STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-24-421

STATE OF MAINE,
Plaintiff/Appellee

v.

TOWNSEND THORNDIKE,
Defendant/Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF FOR APPELLEE STATE OF MAINE

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INTRODUCTION

Townsend Thorndike appeals his convictions for unlawful sexual contact (Class A) and visual sexual aggression against a child (Class C), challenging the trial court's admission of a video of the victim's forensic interview at the Cumberland County Children's Advocacy Center. Contrary to Thorndike's arguments, the trial court did not err in admitting the video under an exception to the hearsay rule created by 16 M.R.S. § 358. Although the trial court previously had ruled that the statute did not apply to this case, emergency legislation amended the statute to explicitly provide that it applied to all cases regardless of when the sexual abuse occurred or when the prosecution commenced. The amendment satisfied the constitutional requirements for emergency legislation because the preamble expressed that an emergency existed, the facts constituting the emergency, and that the amendment was needed immediately to preserve the public peace, health or safety. The trial court's admission of the video under 16 M.R.S. § 358, as amended, did not violate the constitutional doctrine of separation of powers, or the constitutional prohibition against special or private legislation, because the law was of general applicability and it did

not usurp the trial court's authority to ultimately decide whether to admit the video. Furthermore, even if we assume for the sake of argument that 16 M.R.S. § 358 did not apply to this case, the trial court's admission of the video did not constitute error because it was admissible as a recorded recollection under M.R. Evid. 803(5). Therefore, the Law Court should affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The criminal charges against Townsend Thorndike are based on sexual abuse that occurred in the summer of 2021, when the victim was 6 years old. *App.* 34-35. Thorndike was the boyfriend of the victim's mother. *Tr. (6/25/2024),* 58-59. On August 23, 2021, the victim initially disclosed the abuse to her mother, who reported it to the Gorham Police Department. *Tr. (6/25/2024),* 146-47, 152, 155. Detective Steve Rappold promptly scheduled a forensic interview of the victim at the Cumberland County Children's Advocacy Center. *Tr. (6/25/2024),* 155-56.

On August 25, 2021, certified child forensic interviewer Abby Liebowitz conducted a video-recorded forensic interview of the victim that lasted a little over an hour. *Tr. (3/4/2024),* 8-9, 12-13. During the forensic interview, in response to non-leading, open-

ended questions, the child described the following sexual abuse by Thorndike: he made her lie down while he removed his pants and sat on her; he exposed his penis and buttocks and made her touch his buttocks and his anus with her face; he repeatedly touched her anus with his finger over her clothing; he had her stick her finger in his anus; he exposed his bare penis and she saw it was hard and water came out of the top, which he wiped off with his finger and swallowed. *State's Exh. 1.* The victim also said she and Thorndike made a "pinky promise" not to tell anyone about their "butthole games." *Id.*

On September 10, 2021, the State filed a complaint charging two counts of unlawful sexual contact (Class A and Class B) in violation of 17-A M.R.S. § 255-A(1)(E-1) & (F-1), and one count of visual sexual aggression against a child (Class C) in violation of 17-A M.R.S. § 256(1)(B). *App.* 3. On November 4, 2021, the grand jury returned an indictment with the same charges. *App.* 4, 34-35.

Effective June 16, 2023, the Legislature enacted a new law creating an exception to the rule against hearsay for recorded forensic interviews of protected persons, including children and persons with disabilities, provided that certain requirements are

satisfed. P.L. 2023, ch. 193, § 1 (eff. Jun. 16, 2023), codified at 16 M.R.S. § 358.

On December 28, 2023, pursuant to 16 M.R.S. § 358, the State filed a motion in limine to admit the video of the forensic interview. *App.* 10, 36-40. At a hearing on the motion on March 4, 2024, the State presented the video and testimony from the forensic interviewer. The trial court took it under advisement, and on March 12, 2024, issued an order granting the motion in limine and ruling the video was admissible under 16 M.R.S. § 358. *App.* 11-12, 31-33.

After two and a half years of pretrial proceedings, including several continuances that Thorndike requested, the trial was scheduled for March 25-26, 2024. *App.* 5, 7, 9, 11. On Thursday, March 21, 2024, just two business days before the trial was to begin, the trial court *sua sponte* vacated and reversed its initial decision on the video, holding that 16 M.R.S. § 358 did not apply to this case and that therefore the video was not admissible. *App.* 12-13, 29-30. The trial court concluded that the statutory exception to the hearsay rule did not apply in this case because under 1 M.R.S. § 302 a statute does not apply to cases already pending at the time

of its enactment unless the Legislature expressed such an intent, and 16 M.R.S. § 358 contained no such expression of legislative intent. *Id.*

The next day, Friday, March 22, 2024, the State filed a motion to continue the trial, which was scheduled to begin that Monday. *App.* 12, 69. The motion explained that, in light of the trial court's unexpected reversal of its initial ruling on the video, the State needed additional time to prepare for trial, and that going to trial immediately would severely affect the victim's emotional state. *App.* 69. Thorndike took no position on the motion. *Id.* The trial court granted the unopposed motion and continued the trial to the May docket call. *App.* 12-13.[1]

On April 22, 2024, by a two-thirds vote, the Maine Legislature passed as emergency legislation an errors bill, L.D. 2290, *An Act to Correct Inconsistencies, Conflicts, and Errors in the Laws of Maine,*

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[1] The victim's subsequent trial testimony confirmed the grounds for the State's request for a continuance, as she testified that in preparation for trial she had visited the courtroom with the detective and the prosecutor, who had told her the video of her interview would be played after she testified and that then the defense attorney would ask her questions, but then the trial had then been continued. *Tr. (6/25/2024),* 87-88.

which included an amendment to 16 M.R.S. § 358 that added subsection 5:

> **5. Applicability.** Notwithstanding Title 1, section 302, this section applies to:
> A. Cases pending on June 16, 2023; and
> B. Cases initiated after June 16, 2023, regardless of the date on which conduct described in the forensic interview allegedly occurred.

