiff and Defendant, "omission by silence constitutes the supplying of false information." *Brawn v. Oral Surg. Assocs*., 2003 ME 11, ¶ 23, 819 A.2d 1014, 1026 (*citing Glynn v. Atlantic Seaboard Corp.,* 1999 ME 53, ¶ 12, 728 A.2d 117, 121). An inference of fraud is appropriate where a fiduciary relationship exists, a defendant knows particular facts, does not disclose those facts, and causes a plaintiff to rely upon the absence thereof as fact. *See id.* ¶ 13, 728 A.2d at 121 (citing *Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120, 122 (1978) (holding that evidence created an inference of fraud when the officer of the corporation did not disclose all pertinent facts before signing an agreement to sell stock)).

The facts as alleged in the Complaint in the instant matter support Plaintiff's allegations of fraudulent concealment and are founded in the law independently of 14 M.R.S. §752-C. Simply put, the Complaint sets forth sufficient facts to allege fraudulent concealment which prohibits dismissal under M.R. Civ. P. 12(c).

As reflected in Plaintiff's Complaint, Plaintiff did not become aware of Defendant's acts constituting fraudulent concealment until decades after childhood sex abuse occurred. Plaintiff detrimentally relied upon Defendant's omissions that were purposefully made to discourage

Plaintiff from recognizing his cognizable claims during the original limitations period. As such, Plaintiff has suffered damages following material reliance thereupon to his detriment, and his allegations of fraudulent concealment stand separately and distinctly.

IV. 12(c) Dismissal is Inappropriate Where Alleged Facts Support Tolling for Mental Health Disability.

Dismissal on Defendant's Rule 12(c) Motion is inappropriate because Plaintiff's Complaint alleges facts supporting tolling due to mental health disability. As *supra*, this Court must resolve Defendant's Motion whilst assuming that the facts alleged in the Complaint are true and examining them in a light most favorable to Plaintiff. *Haza*, 538 A.2d at 267 (Me. 1988) (*internal citations omitted*). Here, Plaintiff's Complaint sufficiently pleads factual allegations[16] to support a finding that Plaintiff has, since the time of injury, been under a mental health disability that, irrespective of Defendant's other arguments, tolls any applicable statute of limitations.

Since 1840, Maine law has allowed tolling of statutes of limitation for, *inter alia*, the "the insane." *Brown v. Cousens*, 51 Me. 301, 306 (1864). This includes those suffering from ". . . mental disability or want of competent intellectual power . . . ." The question of tolling a statute of limitations on the basis of mental incapacity specifically in the context of trauma caused by childhood sexual abuse was raised before a superior court in 1992:

> [P]laintiff alleges that she was mentally ill when those causes of action arose and thus § 753, § 752, and § 752-C were tolled until 1989. Despite defendant's assertion that this is the first mention of PTSD, it does not contradict plaintiff's prior statements and it presents a material issue of fact. In *Chasse v. Mazerolle*, 580 A.2d 155, 157 (Me. 1990), the Law Court stated that whether a person was mentally ill or not was a question of fact and the standard was whether they "possessed sufficient competence to comprehend and exercise [their] legal rights" in the circumstances of the case. The

[16] "Whether a person is mentally ill within the meaning of 14 M.R.S.A. §853 is a question of fact." *Bowden v. Grindle*, 675 A.2d 968, 971 (Me. 1996) (quoting *Morris v. Hunter*, 652 A.2d 80, 82 (Me. 1994).

> affidavits plaintiff has submitted raise a genuine issue of fact material to the application of section 853.

D'Amico v. Childs, 1992 Me. Super. LEXIS 150, *9.

This analysis requires that mental incapacity rise to the degree of an "overall inability to function in society that prevents plaintiffs from protecting their legal rights." *McAfee v. Cole*, 637 A.2d 463, 466 (Me. 1994). Read in a light most favorable to Plaintiff, under a presumption of truth, the facts alleged in the Complaint support the conclusion that Plaintiff has for decades been under a mental health disability secondary to the trauma of the childhood sex abuse that has impaired his ability to protect his legal rights in the instant matter.

***

WHEREFORE, Plaintiff respectfully submits that Defendant's Motion for Judgment on the Pleadings be DENIED.

Dated: January 3, 2023

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STATE OF MAINE
CUMBERLAND, SS

BUSINESS AND CONSUMER DOCKET
CIVIL ACTION
DOCKET NO: BCD-CIV-2022-00044

[redacted],
Plaintiff,

v.

THE ROMAN CATHOLIC BISHOP OF PORTLAND,
Defendant.

REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

I. Introduction

The question to be decided is not, as Plaintiff frames it, whether anyone has a legal right to sexually abuse children, (Pl.'s Opp'n 1.); it is whether the Diocese, which has never sexually abused children, and which did not at any relevant time have any liability for the intentional wrongful acts of clergy, and whose asserted liability, if any, has been time barred for decades, may be deprived of the protection of a long-expired statute of limitations by retroactive legislation, notwithstanding the Maine Constitution and fundamental principles of fairness.[1] The answer is that the Legislature exceeded its authority by imposing retroactively a substantial liability which, if it had existed, has been time barred in all these cases for multiple decades.

II. The Vested Rights Doctrine.

At the outset, Plaintiff asserts incorrectly that due process rights under the Maine Constitution are materially identical to due process rights under the U.S. Constitution. (Pl.'s Opp'n 5.).[2] The Law Court says otherwise. It has expressly held the vested rights doctrine, which

[1] The Establishment Clause of the First Amendment prohibits civil courts from looking to religious doctrine for rules of decision, so Plaintiff's references to canon law must be disregarded. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871); *Hyung Jin Moon v. Hak Ja Han Moon*, 833 F. App'x 876, 879 (2d Cir. 2020); *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 348 (5th Cir. 2020); *Purdum v. Purdum*, P.3d 718, 728 (Kan. Ct. App. 2013)

[2] *See* Joshua D. Dunlap, *A Venerable Bulwark: Reaffirming the Primacy Approach to Interpreting Maine's Free Exercise Clause*, 73 ME L. REV. 1, 8-9 (2021) ("The framers, then, did not simply copy any existing constitution,

limits the Maine Legislature's authority to enact retroactive legislation, "aris[es] from the Maine Constitution's due process clause, article I, section 6-A." *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 41, 281 A.3d 618. In *NECEC*, the Law Court described the protection of vested rights as having been "rooted in the Maine Constitution since Maine became a state" in 1820, citing cases dating back to 1823. *Id*. ¶ 38.

Maine Constitutional law scholars note that the Law Court has adopted a "primacy approach," and, like other states, "rejects, a 'parallelism' approach that construes state constitutional provisions 'as being precisely conterminous with their counterparts in the United States Constitution.'" Joshua D. Dunlap, *A Venerable Bulwark: Reaffirming the Primacy Approach to Interpreting Maine's Free Exercise Clause*, 73 ME L. REV. 1, 5 (2021) (quoting Marshall J. Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 VT. L. REV. 61, 74 (1988); *see* Marshall J. Tinkle, *The Maine State Constitution* 20 (2d ed. 2013) (advocating for primacy approach); *see also* Jamesa J. Drake, *Reviving Maine's State Constitutional Protection Against Unreasonable Searches and Seizures*, 68 ME. L. REV. 321, 324 (2016). Justice Connors, too, recently recognized the primacy approach in a concurring opinion in *State v. Chan*:

> [U]nder the "primacy approach" that we have explicitly adopted, *see State v. Rowe*, 480 A.2d 778, 781 (Me. 1984), when properly raised and developed, we interpret the Maine Constitution first, examining—independently of the United States Constitution—the constitutional question pursuant to Maine values. *See State v. Flick*, 495 A.2d 339, 343-44 (Me. 1985); *State v. Larrivee*, 479 A.2d 347, 349 (Me. 1984). "It is only when we conclude that [a] claim under the state constitution fails" that we examine the claim from the "standpoint of federal constitutional law." *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984).

State v. Chan, 2020 ME 91, ¶ 34, 236 A.3d 471 (Connors, J. concurring).

(fn 2 continued) including the United States Constitution; instead, they sought to – and did – create a unique document with independent guarantees for the liberties of the people of Maine. Accordingly, absent a reasoned basis for doing so, it is inappropriate to construe the document as necessarily coextensive with the federal constitution. Courts have the duty and 'responsibility to make an independent determination of the protections afforded' under the Maine Constitution. If they fail to do so, they fail to uphold their oath to uphold that constitution.")

