STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-23-122

Robert E. Dupuis, et al.,

Plaintiff-Appellees,

v.

Roman Catholic Bishop of Portland, Maine,

Defendant-Appellant.

On Report from the Superior Court (Business and Consumer Docket)

REPLY BY APPELLANT ROMAN CATHOLIC BISHOP OF PORTLAND TO APPELLEES ROBERT DUPUIS, ET AL., AND STATE OF MAINE

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I. GENERAL INTRODUCTION

Defendant-Appellant Roman Catholic Bishop of Portland ("Diocese") submits this Reply to the briefs of the Appellees. The amicus briefs will be addressed separately. Although the Diocese's two reply briefs overlap to a degree, they are meant to be complementary as a comprehensive response to all briefs supporting affirmance.

The throughline of every Law Court decision germane to this analysis shows that Maine's Constitution prohibits, as a denial of due process, retroactive application of any legislation if it impairs vested rights or if its effect is to leave a party, without judicially enforceable liability before its effective date, subject to adverse judgments after its enactment. Appellees cite no decision holding otherwise.

Conversely, every decision of the Law Court approving what it calls "retroactivity" is not retroactive in any sense that implicates constitutional issues. A truly procedural change affects only how a case is litigated, not whether it may be litigated. Statutes that are truly remedial do not change whether a case may be brought or who wins but affect only what relief a prevailing party may receive.

As discussed in reply to the Amici supporting affirmance, questions of constitutional law ought not to be adjudicated based on sympathy. Because those issues have been interjected by others, the Diocese points out that no person alleged to have committed abuse is a party. Most are dead, and the others have not been sued. The party before the Court is a charitable corporation. Diocesan liability is based on allegations that former leaders did not prevent alleged abuse. The accused officials are

also not parties, and most are dead, including every bishop who served before 2004. If a jury is to be instructed to evaluate the reasonableness of diocesan personnel practices decades ago, the Diocese will be compelled to defend those practices without the testimony of many or all eyewitness participants.

Plaintiff-Appellees were protected by tolling from any statute of limitations during childhood. The applicable statutes of limitations lapsed years after they were adults. Their reluctance to litigate is understandable, but they were not prevented from proceeding in the available time. Judging only from the monetary demands received so far in some of these cases, if the amounts demanded are awarded, the judgments will amount to tens of millions of dollars. The property legally owned by the corporation sole is beneficially owned by thousands of Maine Catholics. Their donations and bequests, and the property donated and built by earlier generations of Maine Catholics, will be the only assets available to satisfy any judgments that occur, except for the modest remaining coverage of 1970s-era insurance policies.

Again, these considerations are not a proper basis for constitutional adjudication but, if they are considered, it matters that the accused abusers are not in court. Any property to be seized on writs of execution if Plaintiff-Appellees and others prevail is not the property of any of any alleged wrongdoer.

In analyzing a due process issue, the proper focus is on what is usual and customary and what is extraordinary and unprecedented. For example, *see* Justice Scalia's opinion in *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) to the effect that

what has long been done is the process that is due. Legislation is almost always prospective. The fact that nothing like this was done by the Legislature for 200 years is powerful evidence of a settled understanding of the boundaries of legislative authority and the scope of due process protection in Maine.[1]

II. ONLY MAINE LAW MATTERS

A. Federal Authorities are not Controlling.

The issues before the Court arise under the Maine Constitution. State-Appellee argues that due process rights under Maine's Constitution are "coextensive" with due process rights under the federal Constitution and that this Court should forgo analysis under the Maine Constitution and "follow the [U.S.] Supreme Court's lead" as set forth in *Campbell v. Holt*, 115 U.S. 620 (1885) and *Chase Sec. Corp. v Donaldson*, 325 U.S. 304 (1945) ("*Chase*"). (State-Appellee's Red Brief, hereinafter "State's Red Br." at 15-19.) Similarly, Plaintiff-Appellees argue that "Maine law is consistent with *Chase Sec. Corp.* and the unambiguous language of the U.S. Supreme Court about the nature of statutes of limitation should guide this Court." (Plaintiff-Appellees' Red Brief, hereinafter "Plaintiffs' Red Br." at 26 (citing *Chase*, 325 U.S. at 314).)

