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)

BRIEF OF APPELLANT ROMAN CATHOLIC BISHOP OF PORTLAND, MAINE

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I. STATEMENT OF FACTS

On June 21, 2021, the Governor approved P.L. 2021, ch. 301, § 1, effective on October 18, 2021, retroactively amending 14 M.R.S. § 752-C to abolish any statute of limitations for civil actions identified in the statutory text. Not long thereafter, many actions were filed, including the thirteen cases that are consolidated in this proceeding. All of them would have been barred by the otherwise applicable statute of limitations but for the new enactment. Each complaint alleges its plaintiff's date of birth. Their individual allegations of sexual abuse decades ago are presented in detail, but those facts are legally immaterial here for motions under M.R. Civ. P. 12(b)(6) or 12(c).

Defendant Roman Catholic Bishop of Portland ("Diocese") answered and moved for judgment on the pleadings under Rule 12(c) in three cases. In ten, the Diocese moved to dismiss under Rule 12(b)(6). The dispositive motions all contend that the cases are barred by 14 M.R.S § 752 because the amendment of § 752-C to revive time-barred claims is void as a matter of settled Maine constitutional law. It is doubly unconstitutional because it would allow litigation of the revived actions according to tort law that was not in effect when the claims accrued or even when they were barred.

The cases were transferred to the Business and Consumer Docket and assigned to Justice McKeon. The dispositive motions were briefed and argued. All thirteen materially identical motions were denied in identical written orders. (*See* App. 5-12 and App. 58 n. 1.) Thereafter, the Diocese moved, pursuant to M.R. App. P. 24(c), that

the cases be reported to the Law Court for decision of this important constitutional question. After briefing and argument, Justice McKeon approved the report. (*See* App. 13-18.) The cases were consolidated in the Law Court and a scheduling order was issued.

II. STATEMENT OF ISSUES PRESENTED

The standard of review is *de novo* for error of law. *MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 21, 40 A.3d 975. Denial of the motions was legal error because the Maine Constitution prohibits retroactive legislative nullification or confiscation of a vested right in immunity from liability. It was also error to allow revival of a barred action that would not have had any legal validity if timely presented, thereby permitting unconstitutional retroactive liability for pre-enactment events. The argument also addresses underlying or subsidiary legal errors.

III. SUMMARY OF ARGUMENT

The Maine Constitution prohibits retroactive legislation that impairs or infringes vested rights or that generates or retroactively creates judicially enforceable liability on claims that were barred before the effective date of the statute. This legislation unconstitutionally does both. From 1823 to 2022, the Maine Law Court has consistently enforced this constitutional principle. Denial of these dispositive motions erroneously failed to respect the constitutional principle and erroneously departed from the teaching of 200 years of Law Court opinions.

The primary error underlying the orders is their narrow limitation of the scope of the due process protections in Maine's Constitution. The orders cannot be reconciled with many Law Court precedents explaining that Maine's due process protections embrace all "things of value." *See NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 44, 281 A.3d 618 ("*NECEC*"). The orders erroneously disregard as *dicta* this Court's many statements that a defendant has a vested right to be free from liability and the effects of retroactive legislation once the limitations period has expired. The orders erroneously rely on opinions from other jurisdictions that are not interpreting Maine's Constitution. The orders also erroneously fail to identify and employ the correct legal framework for protecting vested rights in Maine. Instead, the orders erroneously invoke and conflate frameworks this Court uses to determine whether a statute is intended to be retroactive and/or has a rational basis. A rational basis is enough to authorize a prospective enactment, or even one with retroactive effect, but only if it does not disturb vested rights. A rational basis is never sufficient to defeat vested rights. That is the core meaning of "vested."