P.L. 2023, ch. 646, § D-1 (emergency, effective Apr. 22, 2024), codified at 16 M.R.S. § 358(5). The emergency preamble provided as follows:

> **Emergency preamble. Whereas,** acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and
>
> **Whereas,** acts of this and previous Legislatures have resulted in certain technical inconsistencies, conflicts and errors in the laws of Maine; and
>
> **Whereas,** these inconsistencies, conflicts and errors create uncertainties and confusion in interpreting legislative intent; and
>
> **Whereas,** it is vitally necessary that these uncertainties and this confusion be resolved in order to prevent any injustice or hardship to the citizens of Maine; and
>
> **Whereas,** Public Law 2023, chapter 193, An Act to Establish an Exception to the Hearsay Rule for Forensic Interviews of a Protected Person, established an exception to the hearsay rule for the recordings of forensic interviews of minors and of certain adults with

disabilities at child advocacy centers, as long as specific due process protections are diligently followed; and

Whereas, trial courts across the State have reached disparate decisions regarding whether the Maine Revised Statutes, Title 1, section 302 affects whether Public Law 2023, chapter 193 applied to pending proceedings; and

Whereas, citizens of the State rely on the Legislature to enact statutes that will be interpreted consistently; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now therefore,

Be it enacted by the People of the State of Maine as follows:

P.L. 2023, ch. 646 (emergency, effective Apr. 22, 2024).

On April 23, 2024, the State filed a motion to reconsider the ruling on the video based on the new amendment to 16 M.R.S. § 358. *App.* 13, 41. On May 6, 2024, the trial court granted the motion, reverting to its original ruling that the video was admissible as an exception to the hearsay rule under 16 M.R.S. § 358. *App.* 13, 28. On May 24, 2024, Thorndike moved for reconsideration of that order, but the trial court summarily denied his motion on May 28, 2024. *App.* 14, 27, 42-68.

On June 25 and 26, 2024, the trial court held a jury trial. *App.* 15. At the beginning of the trial the court stated on the record its ruling that the video was admissible as a hearsay exception under 16 M.R.S. § 358 because it satisfied the statutory criteria, that it was relevant, and that its probative value outweighed the risk of unfair prejudice. *Tr. (6/25/2024),* 4-9.

The State presented testimony under oath from the victim, then eight years old. *Tr. (6/25/2024),* 56. The victim identified Thorndike and testified he had dated her mother and briefly lived with them. *Tr. (6/25/2024),* 58-59. She also testified that Thorndike did things to her, that she told her mother what he did to her, and that she later told a lady named Abby at a center. *Tr. (6/25/2024),* 59-60, 66-67, 134. The victim testified she told the truth to her mother and to the lady at the center about what Thorndike had done. *Tr. (6/25/2024),* 67.

During the victim's testimony, the trial court allowed the victim to leave the courtroom while the State introduced the video of the forensic interview and played it for the jury. *State's Exh. 1; Tr.*

(6/25/2024), 60-64.[2] The victim then returned to the witness stand and her direct examination resumed. *Tr. (6/25/2024),* 66-67. On cross-examination, the victim testified that she hadn't seen the video, she didn't specifically recall what she said during the forensic interview, and now, due to the passage of time, she could not remember everything about what Thorndike had done to her. *Tr. (6/25/2024),* 86, 133-35. She also testified that she had promised Thorndike she wouldn't tell anyone what he did to her. *Tr. (6/25/2024),* 132-33.

At the conclusion of the trial the jury returned a verdict finding Thorndike guilty on all counts. *App.* 15. On August 26, 2024, the trial court held a sentencing hearing and entered judgment on the verdict. *App.* 17, 21-24.[3] On September 16, 2024, Thorndike filed notice of appeal. *App.* 20.

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[2] Thorndike did not renew his objection to the video when it was presented at trial because the court had ruled that he already had preserved his objection for purposes of appellate review. *Tr. (6/25/2024),* 9, 60-64.

[3] The judgment merged the two counts of unlawful sexual contact and imposed a sentence of 14 years of imprisonment, all but 8 years suspended, and six years of probation, with a concurrent unsuspended sentence of 5 years of imprisonment on the charge of visual sexual aggression against a child. *App.* 21-24.

ISSUES PRESENTED FOR REVIEW

1. Whether the Legislature's emergency enactment of 16 M.R.S. § 358(5) violated Me. Const. art. IV, pt. 3, § 16.

2. Whether the Legislature's amendment of 16 M.R.S. § 358, and the trial court's application of the amended statute to this case, violated the constitutional doctrine of separation of powers or the constitutional prohibition against special or private legislation.

3. Whether the trial court erred in continuing the trial or in later reversing its ruling on the video of the forensic interview and admitting it in evidence.

ARGUMENT

1) The Legislature's emergency enactment of 16 M.R.S. § 358(5) did not violate Me. Const. art. IV, pt. 3, § 16.

The Law Court reviews questions of constitutional interpretation de novo, presuming all acts of the Legislature to be constitutional and resolving all reasonable doubts in favor of the constitutionality of the statute. *Parker v. Dept. of Inland Fisheries and Wildlife,* 2024 ME 22, ¶ 18, 314 A.3d 208. "The presumption is one of great strength," such that generally, "the existence of facts supporting the legislative judgment is to be presumed." *Maine Milk*

Comm'n v. Cumberland Farms Northern, Inc., 160 Me. 366, 380, 205 A.2d 146, 153 (Me. 1964), *appeal dismissed,* 380 U.S. 521 (1965). "The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality." *Id.,* 160 Me. at 378-79, 205 A.2d at 152. To meet that burden, generally "[t]he party challenging a statute's constitutionality must establish the complete absence of any state of facts that would support the need for the statute's enactment." *MacImage of Maine, LLC v. Androscoggin County,* 2012 ME 44, ¶ 30, 40 A.3d 975.