Since the vested rights doctrine as developed under the Maine Constitution predates by nearly half a century the ratification of the Fourteenth Amendment to the U.S. Constitution, it cannot be true that due process under the Maine Constitution is merely "coextensive with the protections of the federal constitution," (Pl.'s Opp'n 5.). By the time the U.S. Constitution's due process protections were applied to the states, Maine's high court had already found robust due process protections in the Maine Constitution, some of which still have not been recognized under its federal counterpart. *See NECEC*, 2022 ME 48, ¶¶ 38-42, 281 A.3d 618 (citing Maine vested rights cases from before the Fourteenth Amendment: *Adams v. Palmer*, 51 Me. 480 (1863); *Coffin v. Rich*, 45 Me. 507, 514-16 (1858))). The Law Court has also quoted with approval the view attributed to James Madison that property consists of "everything to which a [person] may attach a value and have a right." *NECEC* ¶ 44 (quoting Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 271 (1914)).

Plaintiff also misses the mark by relying on *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). (Pl.'s Opp'n 4.). While federal law establishes no vested right in a statute of limitations defense absent entry of a final judgment, *Id*. at 312, courts in many states including Maine have expressed a contrary view grounded in state law. *See Doe v. Hartford Roman Cath. Diocesan Corp.*, 119 A.3d 462, 511 (Conn. 2015) (identifying Maine as one of twenty-four states that "support the position that legislation that retroactively amends a statute of limitations in a way that revives time barred claims is per se invalid.") (citing to *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816 (Me. 1980).

The Law Court has given clear and repeated indications that a yet-to-be-sued defendant has a vested right to be free from liability on a claim once the statute of limitations on the claim has expired. In *Dobson*, supra, the Law Court stated, albeit in *dicta*:

> Legislation which lengthens the limitation period on existing viable claims does not have the effect of changing the legal significance of prior events or acts. It does not revive an extinguished right or deprive anyone of vested rights. No one has a vested right in the running of a statute of limitations until the prescribed time has completely run and barred the action.

415 A.2d 814, 816 (Me. 1980); *see also Morrissette v. Kimberly-Clark Corp*., 2003 ME 138, ¶ 15, 837 A.2d 123 ("[I]n the workers' compensation setting, amendments to the statute of limitations may be applied retroactively to extend the statute of limitations, but not to revive cases in which the statute of limitations has expired."). The Law Court reinforced the point that retroactive revival of a time-barred claim would impair vested rights in *Heber v. Lucerne-in-Maine Village Corporation* — which involved the retroactive, de facto elimination of a claim for property damage from the defendant's operation of a dam — by relying on *Dobson* for the proposition that the Legislature cannot revive a claim after the limitations period has run. 2000 ME 137, ¶ 11 n.3, 755 A.2d 1064; *see also Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 10 n.6, 837 A.2d 117 (citing *Dobson* for the proposition that "statute of limitations is procedural and may apply retroactively in cases when the statute has not already expired"); *Angell v. Hallee*, 2014 ME 72, ¶ 6, 92 A.3d 1154 (observing in *dicta* in a sex abuse tort case that focused on tolling that "changes in a statute of limitations may extend the limitation period but cannot 'revive cases in which the statute of limitations has expired.'") (quoting *Morrissette*, 2003 ME 138, ¶ 15, 837 A.2d 123).

Over the course of 34 years, the Law Court repeatedly said that the Legislature does not have the authority to revive previously time-barred claims. There is not a single reported decision in Maine that holds, or even suggests, otherwise.

III. Retroactive Recognition of Plaintiff's Claims Against the Diocese

Plaintiff's time to file a claim against the Diocese, if he had one, originally expired on March 10, 1972 under the then-applicable statute of limitations. (*See* Def.'s Mot. 1-2.). If Plaintiff had tried before that date to pursue the claims he is making now, he could not have succeeded, because before its decision in *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 39, 871 A.2d 1208, the Law Court expressly refused to recognize any claim against a religious institution, however denominated (*e.g.*, negligent supervision, vicarious liability, fraudulent concealment), for the intentional misconduct of its clergy. *E.g., Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, ¶ 9, 692 A.2d 441.[3] If Plaintiff had commenced a timely action against the Diocese, he would have lost on the merits. But for the recent amendment to 14 M.R.S. § 752-C, if he had commenced an action at any time after March 10, 1972, regardless of *Fortin*, he would have lost because of the statute of limitations. Either way, *res judicata* would then have barred any subsequent action. It would be a double miscarriage of justice to allow Plaintiff, long after the expiration of the original statute of limitations, to litigate a case that would have been legally untenable if timely brought.

To justify subjecting the Diocese to liability for previously barred actions under recently changed tort law, Plaintiff refers to the "adaptive nature of the common law with respect to judicial recognition of torts and the will of the legislature to modify the same." (Pl.'s Opp'n 13.)[4]

[3] For a more complete analysis of the Law Court's pre-*Fortin* decisions declining to recognize the tort claim asserted by Plaintiff here, *see* Def's Mot. 27-29.

[4] Plaintiff also argues that "[t]he Court should defer to the Legislature," (Pl.'s Opp'n 13), and that "[i]t would be a remarkable departure from constitutional separation of powers for a Maine court to overrule the authority and the clear and unambiguous intent of the Maine Legislature," (Pl.'s Opp'n 5). Plaintiff's arguments are wrong, as was made clear in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.... [I]if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.")

The argument ignores principles of fundamental fairness that the Law Court has repeatedly honored when recognizing novel tort claims. The Court has expressly rejected unlimited retroactive application of changes in common law. *Black v. Solmitz*, 409 A.2d 634, 640 (Me. 1979) ("[F]ully retroactive abrogation of the rule of parental immunity would open the door to claims for alleged personal injuries occurring many years ago."); *Davies v. Bath*, 364 A.2d 1269, 1273 (Me. 1976) ("The normal practice in cases such as this in which we make a departure from the rules of the past is to limit the applicability of the decision to causes of action arising after a certain date and to grant relief to the instant parties."); *Jones v. Billings*, 289 A.2d 39, 43 (Me. 1972) (applying a change of tort rules for injuries that occurred on or after the effective date of the change). Applying the Law Court's "normal practice," a claim based on *Fortin* cannot proceed when the conduct from which that claim arises occurred so long before *Fortin* that any action arising from that conduct was already time-barred before *Fortin* was decided. If the recent amendments to 14 M.R.S. § 752-C are interpreted as Plaintiff argues, the injustice will be more extreme than any injustice the Law Court has avoided by limiting the retroactive application of newly recognized theories of tort liability, *even within unexpired limitations periods*.

IV. 14 M.R.S. § 752-C Cannot Be Applied to the Diocese

The Superior Court (Stokes, J.) held in a 2021 decision that 14 M.R.S. § 752-C applies *only* to the defendant actually accused of committing the "sexual act" or "sexual contact" and *not* to any other defendant. *Me. Human Rights Comm'n ex rel. Pitts v. Warren*, No. KENSC-CV-20-85, 2021 Me. Super. LEXIS 153, at *3-4 (March 12, 2021). In that case, the plaintiff tenant, whose minor daughter was sexually assaulted by the tenant's boyfriend, brought a civil action against her landlord and the landlord's manager alleging that they sought to evict her after learning of the sexual assault. *Id*. at *2-3. Although the plaintiff's claims against the landlord and

manager defendants were barred under the Maine Human Rights Act's two-year limit, the plaintiff tenant argued that § 752-C trumped that statute of limitation. The Court disagreed, granted the defendants' motion to dismiss, and interpreted the operative language in § 752-C as follows:

> The phrase "sexual acts toward minors" is expressly defined to mean a "sexual act" and "sexual contact," as defined in 17-A M.R.S. §§ 251(1)(C) & (D), "that are committed against or engaged in with a person under the age of twenty." 14 M.R.S. §§ 552-C(2)(A) & (B). In the court's view, the statute was intended to eliminate the state of limitations in civil cases where a defendant has "committed" or "engaged in" a sexual act or sexual contact against or with a minor. To expand the applicability of section 752-C to include the claims made here against [the defendant landlord] and [defendant manager] would stretch the language of the statute far beyond any reasonable reading.

Id. at *3-4.

The same reasoning applies here to prohibit applying the statute to the Diocese, accused of negligent supervision, not the sexual act or sexual contact.

V. Tolling for "Mental Illness" Under 14 M.R.S. § 853

Plaintiff argues that, regardless of 14 M.R.S. § 752-C, his claims cannot be dismissed because he also alleges tolling for mental illness under 14 M.R.S. § 853. (Pl.'s Opp'n 26-27.) That assertion does not withstand scrutiny.