Apart from the invalidity of retroactively repealing *any* expired statute of limitations, there is an independently sufficient reason that repeal of *this* statute of limitations is constitutionally invalid. If these actions had been timely brought, they would have failed. There has never been organizational vicarious liability for sexual misconduct not in the scope of the offender's work. More importantly here, there was no recognized theory of organizational tort liability for negligent supervision until

years after these actions were barred. If these cases had been timely brought, they would have been dismissed for failure to state a claim. Those judgments would be *res judicata* to bar these cases. Similarly, if the Legislature had enacted the Restatement theory of supervisory negligence in 2005, the year it was adopted by the Law Court, it could not have done so retroactively to allow liability for events decades earlier.

Decisions by other courts in other jurisdictions concerning other constitutions are inapposite. There is no national "true rule" on the matter. The Maine Constitution prohibits this legislation.

Realistically, none of the cases could have been tolled until 2016 for fraudulent concealment given the extensive public discussion on the subject for decades, including published Law Court decisions. Unless these plaintiffs were disabled from "an overall inability to function in society" at the time of the first abuse and continuously until 2016, there is no tolling for mental illness. *See Douglas v. York County*, 433 F.3d 143, 144 (1st Cir. 2005) (citing *McAfee v. Cole*, 637 A.2d 463, 466 (Me. 1994)). It is noteworthy that none of the plaintiffs alleges having or having had a guardian. Perhaps the best indication that these tolling arguments are baseless is that these complaints were all filed soon after enactment of this legislation.

The Business Court's orders should be reversed with direction to dismiss or enter judgment on the pleadings unless a plaintiff, consistent with Rule 9(a) and Rule 11, presents an amended complaint sufficiently asserting tolling for disabling mental illness continuing until within six years of filing the complaint.

IV. ARGUMENT

A. The Jurisprudential Context.

1. The Constitutional Framework.

The fundamental premise of American democracy is that sovereignty is vested in the People. Since the Revolution, federal or state governmental authority in America has been exercised by officials acting not by delegation from an English "divine-right" monarch but as conferred and limited by written constitutions ratified by the People.

The federal and state constitutions are the supreme law in their respective jurisdictions. When a statutory enactment and a constitution conflict, the inconsistent statute is nullified by the constitutional principle that controls it. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-180 (1803); *In re Op. of the Justices of the Supreme Judicial Court given under the Provisions of Article VI, Section 3 of the Me. Constitution*, 2017 ME 100, ¶ 8, 162 A.3d 188; *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424-437 (1819).

As a matter of federalism, the states retain authority to provide broader or greater protections to rights, liberties, privileges, and immunities of the People than protections provided by the United States Constitution. Maine's Constitution provides greater due process protections to all things of value. For purposes of these consolidated cases, the controlling law is the Constitution of Maine. Unlike the United States Constitution, as construed in *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-16

(1945) ("*Donaldson*"), the Maine Constitution protects anything of value from nullification, invalidation, or confiscation by retroactive legislation.

The Diocese does not contest the presumption of constitutionality. It is clear, however, that overstatement of the force or weight of the presumption can disrespect constitutional principles. Exaggeration of the presumption is itself constitutional error if its effect is to diminish the full scope and meaning of a constitutional principle. The presumption is grounded in a respectful awareness that the Legislature and the Governor also swear fidelity to constitutional principles. Perhaps the greatest utility for the presumption lies in interpreting statutes. When one reasonable construction of a statute would render it unconstitutional or raise a grave constitutional question and the other would not, the settled practice is to adopt the interpretation that avoids the constitutional difficulty. *Martin v. MacMahan*, 2021 ME 62, ¶ 24, 264 A.3d 1224; *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551; *Rideout v. Riendeau*, 2000 ME 198, ¶ 14, 761 A.2d 291.

This presumption does not, however, lessen the Law Court's constitutional obligation to determine authoritatively the meaning of the Maine Constitution. Indeed, all courts, while mindful of the presumption, must assess constitutional challenges so that they are neither too easy, nor too hard. As Chief Justice Marshall taught in *McCulloch v. Maryland*, "we must never forget, that it is a constitution we are expounding." 17 U.S. (4 Wheat.) at 407. The presumption of constitutionality does

not mean that constitutional rights, liberties, privileges, or immunities can ever be subordinated to transitory legislative enthusiasm.