Thorndike argues that the Legislature's emergency enactment of 16 M.R.S. § 358(5) was unconstitutional because the facts set forth in the preamble of P.L. 2023, ch. 646 were inadequate under Me. Const. art. IV, pt. 3, § 16. *Appellant's Brief,* 15-21. On the contrary, the emergency enactment of section 385(5) satisfied the constitutional criteria.

The Maine Constitution grants to the Legislature, in case of emergency, the power to enact laws that take effect immediately.

> No act… of the Legislature… shall take effect until 90 days after the recess of the session of the Legislature in which it was passed, unless in case of emergency, which with the facts constituting the emergency shall be expressed in the preamble of the Act, the Legislature

> shall by a vote of 2/3 of all members elected to each House, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety[.]

Me. Const. art. IV, pt. 3, § 16; *Payne v. Graham,* 118 Me. 251, 107 A. 709, 710-11 (1919). Thus, to pass constitutional muster, an emergency preamble must express facts constituting an emergency that makes the act immediately necessary for the preservation of public peace, health or safety. *Maine Emp't Sec. Comm'n v. Charest,* 177 A.2d 654, 657 (1962).

However, judicial review of any legislation requires great deference. A court must refrain from passing judgment upon the constitutional validity of a legislative act "except in those cases where such declaration is absolutely required." *Morris v. Goss,* 83 A.2d 556, 559 (Me. 1951). "[E]very reasonable presumption will be made in favor of the constitutionality of an act enacted by the Legislature." *Id.* at 562. "Questions of public policy, such as the… necessity, or urgency (immediate necessity) of laws are for final Legislative determination." *Morris,* 83 A.2d at 560-61, quoting *Payne,* 118 Me. 251, 107 A. at 710.

Thus, the courts do not second-guess the Legislature's determination of facts expressed in an emergency preamble, or whether those facts truly constitute an emergency. *Morris,* 83 A.2d at 560-62. Instead, judicial review of the sufficiency of an emergency preamble is limited to determining "whether the fact or facts so expressed as constituting an emergency *can* constitute an emergency within the meaning of that term as used in the Constitution," meaning an emergency affecting public peace, health or safety. *Id.* "In the absence of evidence to the contrary, this court will take the statements in the preamble of legislative acts to be true, and will not substitute its judgment for that of the Legislature." *Maine Milk Comm'n.,* 205 A.2d at 153.

Nor does the Constitution require that the preamble must provide a detailed expression of all facts relevant to the emergency, as it "is satisfied by the expression in the preamble of an ultimate fact or facts which constitute an emergency, without a recital of all of the separate facts evidencing the existence of such ultimate fact." *Morris,* 83 A.2d at 563; see also, *Beale v. Secretary of State,* 1997 ME 82, ¶¶ 6-7, 693 A.2d 336 (upholding the emergency enactment of amendments to laws governing OUI suspensions as part of a

large appropriations bill, even though the preamble spoke only to a fiscal emergency and said nothing about drunk driving, noting that regarding the existence of an emergency "we have not required that the preamble contain a litany of detail.") Indeed, if any facts set forth in the emergency preamble could constitute an emergency related to preservation of public peace, health or safety, then the preamble is constitutionally sufficient. *Morris,* 83 A.2d at 563 (upholding the emergency enactment of a law imposing a sales and use tax, where the preamble merely stated "the essential needs of state government require that additional revenues be raised by this legislature," from which it reasonably could be inferred that existing revenues were insufficient to carry out the essential needs of the state government).

Thorndike argues the Legislature's emergency enactment of 16 M.R.S. § 358(5) was unconstitutional, asserting that the preamble did not state facts that could constitute an emergency or that the amendment was immediately necessary for the preservation of the public peace, health or safety. On the contrary, the preamble complied with the requirements of Me. Const. art. IV, pt. 3, § 16, because it expressed that there was an emergency, the facts

constituting the emergency, and the Legislature's finding that the amendment was immediately necessary for the preservation of the public peace, health and safety.

The emergency preamble for the 2024 amendment of 16 M.R.S. § 358 expressed the Legislature's findings that "errors" in laws previously enacted by the Legislature, including 16 M.R.S. § 358, had caused "uncertainties" and "confusion" about the Legislature's intent, and statutory amendment to correct those errors was "vitally necessary… to prevent any injustice or hardship to the citizens of Maine." P.L. 2023, ch. 646. The preamble also stated the Legislature's findings that the "uncertainties" about the whether the statutory hearsay exception for forensic interviews "applied to pending proceedings" had resulted in "disparate decisions" by trial courts, and "in the judgment of the Legislature," all of "these facts created an emergency within the meaning of the Constitution of Maine," such that the amendment to add subsection 5 was "immediately necessary for the preservation of the public peace, health and safety." Thus, by its plain language, the preamble satisfied the constitutional requirement because it expressed that an emergency existed, the nature of that emergency,

and that the legislation was immediately necessary for the preservation of public peace, health or safety.