14 M.R.S. § 853 provides that if a person entitled to bring an action is "mentally ill . . . when the cause of action accrues, the action may be brought within the times limited herein after the disability is removed." The operative term in Section 853 is "disability," which the Law Court has interpreted to mean "an overall inability to function in society." *See Douglas v. York County*, 433 F.3d 143, 144 (1st Cir. 2005) (citing *McAfee v. Cole*, 637 A.2d 463, 466 (Me. 1994)). The term "disability" must mean that the statute of limitations is tolled *only* when a plaintiff is *unable* to proceed, *not* when a plaintiff is *unwilling* or *reluctant*.

Here, the Complaint makes no claim that Plaintiff was prevented from commencing an action within the original statute of limitations by any disability, much less that he was suffering from any such disability at the time his cause of action accrued. There is also no allegation in the Complaint that, if there was any such disability, it was continuously disabling from the time the cause of action accrued, and not "removed" long ago.

Because the issue of "mental illness" for purposes of the tolling statute is fundamentally an issue of capacity, "the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." M.R. Civ. P. 9(a). In other words, the issue can be resolved against a plaintiff who, at the pleading stage, fails to include allegations sufficient "to alert the court and opposing parties that mental illness might be an issue." *McAfee*, 637 A.2d at 466. In the absence of any such allegations, Plaintiff cannot escape judgment on the pleadings by resort to 14 M.R.S. § 853.

VII. Tolling for Fraudulent Concealment Under 14 M.R.S. § 859

In a further effort to avoid an adverse ruling, Plaintiff points to 14 M.R.S. § 859, which provides: "If a person, liable to any action mentioned, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed *which entitles any person to an action*, the action may be commenced *at any time within 6 years after the person entitled thereto discovers that he has just cause of action*" (emphasis added). Relying on that provision, he argues that the Court cannot grant dismissal or judgment on the pleadings because he has included a claim for "fraudulent concealment" in the Complaint. As demonstrated in Section IV above, the Diocese engaged in no conduct that "entitled" the Plaintiff to any action at any material time, so § 859 cannot be applied here.

Even if the kind of claim Plaintiff is attempting to pursue against the Diocese had been judicially cognizable at any relevant time, § 859 tolls the statute only until 6 years after Plaintiff "discovers that he has just cause for action." Therefore, anyone who reasonably should have known of a cause of action before 2016 would have been time barred before 2022 when the instant action was commenced. In addition to state-wide and nation-wide press coverage of similar claims in the 1980s and 1990s, the Law Court issued a publicly available opinion on April 4, 1997 addressing claims that the Diocese had knowledge of risk presented by a priest and failed to prevent the priest from engaging in sexual misconduct. *See Swanson v. Roman Catholic Bishop*, 1997 ME 63, ¶ 9, 692 A.2d 441. At the outside, therefore, if there was any tolling attributable to § 859 in this case, the time for commencing an action would have expired on April 4, 2003, more than 19 years before the commencement of the instant case.

Beyond the fact that § 859 is categorically inapplicable to Plaintiff's circumstances, Plaintiff has also failed, as a matter of pleading, to bring himself within the scope of the tolling provision. The arguably relevant allegations in Plaintiff's Complaint are in paragraphs 90-98. As asserted in those paragraphs, the material facts the Diocese is alleged to have concealed are all related to the *likelihood,* a predictive opinion, not a fact at all, that Plaintiff would be sexually abused as a minor by (a) a priest generally, and (b) the named priest specifically. If the alleged abuse occurred, once it happened, Plaintiff was, at a minimum, on notice of sufficient material facts to preclude tolling. In rejecting a similar argument, the First Circuit said:

> In making these claims, plaintiff-appellants do not allege that the hierarchy defendants' silence misled them into believing that the alleged sexual abuse did not occur, that it had not been committed by the priests, or that it had not resulted in injury to plaintiff-appellants. In other words, the hierarchy defendants never concealed from any of the plaintiff-appellants the fact of the injury itself. Rather, the essence of plaintiff-appellants' fraudulent concealment argument is that the hierarchy defendants' silence concealed from them an additional theory of liability for the alleged sexual abuse. This argument misses the mark. For a cause of action

> to accrue, the entire theory of the case need not be immediately apparent. *See Arnold v. R.J. Reynolds Tobacco Co.*, 956 F. Supp. 110, 117 (D.R.I. 1997); *Benner v. J.H. Lynch & Sons*, 641 A.2d 332, 337 (R.I. 1994). Once injured, a plaintiff is under an affirmative duty to investigate diligently all of his potential claims. *See Arnold*, 956 F. Supp. at 117; *Benner*, 641 A.2d at 338. In this case, as soon as plaintiff-appellants became aware of the alleged abuse, they should also have been aware that the hierarchy defendants, as the priests' "employers," were potentially liable for that abuse. *See Doe v. Archdiocese of Washington*, 114 Md. App. 169, 689 A.2d 634, 645 (Md. Ct. Spec. App. 1997) (a plaintiff who is sexually assaulted by a priest is on inquiry notice of his potential claims against the Archdiocese, as the priest's employer).

Kelly v. Marcantonio, 187 F.3d 192, 200-01 (1st Cir. 1999); *see also Cevenini v. Archbishop of Wash.*, 707 A.2d 768, 771 (D.C. 1998) (Statute of limitations on plaintiffs' claims against Archdiocese ran simultaneously with statute of limitations on claims against alleged perpetrator priest, regardless of allegations that Archdiocese fraudulently concealed its own wrongdoing).

Moreover, the allegations in the Complaint for fraudulent concealment fail to meet the pleading standard of M.R. Civ. P. 9(b), which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." "A claim of fraudulent concealment, like any claim of fraud, is subject to more rigorous pleading requirements not applied to common law negligence claims." *Picher v. Roman Catholic Bishop of Portland*, 2013 ME 99, ¶ 2, 82 A.3d 101 ("*Picher II*") (citing M.R. Civ. P. 9(b)).

> The complaint must "be specific about the 'time, place, and content of an alleged false representation[.]'" *Murtagh v. St. Mary's Reg'l Health Ctr.*, 2013 U.S. Dist. LEXIS 136223, 2013 WL 5348607, at *6 (D. Me. Sep. 23, 2013) (quoting *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985)). Mere conclusory allegations will not satisfy the particularity requirement. *See Hayduk*, 775 F.2d at 444. Rule 9(b) also requires that plaintiffs identify a basis for inferring scienter on the part of the defendant. *N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009).

Winne v. Nat'l Collegiate Student Loan Tr. 2005-1, No. 1:16-cv-00229-JDL, 2017 U.S. Dist. LEXIS 4360, at *5-6 (D. Me. Jan. 11, 2017).[5]

[5] Maine "regularly look[s] to federal analysis when interpreting our own identical or nearly identical rules." *Bank of N.Y. Mellon v. Shone*, 2020 ME 122, ¶ 25, 239 A.3d 671. Maine's Rule 9(b) is "practically identical to the comparable federal rule[]." *Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676.

The Defendant in this case is a Maine corporation sole, "[a] series of successive persons holding an office; a continuous legal personality that is attributed to successive holders of certain monarchical or ecclesiastical positions, such as kings, bishops, rectors, vicars, and the like." *Picher v. Roman Catholic Bishop of Portland*, 2009 ME 67, ¶ 34, 974 A.2d 286 ("*Picher I*") (citing Black's Law Dictionary 366 (8th ed. 2004)).

In his Opposition, (Pl.'s Opp'n 24-25), Plaintiff relies on dicta from *Picher I* to the effect that vicarious liability for fraudulent concealment "is a claim of liability based on the actions of an agent or agents of the Bishop, other than [the alleged abuser], for fraudulently concealing from [Plaintiff] the propensity of [the alleged abuser] to commit sexual misconduct." 2009 ME 67, ¶ 31. Despite Plaintiff's recognition that any such claim must rely on "the actions [or realistically omissions to fulfill some duty to disclose] of an agent or agents of the Bishop," nothing in Plaintiff's Complaint identifies any natural person within the Roman Catholic Diocese who knew anything about "[the accused priest's] abusive propensities and history prior to [the accused priest's] abuse of Plaintiff." No allegation in the Complaint identifies any communications or events that would have placed any person associated with the Diocese on notice of any such "propensities" or history.

In *Moore v. Erickson & Ralph, Inc.*, No. SAGSC-CV-10-33, 2011 Me. Super. LEXIS 159, * 8-9 (May 3, 2011), the Superior Court denied a motion to amend a complaint to add similarly conclusory allegations on futility grounds, based on Plaintiff's failure to meet the pleading requirements of Rule 9(b). The Court noted, *inter alia*, that in alleging generally that two corporate defendants had "made representations of material fact to Plaintiffs on numerous occasions" and that the representations "constituted false and material misrepresentations . . ."