2. Liability and Immunity as Fundamental Legal Concepts.

Two law review articles published over a century ago continue to provide important structure for any legal analysis: Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917). The articles contain valuable insight about important distinctions among rights, liberties, privileges, and immunities. *See generally* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982); Allen Thomas O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141 (2009); *see also* David Kennedy, *Wesley Hohfeld*, in *The Canon of American Legal Thought* 45, 51 (David Kennedy & William W. Fisher III eds., 2006)(deeming Hohfeld's 1913 article "canonical"); *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 115 (1989) (Kennedy, J., dissenting)(mentioning "the familiar Hohfeldian terminology").

In Hohfeld's terms, immunity and liability are jural opposites. 26 Yale L.J. at 710. A party with liability has no immunity. A party with immunity has no liability. Passage of the time specified in a statute of limitations creates immunity from liability. As discussed below, no statute may retroactively impose liability for completed acts or previous failures to act. *See, e.g., Coffin v. Rich*, 45 Me. 507 (1858); *Lewis v. Webb*, 3 Me

326, 335-37 (1825). Retroactive legislative nullification of immunity from liability is the unconstitutional retroactive imposition of liability.

3. Stability, Predictability, and Finality are Pervasive Fundamental Values.

Multiple principles and rules of law reinforce and secure fundamental characteristics of justice: protection of reliance interests, stability, predictability, consistency, and finality. These pervasive and enduring principles and rules preclude belated inconsistent rules or rulings. They preclude retroactive attempts to undo the effects of governmental actions.

These principles and rules are all grounded in the same set of values. They include 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 (Me. 1990) (double jeopardy)(barring dual murder convictions for single homicide); *Hoag v. Dick*, 2002 ME 92, 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 (Me. 1973) (due process)(requiring appointment of counsel for indigent parent in termination of parental rights proceeding).

Belated changes in laws and rules are the antithesis of due process. Such changes are precluded by familiar principles and rules ranging from *stare decisis* to *res judicata* and collateral estoppel. They operate in equity proceedings as laches or estoppel. They operate as promissory estoppel in actions at law and in specific performance suits in equity. *See McGarvey v. Whittredge*, 2011 ME 97, 25 A.3d 620 (*stare decisis*); *Beegan v. Schmidt*, 451 A.2d 642 (Me. 1982) (*res judicata*, collateral estoppel); *Baxter v. Moses*, 77 Me. 465 (Me. 1885) (laches); *Dept. of Health & Human Servs. v. Pelletier*, 2009 ME 11, 964 A.2d 630 (equitable estoppel); *Chapman v. Bomann*, 381 A.2d 1123 (Me. 1978) (promissory estoppel). These fundamental values permeate and inform the constitutional prohibition of retroactive legislation. They rebut the presumption that this retroactive legislation is constitutional.

Statutes of limitations, in every common law jurisdiction for centuries, have been enacted:

> primarily for the purpose of keeping "stale" claims out of court, ... a policy favoring potential defendants who "might otherwise be faced for long periods with the possibility of meeting claims under more difficult conditions."

Williams v. Ford Motor Co., 342 A.2d 712, 713 (Me. 1975) (quoting *Tantish v. Szendey*, 158 Me. 228, 230, 182 A.2d 660, 661 (1962)). The U.S. Supreme Court has similarly stated that:

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," ... present a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a

> specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."

United States v. Kubrick, 444 U.S. 111, 117 (1979) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); *R.R. Tels. v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)); *see also* *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950):

> There comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when "evidence has been lost, memories have faded, and witnesses have disappeared."

(quoting *R.R. Tels.*, 321 U.S. at 349).

Rights to retain and use immunities acquired by a defendant from a lapsed statute of limitation are substantive rights. *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897):

> [T]he foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser…. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.