Despite that plain language, Thorndike challenges the Legislature's conclusion that an emergency existed, arguing that disagreement among judges is "routine" and the correction of it was merely a "vague aspirational goal" instead of an emergency. *Appellant's Brief,* 18-21. However, as discussed above, it is not the province of the courts to second-guess the Legislature's determination that an emergency existed.[4]

Furthermore, Thorndike's argument misses the mark because it overlooks the Legislature's implicit determination that inconsistency in the application of 16 M.R.S. § 358 amounted to much more than just a routine disagreement among judges. Those disagreements had very serious consequences for victims and defendants in sexual abuse cases, such that some victims and defendants would receive the benefit of 16 M.R.S. § 358, as the Legislature had intended, while others would not. The Legislature

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[4] Indeed, even seemingly small matters like statutory punctuation can have a critical and dramatic impact on statutory interpretation. *See O'Connor v. Oakhurst Dairy*, 851 F.3d 69, 70 (1st Cir. 2017) ("For want of a comma, we have this case.")

determined that the "disparate decisions" placed "the public peace, health or safety" at risk and necessitated immediate action. Me. Const. art. IV, pt. 3, § 16.

To grasp the importance of that disparity, we need only consider the purposes behind the original enactment of 16 M.R.S. § 358: to protect children and persons with disabilities who are victims of sexual abuse from being retraumatized in court, while also protecting the rights of the accused. The statute accomplished those goals by making reliable forensic evidence available to the factfinder, while still protecting the constitutional right to confront and cross-examine witnesses.[5] By its plain language, the

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[5] According to testimony of the bill's sponsor, and other supporters, the purpose of 16 M.R.S. § 358 was "to achieve the important policy goal of protecting Maine's most vulnerable population, children and disabled adults, from sexual assault and sexual abuse," "to hold the abuser accountable," and to "prevent future abuse by the same individual." *An Act to Permit Recordings of a Protected Person to be Admissible in Evidence: Hearing on L.D. 765 before the J. Standing Comm. on Judiciary,* 131st Legis. 1 (2023) (testimony of Sen. Anne Carney). One prosecutor testified that a 10-year-old victim of sexual abuse was so traumatized on the witness stand that she "completely shut down," and when she left the witness stand "she ran into a dark room and hid under a chair, nearly catatonic, holding her ears and eyes shut and rocking back and forth." *Id.,* (testimony of Dep. District Attorney Kate Bozeman). The prosecutor also testified that "[f]orensic interviews of children provide the most accurate evidence for a jury to consider," and that

amendment was intended to ensure that 16 M.R.S. § 358 applied to all cases, and to all protected victims and defendants, regardless of when the sexual abuse occurred or when the case commenced. 16 M.R.S. § 358(5). Thus, contrary to Thorndike's argument, the purpose of both the original statute and the emergency enactment of the 2024 amendment clearly implicated preservation of public peace, health or safety.

Although Thorndike argues that this case is "akin to" the circumstances that were present in *Payne v. Graham,* 118 Me. 251,

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permitting introduction of that evidence while requiring cross-examination "protects a defendant's important rights of confrontation." A representative of the Maine Prosecutors Association testified "[r]esearch shows that testifying in court is traumatizing for children, and that this trauma can diminish the quality and reliability of a child's testimony." *Id.,* (testimony of MPS Executive Director Shira Burns). A representative of the Maine Chapter of the American Academy of Pediatrics testified that for a child victim of sexual abuse, "re-living the experience in an unfamiliar setting while confronting the defendant can generate high levels of acute anxiety," and that "long term studies indicate the need for ongoing psychological support and counseling, not only for any victimization that may have occurred but also for children's experiences of testifying in court." *Id.,* (testimony of Dr. Sydney Sewall, M.D., M.P.H.). Similarly, a representative of the Disability Rights Center of Maine testified that victims with disabilities "have been forced to endure the trauma of reliving their experience in courtrooms," and the bill was "an essential step towards preventing such re-traumatization." *Id.* (testimony of Staci Converse).

107 A. 709 (Me. 1919), and in *Opinion of the Justices,* 680 A.2d 444 (Me. 1996) (*Appellant's Brief,* 18), his reliance on those opinions is misplaced. In *Payne,* the Law Court found that the emergency preamble for a law that made the punishment for prostitution more stringent was constitutionally deficient because the preamble failed to express *any* facts or *any* emergency. *Payne,* 118 Me. 251, 107 A. at 710-11 ("It contains no statement of facts, as required by the Constitution, and no facts that are even suggestive of an emergency.") In *Opinion of the Justices* the Law Court gave an advisory opinion that, by itself and with no further facts, "the mere pendency of a citizen's initiative does not constitute an emergency within the meaning of the Constitution." *Opinion of the Justices,* 680 A.2d at 449.[6]

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[6] Nor does *Opinion of the Justices* support Thorndike's argument that emergency enactment of a law cannot be justified by an emergency created by "the normal operation of government." On the contrary, as noted in the advisory opinion itself, the Law Court has approved emergency legislation enacted in response to emergencies that resulted from the normal operation of government. *Opinion of the Justices,* 680 A.2d 444, 448 (Me. 1996). See e.g., *McCaffrey v. Gartley,* 377 A.2d 1367, 1371 (Me. 1977) (upholding emergency legislation amending the uniform property tax laws in response to a duly initiated bill that would repeal the uniform property tax laws, which in the normal operation of government was to be submitted to the electorate at special election); *Town of South*

In stark contrast, the emergency preamble for the 2024 amendment of 16 M.R.S. § 358 did express facts, and did state that those facts constituted an emergency within the meaning of Me. Const. art. IV, pt. 3, § 16. Therefore, *Payne* and *Opinion of the Justices* do not support Thorndike's argument that the preamble was constitutionally deficient.[7]

Therefore, the emergency enactment of 16 M.R.S. § 358(5), making clear that the statute applies regardless of when the sexual abuse occurred or when the criminal case commenced, was a proper exercise of the Legislature's constitutional power under Me. Const. art. IV, pt. 3, § 16.

Berwick v. White, 412 A.2d 1225, 1227 (Me. 1980) (upholding emergency legislation designed to interrupt the normal course of government by repealing a statute on the first day it was to take effect, thereby preventing it from taking effect.).