Those arguments are wrong. *See NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 38, 281 A.3d 618 ("[T]he protection of vested rights has been

[1] Two recent failed Initiatives purporting to exercise retroactive legislative power by referendum failed as not constitutional *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882, and *NECEC Transmission, LLC v. Bureau of Parks & Lands*, 2022 ME 48, 281 A.3d 618.

rooted in the Maine Constitution since Maine became a state.") ("*NECEC*"). This Court has rejected a "lockstep" approach to constitutional analysis, defined in a recent law review article as follows: "*Lockstep*: The court interprets a state constitutional provision as the equivalent of its federal counterpart." Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons From a Half-Century of New Judicial Federalism*, 75 Me. L. Rev. 1, 4 (2023) (hereinafter "Connors & Finch, *Primacy*").

Rather, this Court has endorsed the primacy approach, addressing the Maine Constitution first. *See State v. Reeves*, 2022 ME 10, ¶ 41, 268 A.3d 281 (stating that the Law Court applies the primacy approach to "first examine [claims] under the Maine Constitution and interpret the Maine Constitution independently of the federal Constitution."); *State v. Athayde*, 2022 ME 41, ¶ 20, 277 A.3d 387 (quoting *Reeves*, above, approvingly); *State v. Fleming*, 2020 ME 120, ¶ 17 n.9, 239 A.3d 648 (stating that the Court applies the primacy approach); *State v. Chan*, 2020 ME 91, ¶ 34, 236 A.3d 471 (Connors, J., concurring) (observing that the Law Court has "explicitly adopted" the primacy approach); *State v. Rowe*, 480 A.2d 778, 781 (Me. 1984) (noting adoption of primacy approach); Connors & Finch, *Primacy,* 7-8 (citing *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984)); Joshua Dunlap, *A Venerable Bulwark: Reaffirming the Primacy Approach to Interpreting Maine's Free Exercise Clause*, 73 Me. L. Rev. 1, 3 (2021) ("Dunlap, *A Venerable Bulwark"*). Except for the State's admission (State's Red Br. at 15) that the Law Court's interpretations of the Maine Constitution do not always follow Supreme

Court decisions about the U.S. Constitution, Appellees address none of the cases or articles cited above.

The Connors & Finch article defines "primacy" as follows:

> *Primacy*. This approach requires analysis and application of state constitutional provisions to come first when a party raises a constitutional issue, even if the state provision is identical in language to its federal counterpart. The court interprets the state provision independently of any construction given to the federal counterpart, and only accords weight to federal interpretations if they are deemed persuasive.

Connors & Finch, *Primacy*, 3. The article gives clear guidance to the Maine bar on how to assist the Court to identify, address, and resolve issues of Maine constitutional law. *Id.* at 24-31. Although the Diocese cited the article (Blue Br. 12 n.2), neither of the Appellees nor their supporting amici appear to have paid its guidance any heed.

This Court last year in *Athayde* explained its rationale.

> We use the primacy approach for three reasons. First, there is no federal violation if the state constitutional provision provides the relief sought by the defendant. *See Massachusetts v. Upton*, 466 U.S. 727, 736, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984) (Stevens, J., concurring) ("The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law." (quotation marks omitted)). Second, we exercise judicial restraint to avoid issuing unnecessary opinions on the United States Constitution. *Cadman*, 476 A.2d at 1150 ("Just as it is a fundamental rule of appellate procedure to avoid expressing opinions on constitutional questions when some other resolution of the issues renders a constitutional ruling unnecessary, a similar policy of judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state constitution." (citation omitted)). Third, the primacy approach enables us to satisfy our duties under our federalist system. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of*

> *American Constitutional Law* 179 (2018) ("A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions."); *State v. Larrivee*, 479 A.2d 347, 349 (Me. 1984) ("We must test that claim initially by our state constitution. That document, after all, has been the primary protector of the fundamental liberties of Maine people since statehood was achieved.").

Athayde, 2022 ME 41, ¶ 21, 277 A.3d 387; *see also* Dunlap, *A Venerable Bulwark*, 7-13.

The text of Maine's Constitution, its history, and Maine case law support the primacy approach.