Plaintiff "never specified who made the alleged misrepresentations or the specific content of the misrepresentations." The Complaint here suffers from the same deficiencies.

VI. CONCLUSION

As elaborated in Joshua Dunlap's and Marshall Tinkle's scholarly works and as more fully explicated in Chief Justice Stanfill's opinion in *NECEC*, the analysis begins with the Constitution of Maine, and the controlling precedents are all to be found only in the decisions of the Law Court. In the aggregate, the Law Court's decisions on retroactive applicability of statutory law, whether in holding or *in dicta*, support granting the Motion, and none support denial. Beginning with the *Laboree* decision in 1823 and culminating in three decisions only last year, the decisions either hold or indicate only that it may be possible that applicable remedies or details of procedure can be modified both prospectively and retroactively for cases even after they have accrued. No case holds or implies, however, that a statute with absolutely no prospective applicability can have only retroactive applicability for the sole purpose of reviving barred claims for tens of millions of dollars of liabilities that otherwise could not be judicially enforced. This is the law in Maine. Only one outcome is possible under that law.

Respectfully submitted,

Dated: January 23, 2023

/s/Gerald F. Petruccelli

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STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO: BCD-CIV-2022-0044

[redacted],

Plaintiff,

v.

ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant.

DEFENDANT'S MOTION TO REPORT TO THE LAW COURT
M.R. App. P. 24(c)

INTRODUCTION

Pursuant to M.R. App. P 24(c) and pages 7 and 8 of the Court's Order Denying Defendant's Dispositive Motion in this matter, Defendant Diocese respectfully moves that the Court report all the related cases[1] to the Law Court for appellate review of important and close legal questions.

To complete the record on this motion, to demonstrate the importance of prompt appellate review, and to clarify and confirm the representations of counsel mentioned on page 8 of the Order, an affidavit of Defendant's attorney is submitted herewith to document that Defendant has received, as of the date of the affidavit, letters of representation, or notices of claim, or demand letters, or sufficiently similar communications to have generated the opening or reopening of more than sixty files, all of which involve the issues decided by the Court in its Order.

[1] Docket Nos. BCD-CIV-2022-44 - [redacted], BCD-CIV-2022-48 – [redacted], BCD-CIV-2022-49 - [redacted], BCD-CIV-2022-6[redacted]0 - [redacted], BCD-CIV-2022-61 - [redacted], BCD-CIV-2022-62 - [redacted], BCD-CIV-2022-63 - [redacted], BCD-CIV-2022-64 - [redacted], BCD-CIV-2022-65 - [redacted], BCD-CIV-2022-66 - [redacted], BCD-CIV-2022-67 [redacted], BCD-CIV-2022-68 - [redacted], BCD-CIV-2022-69 - [redacted].

ARGUMENT

"Rule 24 permits parties, in limited circumstances, to obtain review from the Law Court prior to obtaining a final judgment from the trial court." *Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2013 ME 89, ¶ 9, 81 A.3d 348 (quoting *Liberty Ins. Underwriters, Inc. v. Estate of Faulkner* 2008 ME 149, ¶ 5, 957 A.2d 94.) Rule 24(c) provides:

> If the trial court is of the opinion that a question of law involved in an interlocutory order or ruling made by it ought to be determined by the Law Court before any further proceedings are taken, it may on motion of the aggrieved party report the case to the Law Court for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties without making any decision therein.

M.R. App. P. 24(c).

Accordingly, immediate report of a case involving an interlocutory order or ruling is appropriate if: (1) the aggrieved party moves for such a report, and (2) the trial court certifies its opinion that a question or questions of law necessarily determined in its decision ought to be determined by the Law Court before further proceedings in the trial court. M.R. App. P. 24(c); 3A Harvey & Merritt, *Maine Civil Practice* § A24:4 at 233-34 (3d, 2021-2022 ed. 2021).

Although the text of the Rule could be read to empower trial judges to determine what questions need interlocutory review, the Law Court retains the ultimate authority to decide whether to accept or reject a report. The Law Court has stated that, in the interest of judicial economy, the trial court should make a preliminary finding in its report that "the question of law reported [is] of sufficient importance *and* doubt to justify the report." *Toussaint v. Perreault*, 388 A.2d 918, 920 (Me. 1978). Consequently, the standard governing this motion is drawn from the process the Law Court would follow. In the Law Court's process, it must "determine whether accepting the report and answering the questions of law therein is consistent with our basic function as an appellate court, or would improperly place us in the role of an advisory board."

NECEC Transmission LLC v. Bureau of Parks & Lands, 2022 ME 48, ¶ 26, 281 A.3d 618 (internal quotation marks omitted). Here it is clear that important and contested issues of law have been decided and are ripe for appellate review, not an advisory opinion. That determination is made by weighing three factors: "(1) whether the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation; (2) whether the question might not have to be decided because of other possible dispositions; and (3) whether a decision on the issue would, in at least one alternative, dispose of the action." *Id*. (internal quotation marks omitted).

The Law Court has also put it this way:

> The first factor, in essence, asks whether the issue presented is sufficiently significant to outweigh the purposes served by the final judgment rule. The second factor addresses the possibility of other rulings rendering the question moot. If there exist alternative grounds that could result in a final disposition, we are unlikely to accept the question. The third factor asks whether at least one possible answer to the reported question would finally resolve the dispute.

In re Conservatorship of Emma, 2017 ME 1, ¶ 8, 153 A.3d 102 (internal citations omitted) (citing *Littlebrook Airpark Condo. Ass'n*, 2013 ME 89, ¶¶ 10, 12-13, 81 A.3d 348).

Therefore, in addition to what is generally apparent from the record to date, it seems appropriate to address specifically the factors identified in the cases cited above.

As this Court is aware, these cases all involve serious issues central to the outcomes of the cases and having broader importance. Briefly, they include the constitutionality of retroactive applicability of the recent amendment to 14 M.R.S §752-C, associated questions of Maine constitutional law of broader importance, and the applicability of §752-C to defendants, especially organizations, other than the human defendants accused of physically committing the specific crimes that define the scope of §752-C.

The issues presented are of great direct or case-specific importance by any standard. They are centrally important to the completion of litigation of even one of these cases and

equally central to the completed adjudication or disposition of all these cases and the others that are certain to follow. In other words, the questions are not even arguably ancillary or peripheral but are logically essential to whether any of these cases may proceed at all.

An additional measure of importance is the broader public interest. There is substantial public interest in decision of these issues in these cases. Not only will the Law Court's decision determine the retroactivity of this enactment in many cases, but it will also be important controlling precedent in future disputes about the retroactivity of future laws. That added measure of broad general importance further supports report to the Law Court.

Second, there is no reasonably identifiable possibility that there will be other rulings in these cases that will render the questions moot. No plaintiff can win any judgment in any of these cases without first prevailing on the dispositive issues presented by these motions. The only remotely hypothetical or theoretical way that Defendant can win a final judgment that would render these issues moot is to win all these cases at trials on other grounds. That such a series of speculative outcomes is not impossible is not a sufficient basis for supposing that a statistically improbable set of outcomes will render these questions moot.

The third factor is whether a decision by the Law Court in at least one of the two alternatives, would finally resolve the disputes. That third factor is not in the text of Rule 24(c) but appears to have been adopted by the Law Court. *See State ex rel. Tierney v. Ford Motor Co.*, 436 A.2d 866, 870 (Me. 1981) (citing *State v. Placzek*, Me., 380 A.2d 1010, 1013 (1977); 3A Harvey & Merritt, *Maine Civil Practice* § A24:4 at 235 (3d, 2021-2022 ed. 2021). Obviously, a Law Court affirmance of the Orders in question would not end, but would only begin, the litigation process for these cases. However, reversal of the Order, to grant these Motions, would end all those cases and, by stare decisis, end or obviate dozens of others. Here, with so many

cases filed and forecasted presenting identical questions, the judicial economy factor strongly favors report to get final authoritative appellate review of the two important questions decided.[2]

Finally, Defendant respectfully suggests that report is appropriate because it is preferable to interlocutory appeal. Indeed, but for the explicit authorization of certain interlocutory appeals in Appellate Rule 24(c), Defendant would file a notice of appeal and resist its dismissal under at least one of the exceptions to the final judgment rule.