[7] Furthermore, as noted in *Opinion of the Justices,* such advisory opinions are of only limited precedential value because they "are not binding," and they "are expressed without the benefit of full factual development, oral argument, or full briefing by all interested parties." 680 A.2d at 447.

2) The Legislature's amendment of 16 M.R.S. § 358, and the trial court's application of the amended statute to this case, did not violate the constitutional doctrine of separation of powers or the constitutional prohibition against special or private legislation.

The Law Court reviews de novo the trial court's legal conclusions and issues of constitutional interpretation. *Burr v. Dept. of Corrections,* 2020 ME 130, ¶ 20, 240 A.3d 371. The Law Court applies the plain language of a constitutional provision if that language is unambiguous. *Payne v. Secretary of State,* 2020 ME 110, ¶ 17, 237 A.2d 870.

Thorndike argues that the Legislature's amendment of 16 M.R.S. § 358, and the trial court's application of the amended statute to this case, violated the constitutional doctrine of separation of powers and the constitutional prohibition against special or private legislation. *Appellant's Brief,* 22-25. Pointing to testimony on L.D. 2290 from the victim's family and the Maine Prosecutors Association, and specific references to this case in the discussion before the legislative committee, he asserts that the Legislature unlawfully interfered with the affairs of the judiciary by passing a law specifically intended to affect this case in particular, rather than enacting a law that was generally applicable. *Id.* On

the contrary, the Legislature's amendment of 16 M.R.S. § 358, and the trial court's application of the amended statute to this case, did not violate the Constitution.

The Maine Constitution reinforces the separation of powers between the legislative, executive, and judicial branches of government by providing that no branch shall exercise the powers properly belonging to the others, except as expressly permitted. Me. Const. art. III, § 2.[8] Additionally, the Maine Constitution generally prohibits the Legislature from enacting "special or private legislation" that exempts one individual from a generally applicable law. Me. Const. art. IV, pt. 3, § 13; *Brann v. State,* 424 A.2d 699, 704 (Me. 1981).[9] Thus, the Legislature may not "set aside a judgment or decree of a Judicial Court," and it may not dispense

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[8] Because separation of powers under the United States Constitution is merely inferred, not explicit, the doctrine under the Maine Constitution "is much more rigorous than the same principle as applied to the federal government." *State v. Hunter,* 447 A.2d 797, 799 (Me. 1982).

[9] Me. Const. art. IV, pt. 3, § 13 provides as follows: "The Legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation."

with a general law in favor of a particular case. *Lewis v. Webb*, 3 Me. 326, 332 (1825).

However, 16 M.R.S. § 358 merely created a statutory exception to the hearsay rule, and the creation of rules governing admissibility of evidence is not exclusively the domain of the judiciary. Indeed, both the Maine Law Court and the United States Supreme Court have held that "[t]he Legislature has the authority to regulate rules of evidence." *Irish v. Gimbel,* 1997 ME 50, ¶ 15, 691 A.2d 664 (rejecting separation of powers challenge to statute permitting admission at jury trial of a medical review panel's findings as an exception to the hearsay rule), citing *In re Peterson,* 253 U.S. 300, 311 (1920) (recognizing the "legitimate exercise of legislative power over rules of evidence"). Indeed, the Maine Legislature has enacted, and the Law Court has approved, many statutes governing admissibility of evidence.[10] Furthermore, the

[10] See e.g., 15 M.R.S. § 1205 (permitting admission in a criminal case of a recorded sworn statement of a person who is under age 16 or has a developmental disability, describing a sexual act or sexual contact with another person); 16 M.R.S. § 356 (permitting admission in evidence of business accounting records as an exception to the hearsay rule), noted in *Supruniuk v. Petriw,* 334 A.2d 857, 861 (Me. 1975); 16 M.R.S. § 357 (permitting admission in evidence of certified copies of hospital records as an exception to

Maine Rules of Evidence, promulgated by the Maine Supreme Judicial Court, are replete with provisions explicitly acknowledging the Legislature's authority to enact statutes governing the admissibility of evidence in court proceedings.[11] Thus, the

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the hearsay rule), upheld in *State v. Jones*, 2019 ME 33, ¶ 17, 203 A.3d 816 (applying the statutory hearsay exception to a report of a nurse who conducted a sexual assault forensic examination); 16 M.R.S. § 451 (permitting admission in evidence of attested copies of court records), noted in *State v. Vosmus,* 431 A.2d 621, 622 (Me. 1981); 16 M.R.S. § 453 (permitting admission in evidence of attested copies of duplicated records kept in any register of deeds, as an exception to the hearsay rule and the best evidence rule), noted in *Sabina v. JPMorgan Chase Bank, N.A.,* 2016 ME 141, ¶ 17, n.7, 148 A.3d 284 (dissenting opinion); 16 M.R.S. § 454 (permitting admission in evidence of attested photocopies of public records, as an exception to the hearsay rule and the best evidence rule); 19-A M.R.S. § 2152(12) (creating an exception to the hearsay rule by requiring the admission in evidence of records provided to DHHS reporting a responsible parent's income for purposes of calculating a child support obligation); 19-A M.R.S. § 3016 (allowing admission in evidence of a sworn affidavit in a hearing to determine parentage or a support obligation); 22 M.R.S. § 2707 (permitting admission of any certificate of birth, marriage or death to be admitted as prima facie evidence of that event).

[11] See e.g., M.R. Evid. Rule 101(b)(11) (providing that the Maine Rules of Evidence do not apply to proceedings that are exempt by statute); Rule 301(a) & (b) (providing that statutes may govern the applicability of presumptions in civil cases); Rule 402 (providing that evidence may be admissible by statute even though otherwise irrelevant); Rule 501 (recognizing witness privilege as established by statute); Rule 508 (recognizing governmental privilege as established by statute); Rule 514 (recognizing mediator privilege as established by statute); Rule 802 (recognizing statutory hearsay

Legislature's enactment of 16 M.R.S. § 358 did not unconstitutionally usurp power belonging exclusively to the judiciary.