It has long been unquestioned that belated changes of law are fundamentally unfair. Often, these values are vindicated by common law rules, by statutes, especially statutes of limitations, or by equity doctrines. When the effect of retroactive legislation is to destroy a vested legal right to immunity from liability and instead to impose liability retroactively, by applying new tort law to old events, violating those core values, the enactment is prohibited by the Maine Constitution as a denial of due process.

Retroactively changing the rules to allow an inherently unfair trial is a separate denial of due process. Given the chronological facts, it is intuitively inevitable that future litigation of these cases will leave the Diocese at a constitutionally impermissible disadvantage. These plaintiffs' respective dates of birth range from 1935 to 1968. Their claims were time-barred as early as 1958 and no later than 1998. When an individual sues an organization years after an occurrence, the disadvantage is especially acute. Although an organization potentially (metaphorically) "lives" forever, many or all the organization's witnesses will be dead or disabled decades after the events in suit. The recent amendment to § 752-C affects *only* civil actions that accrued before August 1988, i.e., over thirty-five years ago, and that were time-barred before August 2000. Given that chronology, this statute is facially unconstitutional.

4. The Controlling Law for Interpreting and Applying the Maine Constitution is Exclusively Maine Law.

Whether 14 M.R.S.A. § 752-C as recently amended is in accord with the Maine Constitution is entirely a question of Maine law. Decisions of other courts interpreting different constitutions or announcing different rules of law have nothing to say to these cases. The only relevant precedents are the published opinions of the Law Court. Those opinions require reversal of the Business Court's orders.

It is a "fallacy" to think that there is "a transcendental body of law outside of any particular state but obligatory within it…." *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (Holmes, J., dissenting).

That Holmes dissent, of course, is the foundation for the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Decisions about other state constitutions or even a judicial opinion by another court purporting to interpret the Maine Constitution would be secondary authority at best.

Because the constitutionality of this entirely retroactive abolition of a lapsed statute of limitation is solely a matter of Maine constitutional law, interpretations of the United States Constitution by the Supreme Court are also inapposite. Despite the frequent observation that the state and federal constitutions are often congruent or similar, it is not the law of Maine that the Constitution of Maine must be construed and applied rigidly in alignment with all federal adjudications about the United States Constitution. On issues of due process protection of vested rights, it is especially significant that the Maine Constitution became effective in 1820, decades before the Fourteenth Amendment was ratified and even longer before the Supreme Court "incorporation" cases. As demonstrated in *NECEC*, the Maine Constitution's due process protection of any things of value was well-established before any due process provisions in the Federal Constitution were even arguably applicable to the states.[1, 2]

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[1] In *NECEC*, this Court described vested rights protection as having been "rooted in the Maine Constitution since Maine became a state" in 1820, citing cases back to 1823. *NECEC*, 2022 ME 48, ¶ 38, 281 A.3d 618.

[2] Maine Constitutional law scholars note that the Law Court has adopted a "primacy approach," and, like other states, "rejects, a 'parallelism' approach whereby a court 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* Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons From a Half-Century of New Judicial Federalism*, 75 ME. L. REV. 1 (2023) (advocating for a more rigorous application of the primacy approach); Marshall J. Tinkle, *The Maine State Constitution* 20 (2d ed. 2013) (advocating for primacy approach).

Donaldson is inconsistent with Maine constitutional law. The Supreme Court's decision in *Donaldson* relies on *Campbell v. Holt*, 115 U.S. 620 (1885). Review of the dissenting opinion in *Campbell* and the relevant jurisprudence of the Law Court since 1823 demonstrates that the dissent in *Campbell* comports with the law of Maine as recently applied in *NECEC* and as declared in multiple cases preceding it. The *Campbell* dissent and *NECEC* read together show that Maine's Constitution and the United States Constitution are different.