Text: The language in the Maine Constitution differs from the language in the federal Constitution. *Compare* Me. Const. art. I, §§ 1, 6, 6-A, *with* U.S. Const. amend. V, XIV*; see Reeves*, 2022 ME 10, ¶ 41 n.10, 268 A.3d 281 (unanimous decision rejecting the State's arguments in that case that provisions of the Maine Constitution and the federal Constitution are "coextensive").

History: The Maine Constitution provided Maine citizens with their only source of due process protection from 1820 until the Fourteenth Amendment to the federal Constitution was ratified in 1868. *See Barron v. Baltimore*, 32 U.S. 243, 247-49 (1833). Even then, after the Fourteenth Amendment was added, the Supreme Court only gradually incorporated the guaranties of the Bill of Rights to apply to the states. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial); *Malloy v. Hogan*, 378 U.S. 1 (1964) (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).

Case law: Although Section 6-A of the Maine Constitution was not adopted until 1963, the Law Court has cited language from 1820 in Section 6 that references "judgment by the peers or laws of the land" to incorporate "processes and proceedings of the common law." *Dwyer v. State*, 151 Me. 382, 392, 120 A.2d 276, 282 (1956). Before *NECEC,* the Law Court often stated that Maine's Constitution provides greater due process protections than the federal Constitution, meaning that they are not "coextensive." *See, e.g.*, *State v. Newell,* 277 A.2d 731, 733-38 (Me. 1971); *State v. Collins*, 279 A.2d 620 (Me. 1972); *Danforth v. State Department of Health & Welfare,* 303 A.2d 794, 795-96 (Me. 1973); *State v. Sklar*, 317 A.2d 160, 165-66 (Me. 1974).

Of course, the primacy approach permits use of Supreme Court decisions to the extent that they are persuasive and not inconsistent with the Maine Constitution. It is therefore appropriate to note that the Supreme Court opinion in *Chase* is deeply flawed and rests on a fragile foundation. The primary authority is *Campbell*, but the dissent in *Campbell*, 115 U.S. at 630-34 (Bradley, J., dissenting), is in accord with Maine law. The *Chase* opinion acknowledges that some state courts have rejected *Campbell's* holding under their own state constitutions. *Chase*, 325 U.S. at 312-13 & n.9. Moreover, *Chase* relies on a quote from Justice Holmes in an opinion for the Massachusetts Supreme Judicial Court. *Id.* at 314-15 (citing *Danforth v. Groton Water Co.,* 178 Mass. 472 (Mass. 1901)). The opinion, however, does not support the proposition for which *Chase* cited it. In *Danforth*, no statute of limitations was repealed, and no statute of limitations had expired. Rather, the legislation in question had

removed a procedural step, previously obligating a claimant to file an application for reimbursement with the county commissioners before commencing litigation. The legislative change eliminated that procedural step so that an action, that was never time-barred by the statute of limitations, could proceed notwithstanding the claimant's failure to have filed the previously obligatory application. *Id.* at 477-78. The *Danforth* opinion distinguished *Campbell*, saying (not unlike the line of cases in Maine following *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814 (Me. 1980)) that retroactive repeal of a statute of limitations after it had expired would have been prohibited under the Massachusetts Constitution and "that such a repeal would have no effect." *Id.* at 476. In short, *Chase* is not a binding interpretation of Maine's Constitution. Nor is it persuasive because its correctness is rendered doubtful by the Supreme Court's apparent misunderstanding of the Holmes opinion in *Danforth*.

B. The Correct Framework for Adjudicating Retroactive Legislation

Maine's Constitution prohibits legislation that impairs vested rights or renders a party liable for long-ago events. It does not authorize retroactive legislation that impairs vested rights or leads to liability for pre-enactment events. As Plaintiff-Appellees recognize, "Maine courts exercise authority to strike down remedial statutes if they violate substantive due process rights. *Where a vested right is not affected*, Maine courts will determine that legislation is constitutional if it satisfies the three-factor rational-basis test." (Plaintiffs' Red Br. 7 (emphasis added); *see also* Plaintiffs' Red Br.