The Law Court has generally recognized three exceptions to the final judgment rule. The first and strongest is "judicial economy." The judicial economy exception "permits an interlocutory appeal when (1) review of a non-final order can establish a final, or practically final, disposition of the entire litigation, and (2) the interests of justice require that immediate review be undertaken."[3] *Maples v. Compass Harbor Vill. Condo. Ass'n*, 2022 ME 26, ¶ 17, 273 A.3d 358 (quoting *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, ¶ 16, 202 A.3d 1189).

In this instance, the phrase, "judicial economy" addresses not only the avoidable substantial burdens upon the courts but implicates an issue of major importance to this Defendant. To win these cases after a protracted period of expensive discovery will have deprived the Diocese of one of the principal benefits of the statute of limitations, which is to

[2] Defendant acknowledges that the Oppositions to the Motions included assertions that the Plaintiffs—all of them—would be entitled to tolling for two reasons, one resting upon the extended disabling mental illness of all of them, and the other resting upon the proposition that Defendant had fraudulently concealed from all of them information they needed to commence actions within the otherwise applicable limitations periods in their respective cases. The Court by implication mooted those arguments. As a matter of judicial economy, however, it is not a reason to deny report of important questions common to many cases that a few cases may present tolling arguments that might survive summary judgment. Plaintiffs undoubtedly disagree but Defendant's position is that neither of those tolling efforts can save all these cases, if either contention can save any of them. As Defendant argued during the motion process, those contentions are not sufficiently alleged to satisfy Rule 9(a) or 9(b), respectively.

[3] The Law Court has clarified "that the availability of the judicial economy exception does not depend on our deciding the case in a certain way, and, with respect to the first requirement, a party need only demonstrate that, in at least one alternative, our ruling on appeal might establish a final, or practically final, disposition of the entire litigation. *Maples v. Compass Harbor Vill. Condo. Ass'n*, 2022 ME 26, ¶ 17 n.9, 273 A.3d 358 (citations omitted).

avoid *litigation*, not solely to avoid *liability* at the end of litigation. These important interests are entitled to be protected by prompt appellate review of these important and close legal questions.

In addition to the judicial economy exception addressed above, are the "death knell" and "collateral order" exceptions. *Maples*, 2022 ME 26, ¶ 16, 273 A.3d 358. The death knell exception would not be applicable here, but these orders should also be reviewable under the collateral order exception because there is nothing further to be done in the trial court concerning these orders, Defendant obviously has a strong legitimate interest in ending the cases promptly at far less expense and prompt appellate review, in one of two potential outcomes, would end all the cases.

The collateral order exception applies "when the appellant can establish that (1) the decision is a final determination of a claim separable from the gravamen of the litigation; (2) it presents a major unsettled question of law; and (3) it would result in irreparable loss of the rights claimed, absent immediate review." *Doe v. Roe*, 2022 ME 39, ¶ 15, 277 A.3d 369 (quoting *Bond v. Bond*, 2011 ME 105, ¶ 11, 30 A.3d 816).

Here, the questions are threshold questions that need to be answered to decide whether the cases can even proceed, and which by their nature make the answer "separable from the gravamen of the litigation." The questions also regard contested issues of law, that are of determinative importance to the cases and of major public significance, particularly the vested rights question regarding constitutionality of a retroactive enlargement of a statute of limitation to revive a time-barred cause of action. If these cases are allowed to proceed without answering the gateway questions at the beginning, only to see Defendant prevail on appeal later of a final judgment, that would mean years of litigation, and enormous amounts expended defending cases that have no legitimate claim. That harm would be irreparable and justifies immediate review.

Here, as discussed above, resolving the threshold question now could result in immediate, final disposition of the cases now before the Court. Additionally, it could interdict the many more cases to which the Diocese has been alerted. Because at least the judicial economy exception and arguably the collateral order exception would entitle Defendant to appellate review under a notice of appeal, there is additional justification for the Court to report the cases on the express authority of Rule 24(c). Indeed, in the alternative, should the Court deny this motion to report, the Court should also extend the time for filing a notice of appeal to permit the Law Court to decide whether an interlocutory appeal is appropriate. *See* M. R. App. 2B(d)(1).

CONCLUSION

For the foregoing reasons, Defendant respectfully asks that the Court report the Orders to the Law Court for its appellate review.

A proposed order is submitted herewith.

Respectfully submitted,

03/02/2023
Date

/s/ Gerald F. Petruccelli
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NOTICE

Matter in opposition to this Motion must be filed not later than twenty-one (21) days after the filing of this Motion, unless another time is provided by the Maine Rules of Civil Procedure or set by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the Motion, which may be granted without further notice or hearing.

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO: BCD-CIV-2022-0044

[redacted]

Plaintiff,

v.

ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant.

AFFIDAVIT OF GERALD F. PETRUCCELLI

1. My name is Gerald F. Petruccelli. I am a member of the Maine Bar and Petruccelli Martin & Haddow, LLP. I have provided legal services to the Roman Catholic Bishop of Portland, a Maine Corporation Sole ("the Diocese") since 2004.

2. I make this affidavit based on my knowledge and experience as counsel to the Diocese and my general familiarity with our law firm's files and records.

3. We currently have 70 files either newly opened or reopened after and apparently as a result of the recent amendment to 14 M.R.S.A. §752-C.

4. Based on conversations I have had with several attorneys, including several from other states, it is more likely than not that there will be additional claims presented in the coming months if the Court determines that the recent amendment to the statute of limitations may constitutionally be retroactively applied.

Dated March 9, 2023

Gerald F. Petruccelli

STATE OF MAINE
CUMBERLAND, ss.

March 1, 2023

Personally appeared the above named Gerald F. Petruccelli, and took oath that the foregoing statements are true to the best of his knowledge, information, and belief and, if the statements are made on information and belief, that he believes them to be true.

Before me,

Notary Public/Attorney at Law
My Commission Expires: June 13, 2023

KELLY J. CARR
Notary Public-Maine
My Commission Expires
June 13, 2023

STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER DOCKET
CIVIL ACTION
DOCKET NO.: BCD-CIV-2022-00044

ROBERT E. DUPUIS,

Plaintiff

v.

ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO REPORT [M.R. App. P. 24(c)]

NOW COMES Plaintiff Robert E. Dupuis, by and through counsel, and makes his opposition to Defendant's Rule 24(c) Motion to Report.

I. INTRODUCTION

Following this Court's Order dated February 13, 2023, denying Defendant's Motion to Dismiss, Defendant filed a Rule 24(c) Motion asking this Court to Report the instant matter to the Law Court for adjudication of discrete legal issues. For reasons set forth herein, Plaintiff objects to Defendant's interlocutory motion.

II. STANDARD OF REVIEW

Under Maine law and the Maine Rules of Appellate Procedure, "Rule 24 permits parties, in limited circumstances, to obtain review from the Law Court prior to obtaining a final judgment from the trial court. *Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2013 ME 89, ¶ 9, 81 A.3d 348, 352 (citing *Liberty Ins. Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶ 5, 957 A.2d 94); M.R. App. P. 24.

Maine applies a three-part test to assess whether a case may be reported under Rule 24:

> First, we consider whether the question reported is "of sufficient importance and doubt to outweigh the policy against piecemeal litigation." *York Register of Probate v. York County Probate Court,* 2004 ME 58, ¶ 11, 847 A.2d 395, 398 (quotation marks omitted). We have previously determined that questions involving novel issues of law may meet the requirements for importance and doubt. *See Butler v. Mooers,* 2001 ME 56, ¶ 7, 771 A.2d 1034, 1037; *Thermos Co. v. Spence,* 1999 ME 129, ¶ 5, 735 A.2d 484, 486.
>
> Second, we consider whether the question raised on report "might not have to be decided at all because of other possible dispositions." *Morris v. Sloan,* 1997 ME 179, ¶ 7, 698 A.2d 1038, 1041. If, for example, fact-finding or determination of a preliminary issue such as the statute of limitations may render the reported question moot, the question may be discharged. *Id.* ¶ 9, 698 A.2d at 1041; *Sirois v. Winslow,* 585 A.2d 183, 185 (Me.1991); *State v. Placzek,* 380 A.2d 1010, 1013 (Me.1977).
>
> Third, we consider whether a decision on the issue would, in at least one alternative, dispose of the action. *See Swanson,* 1997 ME 63, ¶ 6, 692 A.2d 441, 443. It is sufficient that there be one possible avenue for decision that would dispose of the action. *Id.*

Liberty Ins. Underwriters, Inc., 2008 ME 149, ¶¶ 7-9, 957 A.2d 94, 98.

III. ARGUMENT

I. The Court Should Not Report the Case to the Law Court Because There Are No Alternatives—Let Alone "At Least One Alternative"—"[That Would] Dispose of the Action" Where Claims for Fraudulent Concealment Exist And Create Genuine Issues of Material Fact.