Additionally, even though decisions in other states are not applicable, it is noteworthy that there is a division of authority in those cases and Maine is not alone. *Compare, Aurora Pub. Sch. v. A.S.*, 2023 CO 39, ¶ 22, __ P.3d __ (Colo. 2023)(holding that statute creating new cause of action for conduct that predated the statute where previously available claims were time-barred violated Colorado Constitution), *with A.B. v. S.U.*, 2023 VT 32, ¶ 23, __ A.3d __ (Vt. 2023)(holding that statutory amendment retroactively eliminating statute of limitations in child sex abuse cases did not violate Vermont Constitution). The careful survey by the Connecticut Supreme Court, while ruling that retroactive repeal is constitutional in Connecticut, is significant because it identifies Maine law as being to the contrary. *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 v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816 (Me. 1980)). *Dobson* and the other Maine decisions cited and discussed below require reversal of the Business Court orders and dismissal or judgment on the pleadings for the Diocese.

5. Retroactivity.

The term "retroactivity" has been used in many settings to describe the operation of statutes in litigation. The time of the litigation event and the time of the enactment event are fixed and known. Obviously, no retroactivity question can arise if the transaction or occurrence facts follow the enactment date. However, before a court applies a statute in litigation concerning a pre-enactment transaction or occurrence, the constitutionality of the retroactive application needs to be adjudicated.

Law Court decisions determining whether the Legislature intended retroactivity are no help because the Legislature declared that this legislation is retroactive. Indeed, it has no prospective effect. Decisions invalidating or validating legislation under the contracts clause have no significance because there is no contract here.

No Maine case allows retroactive legislation to change *whether* the case can be heard at all or *whether* liability for pre-enactment acts or omissions may be imposed upon a party otherwise free from liability. Maine cases allowing retroactive application of legislation relate only to *how* an otherwise viable case may be heard (only procedural) or relate to the details of what *form* or *kind* of judgment might be available to an otherwise successful plaintiff who is entitled to *some* judgment (only remedial). *See, e.g., Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 561 (Me. 1981); *Berry v.*

Clary, 77 Me. 482, 486, 1 A. 360, 361 (1885); *Coffin*, 45 Me. at 514-516; *Read v. Frankfort Bank*, 23 Me. 318, 321 (1843); *Oriental Bank v. Freeze*, 18 Me. 109 (1841). Retroactivity is unconstitutional if it impairs vested rights or if its effect is to convert the status of affected defendants from no-liability to liability. *Coffin*, 45 Me. at 514-15 (explaining that the Legislature has "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) There is no Maine decision holding that a statute nullifying a vested right or imposing a new liability is constitutional in Maine.

Law Court decisions approving retroactivity for changes that are truly only remedial speak only to cases that were going to be tried anyway and might yield some remedy anyway. The only purpose and effect of this statute is to permit otherwise prohibited litigation to occur and to impose liability (and a familiar damage remedy) in place of the opposite no-liability (as stated by Hohfeld), and therefore no-remedy, for long-ago acts or omissions. Retroactive legislation allowing a remedy where *no* remedy was available on the statute's effective date is not "remedial."

Retroactive legislation allowing litigation of a case that was previously not litigable at all is not "procedural." *See Bellegarde Custom Kitchens v. Leavitt*, 295 A.2d 909, 911 (Me. 1972) (quoting Field, McKusick & Wroth, *Maine Civil Practice*, Vol. 1, § 1.2) ("[T]he question whether an action is barred by a statute of limitations *is a matter of substance*; but the question as to when an action is considered to have been commenced so as to toll the statute of limitations is presumably procedural.")

(Emphasis added.) The standard is whether an enactment relates only to *how* an otherwise litigable case gets litigated and not about *whether* a case can be litigated and not barred. Legislation is unconstitutionally retroactive if it also permits otherwise barred litigation to impose liability on rules of primary law that were not in place at the time of the occurrence. These important distinctions are addressed further below.

It is also important to emphasize that vocabulary is never decisive and may often be unhelpful to the analysis. There is no single universal meaning for the term "procedure." For example, adjudication of constitutional prohibitions against retroactive legislation may have surface similarities to non-constitutional state court choices about whether to apply a statute of limitations from a different state as a matter of comity, even when not compelled by the federal Constitution. The Maine Constitution prohibits disturbance of vested rights. Opinions explaining a permitted judicial choice between two arguably applicable laws, not affecting vested rights, are not germane to a decision to apply a novel retroactive statute that is constitutionally prohibited because vested rights are protected.