31 ("[W]hen a fundamental right – such as vested rights – are not at issue, Maine courts apply a rational basis review to test the constitutionality of a statute.")).[2]

For decades, the Diocese had a vested right to be free from liability and to assert expired limitations as affirmative defenses. Nevertheless, Plaintiff-Appellees urge this Court to undertake rational basis review of new §752-C. This is understandable because the Business Court identified rational basis methodology as a "workable alternative standard" for constitutional analysis of vested rights and due process challenges. (App. 5.) That error requires reversal of these orders.

Often the Law Court's task has been to determine whether the Legislature intended for a statute to operate retroactively. In that work, the Court has distinguished between procedural matters and substantive matters to assist its determination of the Legislature's intent. *See, e.g., Norton v. C.P. Blouin, Inc.,* 511 A.2d 1056, 1060 n.5 (Me. 1986); *Greenvall v. Maine Mut. Fire Ins. Co.,* 2001 ME 180, ¶¶7-8, 788 A.2d 165. Analyses to determine legislative intent have no role when the Legislature's intent is explicit. The question here is not deciphering the Legislature's intent, but the constitutionality of the Legislature's enactment. Significantly, *Norton* makes clear that a statute *cannot* operate retroactively if it violates a provision of either the Maine Constitution or the United States Constitution. *Norton*, 511 A.2d at 1060

[2] "Vested rights" is not a synonym for "fundamental rights." Fundamental rights (e.g., freedom of speech, privacy) are distinct from vested rights (e.g., the right to seek or be free from liability in a judicial proceeding or the right to use land in a manner consistent with a validly issued permit).

n.5. Contrary to Plaintiff-Appellees' suggestion (Plaintiffs' Red Br. 33-34, 38-39), *Norton* does not stand for the proposition that the Maine Law Court employs rational basis review to determine the constitutional validity of retroactive legislation under the Maine Constitution. *Norton* says no such thing. To the contrary, the *Norton* opinion makes clear that Defendant had raised no due process challenge, state or federal, and said, "we have no occasion to determine whether the Due Process Clause contained in the Maine Constitution limits retroactive legislation to any greater degree than does its federal counterpart." *Norton*, 511 A.2d at 1061 n.7. *Norton* was decided under Maine's Contracts Clause.

As Appellant's Blue Brief shows, rational basis is not the standard to determine whether a right is vested or whether a vested right is impaired. (Blue Br. 3, 18-19.) None of this Court's vested rights cases mention rational basis, and none of this Court's rational basis cases are about due process protection of vested rights.

III. MAINE PRECEDENT

A. Maine Cases Cited by Plaintiff-Appellees are Inapposite.

Plaintiff-Appellees materially misstate the meanings of several Maine cases to support their arguments. The reality is: (1) no Maine case holds or even says that the Maine Legislature is constitutionally empowered to revive time-barred claims; (2) every Maine case that discusses legislative revival of time-barred claims says that the Legislature lacks that authority; and (3) there are no reported cases in Maine that

address any enactment by the Maine Legislature, like the statute at issue here, that has *no* prospective application and *only* retroactive application.

Plaintiff-Appellees have cited cases despite language in them that explicitly precludes their application here. For example, Plaintiff-Appellees cite *Heber v. Lucerne-in-Maine Village Corp.*, 2000 ME 137, ¶ 10, 755 A.2d 1064, for the proposition that "[a]n individual does not have a vested right in a particular procedure...and a statutory enactment affecting procedure rather than substance will govern previously accrued causes of action that have not yet been filed." (Plaintiffs' Red Br. 32.) However, the very next paragraph of that opinion distinguishes that case from *Dobson*. In the words of the *Heber* Court, *Dobson* means that:

> because no party has a vested right in the running of a statute of limitations until the prescribed time has completely run and barred the action, amendment to statute of limitations could be applied to cause of action accruing before change because change would not affect substantive right of defendant where period had not yet run; if the prior period had already operated to extinguish the cause of action, resuscitating the cause of action would affect substantive right of a defendant, therefore amendment would not govern.

Heber, 2000 ME 137, ¶ 11, n.3, 755 A.2d 1064.