Without waiver of legal arguments, rights, privileges, or standing, Plaintiff agrees that the legal question of constitutionality implicates a matter of significant importance and public

interest.[1] Plaintiff's unwavering position has been—and continues to be—that legislative amendments to 14 M.R.S. § 752-C reflect a prevailing public sentiment and related significant interest regarding the legality and justice underlying the claims of Plaintiff and those similarly situated.

Plaintiff challenges, however, the propriety of Defendant's Rule 24 Motion under the Rules of Appellate procedure as deficient in meeting the requirements thereof. The advisory note to Rule 24(c) makes clear that a matter may be reported *only where facts are undisputed*. M.R. App. P. 24(c) restyling note, June 2017. ("**When facts are not in dispute**, the matter can be submitted to the Law Court on report, assuming it otherwise qualifies for consideration. **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 the trial court**") (emphasis added).

Here, as Plaintiff's Complaint already sufficiently alleged, there remain numerous genuine issues of material fact in dispute. *See* (Pl.'s Compl. ¶¶ 54-78, *Negligent Failure to Warn, Train, or Educate*; 80-88 *Breach of Fiduciary Duty*; 90-98, *Fraudulent Concealment*; 100-13, *Negligent Supervision*; 115-32, *Respondeat Superior*; 134-38, *Intentional Infliction of Emotional Distress*; and 140, *Punitive Damages*); (Def.'s Ans. ¶¶ 3, 7-10, 14-18, 20-49, 51, *generally*; 54-55, 57-78 *Negligent Failure to Warn, Train, or Educate*; 80-88, *Breach off Fiduciary Duty*; 90-98, *Fraudulent Concealment*; 100-13, *Negligent Supervision*; 115-32, *Respondeat Superior*; 134-38, *Intentional Infliction of Emotional Distress*; and 140-41, *Punitive Damages*). Ample statements,

[1] Plaintiff maintains that Defendant's argument on the legal question of "application" is semantic and unsupported by Maine law. As this Court recognized in its Order dated February 13, 2023, the question of whether 14 M.R.S. § 752-C may be applied to institutional or organizational defendants was resolved in the affirmative in *Boyden v. Michaud*, No. CV-07-331, 2008 Me. Super. LEXIS 88 (May 14, 2008). This Court held that it ". . . has no reason to deviate from the rational provided in *Boyden*, notwithstanding that court's qualification of this question as 'razor thin.'" *Dupuis v. Roman Catholic Bishop of Portland*, No. BCD-CV-2022-00044, at 7 (Me. B.C.D. Feb. 13, 2023). Given the clarity with which *Boyden*, as controlling authority, speaks, Defendant's "application argument" is of insufficient doubt "to outweigh the policy against piecemeal litigation." *York Register of Probate,* 2004 ME 58, ¶ 11, 847 A.2d 395, 398.

which must be accepted as true for early dispositive motions,[2] and Plaintiff's attached affidavit, support denial of Defendant's motion. *See* (Pl.'s Aff. ¶¶ 12, *generally*; 16-19, *Crimens Solicitationis*; 20-24, 27, *failure to disclose incidences of prior sex abuse by clergy of Defendant*; 25, *failure to disclose knowledge of reassignment and admittance to "rehabilitation" or "reform" programs*; 26, *failure to disclose knowledge of prior acts of sex abuse by Curran*; and 28-37, *fraudulent concealment*).

Defendant's instant Motion incorrectly asserts—in a footnote—that this Court's Order of February 13, 2023, ". . . by implication mooted . . ." Plaintiff's claim for fraudulent concealment and the legal question of mental health tolling. (Def.'s Mot. Report 5. n. 2); *see infra*. Plaintiff finds no plain or reasonable such reading in this Court's February 13, 2023, Order. Rather, Plaintiff maintains that the claim for fraudulent concealment remains deeply enmeshed in disputes of genuine issues of material fact sufficiently specific and certain so as to obviate broad application of the reporting mechanism.

Report of all Plaintiff's claims alleged in the Complaint to the Law Court for review would run afoul of the plain language of Rule 24(c) and supporting notes. Because Defendant faces the prospect of litigation on the fraudulent concealment claim *regardless* of constitutionality or application, a Rule 24(c) report in the instant matter logically cannot "in at least one alternative, dispose of the action." Plaintiff's claims for fraudulent concealment are unencumbered by the constitutional question because, if proven, Plaintiff's claims are subject to *no* statutes of limitation.

Separate but relatedly, Defendant's instant Motion makes misstatements of both law and fact regarding whether resolution of the constitutional legal question is dispositive:

> No plaintiff can win any judgment in any of these cases without first prevailing on the dispositive issues presented by these motions. The

[2] *See McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994) (In reviewing a 12(b)(6) Motion ". . . the material allegations of the complaint must be taken as admitted . . . .").

> only remotely hypothetical or theoretical way that Defendant can win a final judgment that would render these issues moot is to win all these cases at trials on other grounds. That such a series of speculative outcomes is not impossible is not a sufficient basis for supposing that a statistically improbable set of outcomes will render these questions moot.

(Def.'s Mot. Report 4).

> Obviously, a Law Court affirmance of the Orders in question would not end, but would only begin, the litigation process for these cases. However, reversal of the Order, to grant these Motions, would end all those cases and, by stare decisis, end or obviate dozens of others. Here, with so many cases filed and forecasted presenting identical questions, the judicial economy factor strongly favors report to get final authoritative appellate review of the two important questions decided.

(Def.'s Mot. Report 4-5).

These positions are untenable. If Plaintiff proves his claims for fraudulent concealment—claims that cannot be adjudicated until a finder of fact has resolved all genuine issues of material fact incident thereto—then the legal questions of constitutionality and application are mooted. Whatever outcome may be reached in evaluating these legal questions, it remains an undeniable fact that (a) Plaintiff has not yet been able to duly prosecute and present evidence through the course of discovery, and (b) if/when Plaintiff engages in discovery, evidence entering the record will be dispositive—one way or the other—of the fraudulent concealment claims. Maine law is unequivocal that an action may be maintained within six years after an injured party learns of ". . . a fraud committed which entitles any person to an action . . . ." 14 M.R.S. § 859. Therefore, whether, how, and by what evidence Plaintiff discovered that Defendant fraudulently concealed its knowledge and ability to guard against the risk of child sex abuse is an unresolved question of fact awaiting discovery.

Granting Defendant's instant Motion on the premise of reporting the legal questions of constitutionality and application without specifically excepting Plaintiff's claims for fraudulent concealment—and commencing discovery related thereto—would have the effect of depriving the parties of their right to discovery on unresolved and genuine issues of material fact.

II. If the Instant Motion is Granted, the Court Should Take Notice of M.R. App. P. 25(f) Requiring Notification to the Maine Attorney General of the State's Right to Intervene on Issues of Constitutionality.

Should this Court grant Defendant's instant Motion to Report on the constitutional question, Plaintiff begs the Court issue an Order that takes record notice of M.R. App. P. 25(f) ("Intervention by the State"). The text of Rule 25(f) reads:

> **Intervention by the State.** When the constitutionality of an act of the Legislature of this State affecting the public interest is drawn in question upon such certification to which the State of Maine or an officer, agency, or employee thereof is not a party, the Supreme Judicial Court shall notify the Attorney General and shall permit the State of Maine to intervene for presentation of briefs and oral argument on the question of constitutionality.

M.R. App. P. 25(f).

Pursuant to the Rule, any report of the instant and related cases to the Supreme Judicial Court on the legal question of constitutionality triggers the Law Court's duty to notify to place the Office of the Maine Attorney General on notice of the same to provide an opportunity for the State of Maine to intervene in the litigation for the limited purpose of presenting arguments on the issue of constitutionality.

***

WHEREFORE, Plaintiff respectfully submits that Defendant's Motion to Report be DENIED.

Dated: March 23, 2023

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STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER DOCKET
CIVIL ACTION
DOCKET NO.: CV-2022-44

ROBERT E. DUPUIS,

Plaintiff

v.

ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant

AFFIDAVIT OF ROBERT E. DUPUIS, IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO REPORT [M.R. App. P. 24(c)]

I, Robert E. Dupuis, having been duly sworn, hereby depose and state as follows:

1. My name is Robert E. Dupuis. I am 74-years-old. My date of birth March 10, 1949.

2. I reside in East Lyme, County of New London, State of Connecticut.

3. In/around 1961, and at all times pertinent to the Complaint, I was a resident of Old Town, County of Penobscot, State of Maine.