Nor did the Legislature's 2024 amendment of 16 M.R.S. § 358 unconstitutionally usurp the trial court's power in this case. Despite Thorndike's assertions to the contrary, the Legislature's amendment of 16 M.R.S. § 358 was not intended solely to change the ruling on the video in this particular case. Instead, based on its plain language, the purpose of the amendment was to make the statute applicable to all cases regardless of when the abuse occurred or when the case commenced. 16 M.R.S. § 358(5). Thus, it was a law of general applicability.

Nor did application of the amended statute in this case automatically "set aside" or nullify the trial court's prior ruling on

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exceptions); Rule 803(6)(D) (recognizing statute providing for admission of business records as a hearsay exception); Rule 901(b)(10) (allowing authentication or identification of evidence by any method allowed by statute); Rule 902(4), (11) & (12) (allowing authentication of public records and domestic or foreign business records by a certificate authorized by statute); Rule 903 (providing that a subscribing witness's testimony is required to authenticate a writing only if required by statute); and Rule 1002 (providing that an original document is not required to prove its contents if a statute provides otherwise).

the video, or deprive the trial court of its exclusive judicial power to rule on its admissibility. The statute does not tie the hands of any trial court, nor does it strictly require admission in evidence of any video of a forensic interview. Instead, the statute expressly reserves to each trial judge the authority to exclude any video of a forensic interview, or any part thereof, if the trial court determines it is not relevant or it is "otherwise inadmissible under the Maine Rules of Evidence." 16 M.R.S. § 358(3)(H). Accordingly, in this case the trial court was free to exclude the entire video, or portions thereof, if it was not relevant or if its probative value was substantially outweighed by a risk of unfair prejudice, confusing the issues, wasting time, or needlessly presenting cumulative evidence. M.R. Evid. 402 & 403. Thus, application of the amended statute in this case did not unconstitutionally usurp the trial court's judicial authority to rule on the admissibility of the video.

Thorndike also argues the 2024 emergency enactment of the amendment to 16 M.R.S. § 358 was unconstitutional because the Legislature was influenced by testimony about this case from the Maine Prosecutors Association and the families of the victim in this case and in a separate case from York County. *Appellant's Brief,*

21; *An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine: Hearing on L.D. 2290 before the J. Standing Comm. on Judiciary,* 131st Legis. 1 (2024) (testimony of Megan Maloney, Christina L[redacted], and Benjamin S[redacted]). However, submission of testimony by interested parties is a normal and uncontroversial part of the legislative process.[12] It is not unlawful or improper for citizens and advocacy groups to provide legislative testimony concerning a bill that directly affects them, nor for the Legislature to enact a law designed to address real problems faced by Maine citizens. In fact, that communication and responsiveness between lawmakers and constituents is an essential part of our representative form of government.

In a remarkably similar case, the Law Court rejected the same constitutional challenges to emergency legislation enacted in response to a pending court case, based on the fact that the

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[12] Indeed, representatives of the Maine Association of Criminal Defense Lawyers and the American Civil Liberties Union of Maine submitted testimony *opposing* the amendment. *An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine: Hearing on L.D. 2290 before the J. Standing Comm. on Judiciary,* 131st Legis. 1 (2024), (testimony of MACDL President Walter McKee, former MACDL President Hunter Tzovarras, and ACLU of Maine Policy Director Meagan Sway).

legislation did not only affect the outcome of the particular case, but also served a broader societal purpose. In *MacImage of Maine, LLC v. Androscoggin County* the Law Court considered constitutional challenges to emergency legislation that retroactively established specific fees for bulk digital copying of county land registry documents and indexes. 2012 ME 44, 40 A.3d 975. The legislative history established that the Legislature had enacted the statute in direct response to a pending lawsuit, in which the Superior Court eventually would rule that fees charged by several counties for such bulk digital copying were unreasonable. *Id.,* 2012 ME 44, ¶¶ 12, 14, 40 A.3d 975.[13] The Law Court held that the emergency enactment of the statute was a proper exercise of the Legislature's power, that it did not violate the constitutional prohibition against special legislation, and that application of the statute to the pending case did not violate the constitutional doctrine separation of powers, even though it caused reversal of the

[13] At the time of the emergency enactment, there was an appeal pending in the Law Court from the Superior Court's judgment against the counties. *MacImage of Maine, LLC v. Androscoggin County,* 2012 ME 44, ¶¶ 13-14, 40 A.3d 975.

Superior Court's judgment. *Id.,* 2012 ME 44, ¶¶ 22-29, 37, 40 A.3d 975.[14]

The Law Court noted that even though the legislative history clearly showed the statute was enacted at least in part to affect the outcome of the pending lawsuit, the statute was constitutional because it also served a broader public purpose beyond that particular case.

> Although MacImage and Simpson argue that the Legislature's actions constitute an attempt to overturn a decision in a private dispute, the Public Law also served more broadly to balance the public and private interests involved in fee-setting for counties' electronic copying of registry land records and indexes – a technological reality that was not addressed in preexisting legislation. […] The Legislature did not, by enacting this policy-based legislation, usurp the adjudicatory power of the courts. […]
> The enacted legislation does not offend [the] Special Legislation Clause because the enacted law is not a private resolve singling out an individual for unique treatment; rather, the Legislature was attempting to address a newly developing issue that broadly affects the counties in the state and all entities who have requested – and will request – bulk digital information from the counties.

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[14] The Law Court also rejected arguments that the retroactive statute violated constitutional provision governing due process, equal protection, and takings. *MacImage,* 2012 ME 44, ¶¶ 30-36, 40 A.3d 975

Id., 2012 ME 44, ¶¶ 29, 37, 40 A.3d 975.