Plaintiff-Appellees also cite multiple times to *State v. LVI Group*, 1997 ME 25, 690 A.2d 960, to argue that no vested right is affected by the retroactive repeal of a statute of limitations. (Plaintiffs' Red Br. 7, 33-34.) That case did not involve retroactive repeal of a lapsed statute of limitations, and the opinion explicitly states that the Legislature could *not* "retroactively revive a similar cause of action against LVI

on which the statute of limitations had run prior to the effective date of the amendment…." *Id.* ¶ 11, n.4. *LVI* is not authority for affirmance. It further supports Appellant's position.[3]

Besides relying on the above authorities despite the discrepancies between the clear statements of the Court and their arguments, Plaintiff-Appellees also fail to distinguish, in any meaningful way, several important Maine cases. After asserting without benefit of any authority that cases evaluating changes to statutes of limitations in the Maine Workers' Compensation Act (*i.e.*, *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, ¶15, 837 A.2d 123; *Dobson*, 415 A.2d at 816-17) are *per se* inapposite, the Plaintiff-Appellees argue that the legislative changes addressed in those cases are different from the statute at issue in this case, in that none of the cases addressing changes to statutes of limitations in the Workers' Compensation setting operated to abolish a statute of limitations retroactively. While it is true that *Morrissette, Dobson* and other cases addressed prospective changes to statutes of limitations, in explaining its rationale in those cases, the Court was careful to be clear that prospective changes are permissible but retroactive revival of barred claims is unconstitutional. This explanation was, in each case, an integral part of the Court's reasoning and essential to justifying the decision allowing the legislation to apply in pending cases about prior

[3] Plaintiff-Appellees' reliance (Plaintiffs' Red Brief at 5) on *Thut v. Grant*, 281 A.2d 1, 6 (Me. 1971) for the proposition that "[a] statute of limitations that is intended to be retroactive affects only a litigant's potential remedies" is also unwarranted, because *Thut* says no such thing, neither on page 6 nor anywhere else. Nor does the Tenth Amendment to the United States Constitution say anywhere that "Statutes of limitation merely say when civil liabilities may be litigated," as the Plaintiff-Appellees claim (Plaintiffs' Red Br. at 4).

injuries. In *Morissette,* the Court said, "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." 2003 ME 138, ¶ 15, 837 A.2d 123 (emphasis in original). In *Dobson*, it said: "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 at 816-17. *See also, 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."). Note that the Court said clearly that such changes *are* "procedural" but *may not* be applied to barred cases retroactively. These are not gratuitous asides but authoritative judicial pronouncements explaining important decisions about important statutes affecting thousands of Maine workers and employers.

Instead of dismissing these repeated, consistent statements by this Court as "mere dicta," their meaning and effect is better measured or determined by how often the statements have been treated as settled propositions of Maine law. In addition to this Court's own statements in a long line of cases that the Legislature cannot revive time-barred claims, the statements have been recognized as authoritative elsewhere. *See Doe v. Hartford Roman Cath. Diocesan Corp.*, 119 A.3d 462, 511 (Conn. 2015) (identifying Maine as one of the 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*, 415 A.2d at 816).

Finally, Plaintiff-Appellees mention several Maine cases without meaningful explanation or argument. (Plaintiffs' Red Br. 15-16 nn.5-26.) There is neither space nor need to explain why those cases do not support affirmance of these orders. It is sufficient response to all of them that truly procedural and truly remedial legislation is not retroactive in any constitutional sense. The measure of constitutionality is whether legislation retroactively impairs a vested right or whether the effect of the legislation would render a party liable after enactment for claims on which liability was legally precluded before enactment. This statute fails both standards.

B. New Section 752-C Nullifies or Destroys a Thing of Value.

As recently as 2022, the Law Court reaffirmed and clarified that Maine has embraced a broad view of the interests that are protected by Maine's due process provisions. *NECEC*, 2022 ME 48, ¶ 44, 281 A.3d 618. Plaintiff-Appellees all claim a "revived" right to seek and obtain judgments and writs of execution to levy on property of the only Defendant, a charitable corporation sole. (Plaintiffs' Red Br. 21, 35, 43.) The members of the Church in Maine are the beneficial owners of the property legally titled to the corporation sole. *See Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 3 n.1, 871 A.2d 1208; *Craig v. Franklin Cty.*, 58 Me. 479, 493 (1870). To say there is no property interest at stake is to ignore operational and economic reality. It follows, as in *Miller v. Fallon*, 134 Me. 145, 153, 183 A. 416, 419

(1936), that a cause of action is a thing of value protected by the Constitution from legislative nullification. Obviously, the statute of limitations in *Miller* was also "procedural" but that label did not overcome the constitutional impediment to retroactive application of that amendment of that statute of limitations. So too an affirmative defense is both procedural and a thing of value. Alternatively, one can say that freedom from liability is a thing of value.