4. In/around 1961, I resided with my parents—Edgar J. Dupuis (DOB: 06/18/1921) and Estelle V. Dupuis (DOB: 02/14/1925)—and my several siblings.

5. In/around 1961, my family and I were active parishioners at the St. Joseph Parish in Old Town, Maine— a Catholic parish administered by the Roman Catholic Bishop of Portland (*hereinafter* "Defendant").

6. In/around 1961, I was a student enrolled at St. Joseph Parochial School in Old Town, Maine.

7. As a parishioner and student of the parish parochial school, I was recruited and/or selected by Defendant and/or parish leaders to serve as a manual laborer at St. Joseph Church in Old Town, Maine, beginning in summertime in/around 1961.

8. Because my family were devout Catholics, my parents considered it a great honor that I was selected to serve St. Joseph Parish and Church doing odd-jobs and errands such as cleaning and mowing lawns.

9. Because my family endured financial hardship, my parents relied in part upon the small amounts of money I was paid by Defendant for these services.

10. As part of my duties in this role for Defendant, I reported to the priests assigned to St. Joseph Church.

11. In/around 1961, the clergy assigned to St. Joseph included one Rev. John J. Curran (*hereinafter* "Curran"), an employee, priest, and employee for Defendant assigned to St. Joseph Parish and Church.

12. In/around 1961, I was sexually abused by Curran—an employee of Defendant—while on church property.

13. At no time prior to, during, or following the period of approximately 1961 was I or my family ever contacted by Defendant, then-Bishop Daniel J. Feeney, or any other employee, official, representative, and/or affiliate of Defendant and/or the Roman Catholic Church regarding the sex abuse I experienced.

14. At the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of canonical proclamations, such as the Synod of Elvira—a 4th Century (c. 305-306 CE) ecclesiastical council before which issues of child sex abuse of minor males by adult males were discussed and addressed by the Roman Catholic Church.

15. Defendant failed to disclose to me or my parents any of the hazards of abusive priests, generally, that it knew and/or reasonably should have known since the 4th Century.

16. At the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of the 1922 *Crimens Solicitationis*—or "On the Manner of Proceeding in Cases of the Crime of Solicitation"—an instruction

of the Dicastery for the Doctrine of the Faith issued by Pope Pius XI.

17. Defendant failed to disclose to me or my parents any of the hazards of abusive priests, generally, that it knew and/or reasonably should have known during or before 1922.

18. At/around the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of the 1962 *Crimens Solicitationis*—or "On the Manner of Proceeding in Cases of the Crime of Solicitation"—an instruction of the Dicastery for the Doctrine of the Faith issued by Pope John XXIII.

19. Defendant failed to disclose to me or my parents any of the hazards of abusive priests, generally, that it knew and/or reasonably should have known about since 1962.

20. At the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of prior instances of childhood grooming and sex abuse by its employees, including members of the clergy.

21. Defendant failed to disclose to me or my parents any of the hazards of abusive priests, generally, that it knew and/or reasonably should have known about occurring in Maine, under the supervision of Defendant.

22. Specifically, at the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of prior instances of childhood grooming and sex abuse by Rev. Ralph Corbeil in/around 1948.

23. Specifically, at the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of prior instances of childhood grooming and sex abuse by Rev. James P. Vallely in/around 1955.

24. Specifically, at the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of prior instances of childhood grooming and sex abuse by Rev. Lawrence Sabatino in/around 1958 and again in/around 1971.

25. Specifically, at the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of prior instances of childhood grooming and sex abuse by priests as evidenced by Defendant's practice of "reassigning" and/or sending alleged abusers to "reform" and/or "rehabilitation" centers in/around this same time.

26. Specifically, at the time I was sexually abused by Curran, I was not aware that Defendant was aware, in possession of, and/or had actual and/or constructive knowledge and/or notice of prior instances of childhood grooming and sex abuse by Curran.

27. Defendant failed to disclose to me or my parents any of the hazards of abusive priests, both generally and specifically, about which it knew and/or reasonably should have known occurring in Maine, under the supervision of Defendant, including those of Curran.

28. I and/or my parents reasonably and in-fact relied upon Defendant's nondisclosure to my detriment.

29. I believe Defendant intended to (and/or did so in fact) recklessly induce me to continue having contact with the Catholic Church and with Defendant, to support the Church and Defendant, and/or to refrain from acting—including avoiding abusive environments and taking steps to protect oneself or their children—in actual reliance by myself and/or my parents on Defendant's nondisclosure.

30. Given my status as a minor child and parishioner of Defendant, I believe that Defendant owed my family and I a fiduciary duty to reveal information and/or actual and/or constructive knowledge it had that, if shared with me and/or my parents, would reasonably have had the effect of preventing the sexual abuse that I experienced as a child.

31. If I and/or my parents had known any of the foregoing at the time I was sexually abused by Curran, I and/or my parents would have been able to protect me from said sex abuse by either identifying red flags, warning signs, opportunities for isolation, opportunities for exploiting my unique, personal vulnerabilities, opportunities for grooming me, and knowing where to turn and who to communicate with about child sexual abuse prevention safety rules, and or disassociating with the

Catholic Church, Defendant, and/or affiliates thereof.

32. If I and/or my parents had known any of the foregoing at the time I was sexually abused by Curran, I and/or my parents would have been able to protect me from said sex abuse I suffered by disassociating me from Curran.

33. I believe that, had I and/or my parents been made aware of any of the foregoing, I would not have been subjected to childhood sex abuse as it relates to this matter and would not have suffered the claimed damages and or the extent of damages that I have experienced and will continue to experience.

34. I believe that, had I and/or my parents been made aware of any of the foregoing, I and/or my parents would have taken actions to prevent me from being in direct contact with Defendant's employees, including Curran, thereby extinguishing any opportunity for the abuse to occur.

35. I believe that the conduct of Defendant as alleged above was intentionally and recklessly done.

36. I believe that, as a result of Defendant's nondisclosures as above, I suffered physical and permanent, severe emotional injury and damages, including, but not limited to: emotional distress, physical manifestations thereof, embarrassment, loss of self-esteem, disgrace, humiliation, difficulty with interpersonal relationships, and loss of enjoyment of life; inability to perform daily activities and obtain full enjoyment of life; and incurred expenses for medical psychological treatment, therapy, and counseling.

37. I believe that Defendant's fraudulent concealment was a direct and foreseeable cause of my respective damages, as above.

3/21/23
Date

Robert E. Dupuis

STATE OF FLORIDA
CS Seals, SS.

Date: March 21, 2023

Then appeared the above-named Robert E. Dupuis, and made oath that the facts set forth herein are true upon their own knowledge, information or belief and, so far as upon information and belief, they believe this information to be true.

Notary Public/Attorney

ERIK RUSCETTE
MY COMMISSION # HH 167147
EXPIRES: July 31, 2025
Bonded Thru Notary Public Underwriters

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
CIVIL ACTION
DOCKET NO: BCD-CIV-2022-00044

ROBERT E. DUPUIS,

Plaintiff,

v.

ROMAN CATHOLIC BISHOP OF PORTLAND,

Defendant.

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO REPORT TO THE LAW COURT

Defendant respectfully submits this Reply in this action and twelve other actions presenting identical questions. No material fact is disputed. Report of these cases pursuant to M.R. App. P. 24(c) is individually appropriate with respect to each or any of these cases but the overwhelming point here is that all these cases, eight others filed after these cases and now in suit, and dozens more asserted but not yet filed need a prompt and decisive resolution by the Law Court of the two important legal issues decided by this Court: the retroactivity or not of the recent amendment to 14 M.R.S. §752-C and the applicability or not of §752-C to organizations.

The Court did not decide two other issues, although the briefs and oral arguments addressed them. Defendant's contention remains that tolling is legally impossible for disabling mental illness for every one of these plaintiffs, probably not factually possible for any of them, and that none of them has pleaded it. Defendant's contention with respect to tolling for fraudulent concealment is that it is insufficiently pleaded to satisfy M.R. Civ. P. 9(b) but, more to the point, the pleadings themselves demonstrate as a matter of law that every one of these plaintiffs, and indeed any plaintiff alleging sexual abuse, had adequate knowledge or information at the time of any alleged abuse to commence legal proceedings during the course of which

broad discovery would have been available. But it is also dispositive, as a matter of law, that there can be no fraudulent concealment of a cause of action when there was no legally recognized cause of action to conceal. No action for negligent supervision was recognized in Maine at any time that would matter in any of these cases. Respectfully, in other words, the Court could have decided all four of these questions as a matter of law, but it seems reasonable to infer that the Court likely considered the tolling issues to be mooted by its other two decisions. That circumstance seems to be the only point of the Opposition.