In this case, as in *MacImage,* the Legislature's emergency enactment of an amendment to 16 M.R.S. § 358 did not violate the constitutional prohibition against special or private legislation, even though it affected this particular case, because the amendment broadly affects all cases involving a recorded forensic interview concerning sexual abuse of a child or a disabled adult.[15]

[15] Although Thorndike cites the Law Court's opinions in *Lewis v. Webb* and *Dupuis v. Roman Catholic Bishop of Maine* (Appellant's Brief, 23-24), his reliance on those opinions is misplaced. In *Lewis,* the Law Court held that a legislative resolve purporting to give to a particular individual the right to appeal belatedly from a final judgment of the probate court was an unconstitutional special or private law. *Lewis v. Webb,* 3 Me. 326, 335-337 (1825). In *Dupuis,* the Law Court held that the Legislature did not have the authority to retroactively revive a cause of action after its statute of limitations had expired. *Dupuis v. Roman Catholic Bishop of Maine,* 2025 ME 6, ¶¶ 13, 29, __ A.3d __. Thus, the holdings of both *Lewis* and *Dupuis* are narrowly focused on legislation that purported to revive an *expired* cause of action, and in neither case did the Law Court hold that the Constitution prohibited the Legislature from enacting legislation of general applicability merely because it also would affect the outcome of *pending* litigation.

3) The trial court did not err in in continuing the trial or in later reversing its ruling on the video of the forensic interview and admitting it in evidence.

The Law Court reviews the trial court's factual findings for clear error and reviews its legal conclusions de novo. *State v. Croteau,* 2022 ME 22, ¶ 19, 272 A.3d 286. A trial court has broad discretion to grant or deny a request for a continuance, and the Law Court reviews that decision for abuse of discretion. *State v. Damboise,* 1997 ME 126, ¶ 4, 695 A.2d 1203. When admission of evidence is challenged, the Law Court reviews the trial court's foundational findings for clear error and reviews the ultimate determination of admissibility for abuse of discretion. *State v. Abdi,* 2015 ME 23, ¶ 16, 112 A.3d 360.

Thorndike argues the trial court erred in its legal conclusion that 16 M.R.S. § 358 applied to this case.[16] However, the statute's

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[16] Based on Thorndike's brief, in this appeal he does not challenge the trial court's finding that the video satisfied the criteria for admissibility under 16 M.R.S. § 358. Such a challenge would be fruitless, because competent evidence at the hearing on the motion in limine supported the trial court's finding that the video satisfied the statutory criteria. Specifically, the evidence showed that the State filed a motion in limine to admit the video; the video was a fair and accurate representation of the victim's statements; the recording was both visual and audio; the interview was conducted by a qualified forensic interviewer using an evidence-based practice;

plain language clearly and unequivocally established "an exception to the hearsay rule under the Maine Rules of Evidence, Rule 802, for the recording of a forensic interview of a protected person," and by virtue of the 2024 amendment its plain language clearly and unequivocally established that the statute applies to all cases, "[n]otwithstanding Title 1, section 302" and regardless of when the case was initiated and when the criminal conduct occurred. 16 M.R.S. § 358(3) & (5).

The trial court had reversed its initial ruling on the video because it realized that under 1 M.R.S. § 302 a statute does not apply to cases pending at the time of its enactment unless the

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the forensic interviewer was employed by or affiliated with a child advocacy center, had completed at least 32 hours of specialized instruction on an evidence-supported interview protocol, and had participated in ongoing education in the field of child maltreatment or forensic interviewing; the victim was a protected person because she had not attained 18 years of age at the time of the interview; during the interview only the forensic interviewer was present in the room with the victim; and the victim's statements were not made in response to suggestive or leading questions. 16 M.R.S. § 358(1-3); *App.* 31-33; *Tr. (3/4/2024); State's Exh. 1.* The remaining statutory criteria were satisfied at trial, namely that the victim resumed the witness stand and testified immediately following the State's presentation of the video to the jury, and she was available to be cross-examined. 16 M.R.S. § 358(3)(G); *Tr. (6/25/2024),* 64, 66-67, 81-135.

Legislature expressed such intent. *App.,* 29-30, citing *State v. Beeler,* 2022 ME 47, ¶ 1, n.1, 281 A.3d 637, and *State v. Tripp,* 2024 ME 12, ¶¶ 13-15, 314 A.3d 101.[17] However, by amending 16 M.R.S. § 358 the Legislature explicitly stated that, notwithstanding 1 M.R.S. § 302, the statute applied to all cases regardless of when a case was initiated. 16 M.R.S. § 358(5). Based on that amendment, the trial court properly reversed its ruling on the video because 1 M.R.S. § 302 no longer barred application of 16 M.R.S. § 358 in this case. *App.*, 27. Given the plain language of 16 M.R.S. § 358, as amended, the trial court's ruling that the statute applied to this case was neither erroneous nor an abuse of discretion.[18]

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[17] 1 M.R.S. § 302 provides as follows, creating a statutory rule of construction:

> The… amendment of an Act… does not affect any punishment, penalty or forfeiture incurred before the… amendment takes effect, or any action or proceeding pending at the time of the… amendment, for an offense committed… under the Act… amended. Actions and proceedings pending at the time of the passage [or] amendment… of an Act… are not affected thereby.

DelMello v. Dept. of Environmental Protection, 611 A.2d 985, 986 (Me. 1992).