Litigation exposure certainly matters on any balance sheet compliant with Generally Accepted Accounting Principles and matters to auditors under Generally Accepted Auditing Standards. Every lawyer of any experience with business clients has written letters to auditors to opine about pending litigation, threatened litigation, asserted claims, and even unasserted claims.[4] This information is of intense interest to lenders. Although this Defendant is a charitable corporation, there will be no reason for the Legislature to stop here. Retroactive repeal of statutes of limitations on product liability claims would be permissible if these orders are affirmed. Investors in manufacturing companies will consider the permanence of expired Maine statutes of limitations. Liability insurance underwriters would undoubtedly take account of the permanence or stability of all statutes of limitations in Maine. The uncertainty and instability that affirmance of these orders will bring to Maine law will be a concern at

[4] *See* American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, *The Business Lawyer*, 1710-15 (April 1976), available at https://www.jstor.org/stable/40685591; Codification of Acct. Standards ¶¶ 450-20-25-2, 450-50-1, 3, 5, 6, 6a (Fin. Acct. Standards Bd. 2023).

the beginning of every legislative session and more concerning whenever such a bill is offered even if the bills are usually defeated. An expired statute of limitations and the protection from liability it affords is a thing of great value. (*See* Blue Br. 20-23.)

Appellees make no serious argument that the pre-enactment position of the Diocese, i.e., having the protection of the statute of limitations, has no value. Functionally and economically, there is no difference between retroactive repeal of a statute of limitations "reviving" an expired action and enactment of a new statute retroactively imposing liability for past events. The arguments of the Appellees seem to hang on the idea that characterizing a statute of limitations as "procedural," whether expired or not, must mean that procedural things all have no value or, if they have value, they are nevertheless outside the due process protections of the Maine Constitution. (*See* App. 7-8; State's Red Br. 12-14; Plaintiffs' Red Br. 10-11.) None of this is intuitively obvious. More to the point, no Maine case holds that or even says that, and several say otherwise. Indeed, every Maine case mentioning statutes of limitations and vested rights states that there is a vested right in the protection afforded by an expired statute of limitations. (*See* Blue Br. 25-29.) As noted in the Blue Brief, it is simplistic to treat everything identically if the word "procedural" is used to describe it. The quote from Justice Frankfurter on Pages 16-17 of the Blue Brief remains true and important. It speaks to these cases directly.

To understand how courts might have been imprecise about using the term "procedural" in different contexts, it is helpful to consider disputes about what state's

statute of limitations should apply, especially in business or commercial matters across state lines. Assuming personal jurisdiction and venue could be satisfied in two states and the state with the shorter statute of limitations declined to hear the case, another state with judicial authority over the subject matter and the parties and a longer statute of limitations might welcome the case and decide it. In such a circumstance, a decision enforcing the short statute of limitations in the first state was *res judicata* only as to that issue in that state and would not bar litigation of a transitory civil action in another common law forum with jurisdiction. Restatement (Second) of Conflict of Laws §§ 110 cmt. b (Am. L. Inst. 1977) (stating:

> "plaintiff's suit may be dismissed in state X on the ground that it is barred by the X statute of limitations. This judgment will preclude the plaintiff from thereafter maintaining an action to enforce the claim in state X. This judgment, however, binds the parties only with respect to the issue that was decided. It will preclude the plaintiff from maintaining an action to enforce the claim in another state only if the courts of the other state would apply the X statute of limitations under the rule of § 142. As between States of the United States, full faith and credit permits the courts of a State to entertain an action that has previously been dismissed by a judgment not on the merits in a sister State provided that this judgment is given the same res judicata effect that it has in the State of rendition (see §§ 93-97)").

This is the sense in which a statute of limitations is often stated to be "procedural" because the barred action is viable elsewhere. It is about geography, not about "reviving" expired statutes of limitations. Terminology from choice of law cases where there is no retroactive "revival" of a barred action is not a legitimate basis to analyze and decide that important constitutional question here.