Before addressing the central issue, it needs to be said that every affidavit submitted with any opposition is completely immaterial for present purposes. The only facts that matter are the plaintiffs' dates of birth, the readily available dates of the various statutory enactments, and the dates of the Law Court's published decisions concerning the existence or not of a cause of action for negligent supervision. The personal occurrence facts of these plaintiffs and the assertions of their family members have no bearing on whether the case should be reported. This is not a motion for summary judgment on the merits as to which the opposing party can prevail by showing that there are disputed material facts about the occurrence. These motions properly seek prompt appellate review on questions of constitutional and statutory law as to which there are no unresolved material facts.

Turning to the question of whether the Court should grant the present Motion, Plaintiffs do not appear to contest that the two issues that were decided by the Court are important. They are important for the internal litigation logic of their respective cases, important for the dozens of other prospective cases of which the Defendant Diocese has already received notice, and important for society at large concerning constitutional limits on the Legislature's authority to

enact retroactively effective legislation, in this and other circumstances, and concerning the proper interpretation of statutory language such as the text of §752-C.

The only question presented by the plain language of M.R. App. P. 24(c) is whether, in the opinion of this Court, these questions are sufficiently important and sufficiently contested to merit interlocutory review. Further debate about that does not seem necessary. Instead, the focus falls on Plaintiffs' argument that report is legally impossible because a Law Court decision reversing or vacating this Court's decisions on the retroactivity and applicability questions will not fully and finally terminate each case. To this, there are two principal responses.

The first point is that Plaintiffs' argument overstates the role of the finality factor, which does not even appear in the text of Rule 24(c). The text of the rule contains no requirement that, under at least one outcome, every one of these cases would necessarily have to end for every case to be reportable. That proposition is not and has never been a rule of law. At most, the prospect that a case will end if decided in at least one of the possible ways is a prudential consideration governing the Law Court's judgment about whether to allow a permissible interlocutory appeal or a permissible report by agreement of the parties under Appellate Rule 24(a). Even as a prudential factor, Rule 24(c) does not include any mention of the finality consideration.

The words quoted in Plaintiffs' Opposition from *Liberty Insurance Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶ 9, 957 A.2d 94, are accurately quoted but do not constitute or even state any holding in any precedent about the meaning of Rule 24(c). (Pl.'s Opp'n to Def. Mot. Report 2.) Specifically, the phraseology in *Liberty Insurance* originates from an inaccurate paraphrasing of *Swanson v. Roman Catholic Bishop*, 1997 ME 63, ¶ 6, 692 A.2d 441, where the Law Court actually and explicitly said that this third factor of final disposition is *not required* by

former Civil Rule 72(c), now Appellate Rule 24(c). The Court in *Swanson* noted in passing, however, that potential finality under one of the possible outcomes was nevertheless satisfied even though it is not needed under this rule. *Id*. ("Although not required by Rule 72(c), our decision will in at least one alternative dispose of the action against the church."); *Morris v. Sloan*, 1997 ME 179, ¶ 7, 698 A.2d 1038 (accurately paraphrasing and quoting *Swanson*)."The *Liberty Insurance* case then mentions the *Swanson* decision in listing the factors the Law Court might consider in the course of deciding whether acceptance of a report would upset the normal distribution of authority between trial and appellate courts and present an unacceptable risk of turning the Law Court's appellate function into an advisory function.

In *Morris v. Sloan*, decided the same year as *Swanson*, the Law Court accurately cited to *Swanson* to say that former Civil Rule 72(c), now Appellate Rule 24(c), does *not* require the Law Court to consider whether its decision on a question on report would in at least one alternative dispose of the action. *Id*. The plaintiffs in that case, a medical malpractice action, sought report to decide an evidentiary question on admissibility of findings of a prelitigation screening panel due to an alleged bias of a panel member. *Id*. ¶ 1. The Law Court ultimately rejected the report for reasons unrelated to considerations of finality, because (1) any decision would not have importance as a source of general law, (2) because the question might never have reached it in the normal course of litigation, and (3) to avoid encouraging piecemeal litigation. *Id*. ¶¶ 8-10.

Here, unlike *Morris v. Sloan,* the questions on report *would* have importance as a source of general law regarding retroactive legislation and proper interpretation of §752-C. Likewise, the questions on report here *would* reach the Law Court in the ordinary course of litigation and *would not* encourage piecemeal litigation.

In short, *Liberty Insurance* mentions the third factor citing *Swanson,* but *Swanson* says only it was *not* a requirement but was nevertheless present. The essential point is that neither *Swanson* nor *Liberty Insurance* holds that assured finality is a *sine qua non* of reportability. It is no more than a prudential consideration to be given appropriate weight relative to the importance and closeness of the questions to be reported.

Second, assuming arguendo that it is a legal necessity, and not just a prudential consideration, that at least one outcome in the Law Court would end a particular case, it is impossible to imagine that every one of these Plaintiffs and every one of the prospective plaintiffs, was disabled by mental illness at all material times or the victim of fraudulent concealment at any time, much less all material times. Given the number of cases, it is as certain as certain can be that many, if not most or even all, of these cases will end, if the Diocese prevails in the Law Court. The rigors of M.R. Civ. P. 9(a)-(b) and M.R. Civ. P. 11, and the presumed compliance of Plaintiffs and their counsel with those rules, will inevitably lead to the abandonment of a significant number of these cases and the failure of others. Even if it is assumed that the Court's power to report an individual case is affected by the possibility or even likelihood that it might survive for further litigation on the narrow questions of tolling, the crucial point as a matter of judicial economy and fairness is there are thirteen cases and some of them will end and all of them will be narrowed if the Diocese prevails on appeal. In short, it is not to be doubted that the Law Court has jurisdiction and power to hear and decide these cases now. The only issue is whether it should. That judgment is a matter of both fairness and efficiency and both fairness and efficiency implicate the interests of all parties. M.R. Civ. P. 1 and M.R. App. P. 1 both direct the courts to construe the rules "to secure the just, speedy, and inexpensive [outcome]." Full litigation of 13 or 21 or 60 or 80 or more cases in all 16 counties

when it is at least strongly arguable that none of the plaintiffs has any right to any litigation is neither just nor speedy nor inexpensive. It is just, far more speedy, and substantially less expensive to determine now whether, as a matter of constitutional law, the plaintiffs have any right to litigate at all.

To summarize, it is evident that none of the tolling issues will ever be mentioned again if the Law Court affirms this Court's decisions on the two questions this Court decided. But the essential point is that Rule 24(c) textually provides that, even where there will be further litigation in a single case, there may occasionally be an issue that meets the proverbial elephant-in-the-room standard, so that appellate determination of that issue on interlocutory appeal or report will so materially affect the subsequent course of that one case that Law Court review is legally possible, and in appropriate cases, permissible, even where it is certain that the case will not end. *A fortiori,* report of multiple cases presenting two common issues of law for a consolidated appeal is legally permissible and certainly prudent. Indeed, it may be argued the denial of this report would approach or even be a denial of due process given the enormity of the consequences in declining timely appellate review. The Rule empowers trial judges to exercise their judgment as to when and under what circumstances an important and doubtful issue or two should be reported to the Law Court, even before there is a final judgment. The gratuitous mention of finality in *Swanson* where it was inapplicable and its unnecessary reiteration in the *Liberty Insurance* case show only that the finality question is at most a prudential factor in the Law Court's later consideration of whether to accept a report. Those recitals did not and could not create an absolute legal prohibition negating the plain language of the Rule.

For these reasons, then, the Court should report this entire case (and all the others) for the Law Court's consideration to permit the Law Court to decide the retroactivity and applicability

questions and to decide whether the tolling issues can be decided on this record as a matter of law as the Diocese has argued. This is ultimately a pragmatic, prudential judgment about the best use of judicial resources and about the interests of now dozens of actual and potential litigants, including the Defendant, in getting an adjudication of important legal issues sooner rather than later.

Also, the Diocese concurs with the Plaintiffs that the Attorney General ought to be notified of the Report and given an opportunity to participate.

Finally, if the Court now decides to deny the Motion it invited in its Order, the Diocese respectfully renews its request that the Court exercise its authority under M. R. App. 2B(d)(1) to extend the time for filing a notice of appeal to permit the Law Court to decide whether an interlocutory appeal is advisable under these circumstances.

Respectfully Submitted,

Date: April 3, 2023

/s/Gerald F. Petruccelli

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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, Esq. hereby certify that a copy of this Appendix was served upon counsel at the address set forth below by email and first-class mail, postage prepaid on July 31, 2023:

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