[18] The trial court also correctly ruled that application of 16 M.R.S. § 358 to this case did not violate the prohibition against *ex post facto* laws under Me. Const. art I, § 10, cl. 1. *App.,* 32-33. The prohibition against *ex post facto* laws applies only to substantive

Furthermore, even assuming for the sake of argument that 16 M.R.S. § 358 did not apply to this case, the trial court's admission of the video was not clearly erroneous because the video also was admissible under the hearsay exception for a recorded recollection. M.R. Evid. 803(5). A recorded recollection qualifies for admission as an exception to the hearsay rule if it meets the following criteria:

> a record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made… by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

M.R. Evid. 803(5). Applying those criteria, the Law Court held in *State v. Adams* that a forensic interview of a child victim of sexual abuse properly was admitted at trial as a recorded recollection.

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laws that criminalize conduct, increase punishment, or restrict defenses, prohibiting the application of such laws to conduct that occurred before the law was enacted, whereas laws that affect only procedure are presumed to apply retroactively. *State v. Letalien,* 2009 ME 130, ¶ 25, 985 A.2d 4; *Greenvall v. Maine Mutual Fire Ins. Co.,* 2001 ME 180, ¶ 7, 788 A.2d 165; see also *Collins v. Youngblood,* 497 U.S. 37, 41 (1990). Because 16 M.R.S. § 358 only affects procedure, by creating a statutory exception to the hearsay rule, its application to this case does not violate the constitutional prohibition against *ex pos facto* laws.

2019 ME 132, ¶¶ 14 & 18, 214 A.3d 496.[19] In this case, as in *Adams,* the evidence satisfied the criteria for admission of the video as a recorded recollection under Rule 803(5), because the forensic interview occurred shortly after the sexual abuse, and the victim testified at trial that she told the truth during the forensic interview but over time her memory had worsened and now she did not recall everything Thorndike did to her. *Tr. (6/25/2024),* 59-60, 66-67, 134.

Thorndike also argues the process was fundamentally unfair, he suffered prejudice, and he is entitled to a new trial because if the trial had not been continued then the video would have been excluded. *Appellant's Brief,* 21-22. However, the trial court did not err in reconsidering, and then reconsidering again, its initial ruling on the State's motion in limine. Under M.R.U. Crim. P. 12(c), "[f]or good cause shown the justice or judge presiding at trial may change a ruling made in limine." Thus, Thorndike had no vested right in

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[19] The Law Court also held in *State v. Adams* that admission of a child victim's forensic interview as a recorded recollection did not violate the defendant's constitutional right to confront and cross-examine witnesses because the victim was available at trial for cross-examination, regardless of the strength of her memory. 2019 ME 132, ¶ 21, 214 A.3d 496.

the trial court's second ruling on the motion in limine, no more than the State had a vested right in the trial court's first ruling. The fact that the Legislature exercised its emergency power to amend 16 M.R.S. § 358 to make it applicable to every case constituted good cause for the trial court to change its ruling.

Nor did the trial court err in exercising its broad discretion to grant the State's motion to continue the trial. *State v. Hunt,* 2023 ME 26, ¶ 16, 293 A.3d 423. A continuance was warranted because, as stated in the State's motion, the State needed more time to prepare for trial and to protect the victim's emotional well-being in light of the trial court's unexpected last-minute reversal of its initial ruling on the video. *App.* 69. Indeed, under the 1981 advisory note for M.R.U. Crim. P. 12(c) it is written "[i]f the pretrial ruling [on a motion in limine] is changed, the court should consider granting a continuance to avoid prejudice." Furthermore, Thornton failed to preserve the right to challenge the continuance on appeal because he did not object to it. *App.* 69; *Appellant's Brief,* 21; *State v. Moore,* 2023 ME 18, ¶¶ 19-20, 290 A.3d 533 (declining to consider on appeal even a claimed violation of constitution rights that was not

raised before trial court).[20] Therefore, he should not now be heard to complain that prejudice resulted from the continuance.

Finally, Thorndike incorrectly (and repeatedly) asserts that the State introduced and played the video in lieu of direct testimony from the victim. *Appellant's Brief,* 6, 9 & 13. On the contrary, the State did present the victim's direct testimony, both before and after presenting the video to the jury, and the victim was then cross-examined by Thorndike's attorney. *Tr. (6/25/2024),* 56-60, 64, 66-67, 81-135.[21] (Indeed, under 16 M.R.S. § 358(3)(g) and *State v. Adams,* 2019 ME 132, ¶ 22, 214 A.3d 496, the video would not be admissible unless the victim testified and was available for cross-

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[20] Nor can it be said that the continuance constituted obvious error, meaning error that is plain and affects substantial rights, requiring a reasonable likelihood that it affected the jury's verdict and seriously affected the fairness and integrity or public reputation of judicial proceedings.

> We will not vacate a conviction unless the conduct of the trial court was so highly prejudicial and calculated to result in injustice that an unjust verdict would inevitably result or that the accused did not have that impartial trial to which he is entitled under the law and the constitution.

State v. Bernier, 2025 ME 14, ¶ 10, ___ A.3d ___ (2025).

[21] Indeed, Thorndike was free to use the video in his cross-examination of the victim, to impeach her testimony or to refresh her recollection about the sexual abuse, but he chose not to do so.

examination.) Thus, the video was a part of the victim's testimony, not in lieu of it.

Therefore, the trial court did not err in continuing the trial or in later reversing its ruling on the video and admitting it at trial.

CONCLUSION

For the reasons set forth above, the Law Court should affirm the judgment.

Respectfully submitted,

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Dated: March 17, 2025

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CERTIFICATE OF SERVICE

I certify that on this date I caused a true copy of the foregoing brief to be served upon counsel for Appellant by email addressed to tsmith@lokllc.com, and that upon approval of the brief by the Clerk of the Law Court I shall serve two printed copies by first class United States mail addressed to Tyler J. Smith, Esq., Libby O'Brien Kingsley & Champion, LLC, 62 Portland Road, Suite 17, Kennebunk, Maine 04043.

Dated: March 17, 2025

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