Similarly, it is not true that statutes of repose are invulnerable to retroactive repeal, but statutes of limitations are not.[5] Constitutionally, there is no reason to think that the Legislature can do one but not the other. The difference between a statue of repose and a statute of limitations lies in the effect of a statute of repose to fix the date of accrual and preclude judicial adjustments, such as the discovery rule in *Myrick v. James*, 444 A.2d 987, 996 (Me. 1982), and to prohibit equitable tolling to extend the permissible time for commencing suit. Statutes of limitations and repose are time limits that preclude litigation and protect a party from liability. Nor does it matter to the constitutional question whether a barred action is grounded in judge-made decisional law or rests on a statutory enactment. As a matter of constitutional legislative authority to act retroactively and the due process protection of a party's vested rights, either all barred actions are subject to retroactive repeal to allow "revival" or none of them are.

It is solely a matter of Maine constitutional law whether the Maine Legislature may constitutionally "revive" a Maine action long after it has been time-barred in Maine. This is a Maine case about a Maine defendant concerning events in Maine allegedly causing harm to Maine people. The only statute of limitations that matters is Maine's. The only Constitution that matters is Maine's. Maine's Constitution protects

[5] "Statutes of limitation are statutes of repose and . . . should be construed strictly in favor of the bar which it was intended to create." *Nuccio v. Nuccio*, 673 A.2d 1331, 1334 (Me. 1996)(quoting *Duddy v. McDonald*, 148 Me. 535, 538, 97 A.2d 445, 446 (1953)); *see also* 14 M.R.S. § 752-A (including a statute of limitation and statute of repose within the same statute).

all things of value. And as demonstrated in the Blue Brief, the expiration of the now repealed statutes of limitations is a thing of enormous value.

Finally, nullification of the affirmative defense is especially wrong here because the Diocese would not have been liable to Plaintiff-Appellees before 2005, even if their actions had not been barred for years before that. *Swanson v. Roman Catholic Bishop*, 1997 ME 63, 692 A.2d 441; *see Fortin*, 2005 ME 57, 871 A.2d 1208; *see also* Blue Br. 32-40. State-Appellee wrongly accuses the Diocese of a "red herring" for raising the significance of the evolving law of negligent supervision as potentially retroactively supporting liability in these cases if they are permitted to be "revived." (State's Red Br. 30.) The State-Appellee also wrongly says that this is a separate issue and not within the scope of the Report. (State's Red Br. 10 n.2, 30.) It is not a separate issue; it is an additional reason to reverse the orders. With or without that added reason, it is constitutionally imperative to reject decisively the novel concept that the legislative power in the Maine Constitution is so strong, and the Maine Constitution's due process protections are so weak, that the Legislature may, at its whim, abolish any statute of limitations retroactively to 1820 and perpetually hereafter. There is no principled basis for limiting affirmance of these orders to this Diocese and these claims. Among the many arguments for rejecting this recent innovation in these cases is that these Plaintiff-Appellees would not have been able to proceed at all under the plain holding of *Swanson* or succeed on any theory of negligent supervision before *Fortin* in 2005.

The challenged enactment is unconstitutional because it will materially adversely affect the liability-or-not status of the Diocese. That is its purpose. The technicalities of choice of law concerning not-yet-barred transitory causes of action do not speak to the proper interpretation of the meaning and effect of the Maine Constitution concerning due process protection of vested rights. *NECEC* and *Dobson, inter alia,* have already done that work.

The orders on Report must be reversed.

Respectfully submitted,

OCTOBER 05, 2023
Date

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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, Esq., hereby certify that two copies of the Reply by Defendant-Appellant Roman Catholic Bishop of Portland to Appellees Robert Dupuis, et al., and State of Maine were served upon counsel for Appellees Robert Dupuis, et al., and State of Maine. Two copies were also served to counsel for Amici American Tort Reform Association, American Property Casualty Insurance Association, CHILD USA, Maine Coalition Against Sexual Assault, Pine Tree Legal Assistance, Inc., Maine Trial Lawyers Association, Public Justice, and American Association for Justice. Copies were served at the addresses set forth below by email and first-class mail, postage prepaid on October 5, 2023:

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