To the same effect, some Supreme Court decisions over the last 85 years wrestling with the tension between the Erie doctrine and the Federal Rules of Civil Procedure raise questions about what is "procedural" instead of "substantive." *See Guar. Tr. Co. v. York*, 326 U.S. 99, 108-112 (1945). As Justice Frankfurter admonished,

> [T]he question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover,

> as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

Id. at 109. That case held that the federal court must apply the state statute of limitations that barred the case. Here, naming or classifying statutes of limitations as "procedural" does not decide the constitutionality of retroactively abolishing them for cases already barred, just as it did not decide whether a federal court must respect a limitations bar under state law. Whether a case is barred or may be heard is not about "merely the manner and the means" of litigating the case. *Id.*

Briefly and summarily, primary rules of law, often denominated "substantive," are not about what the courts do or how they do it. They relate instead to what is required or prohibited in people's everyday lives, i.e., when acting as citizens generally, not as litigants specifically. So understood, retroactive imposition of liability for acts or omissions decades earlier is neither procedural nor remedial but an unconstitutional change to primary law. The issue is not only whether a liability action that might have been adjudicated at an earlier time can be revived (it cannot), but also whether novel doctrines of liability or duty, i.e., primary, i.e., substantive, law can be retroactively applied now in a formerly barred action to impose liability that was not legally possible at the earlier time. This is additionally constitutionally impermissible.

It is also important to identify and employ the proper method of analysis. Here, the Business Court cited to *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986) to

identify a "workable alternative standard . . . to determine when retroactive legislation works a deprivation of a party's due process rights." (App. 9.) But it was error to employ an "alternative" standard. That alternative is not the framework this Court uses to determine whether there has been a due process violation impairing vested rights. Rather, the "alternative" framework the Business Court identified is used for determining whether the Legislature intended to make a statute retroactive and/or is within the state's police power, not whether explicitly retroactive legislation that impairs vested rights is constitutional. *See Norton*, 511 A.2d at 1060 n.5, 1061. There is no question here about legislative intent because it is explicit. The sole issue is constitutional permissibility. But constitutional permissibility has its own logic that must be respected. In this circumstance, the constitutional challenge for reasons to be developed more fully below is grounded in the vested right to dismissal or judgment as a matter of law when (1) all claims were long ago time-barred by the appliable statute of limitations *and* (2) all current claims are grounded in theories of liability that were not in existence at any material time.

Rational basis analysis has no role where a challenge to constitutional validity is grounded in a vested right. Rational basis analysis operates to adjudicate a challenge to the Legislature's police power authority to enact a social or economic regulatory measure. It is constitutionally insufficient to divest a vested right. The dispositive question is whether the Diocese has a vested right to be free from the litigation now being filed, threatened, or anticipated, not whether a vested right may be overridden

by a retroactive statute. All these cases were filed after, and obviously because of, the recent amendment to 14 M.R.S. § 752-C. Because there is a vested right to immunity as a settled matter of Maine law, the statute is constitutionally impermissible, and it cannot be saved by rational basis analysis. The means chosen by the Legislature may well be rationally tailored to the Legislature's purpose, but the effect is constitutionally impermissible because it destroys a vested right.

The Law Court has consistently used a categorical test for more than two centuries to analyze the due process limitations on retroactive laws that impair vested rights. *See NECEC,* 2022 ME 48, ¶48, 281 A.3d 618; *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266 (developing a three-part categorical test for when rights vest based on a valid land use permit); *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 295 (1823). The analysis used in *NECEC*, *Sahl*, and *Laboree* is straightforward. The Court did not engage in rational basis review in any of those cases or even mention it. Those are only some of the precedents that require reversal of these orders. In Maine, retroactive legislation is unconstitutional if it impairs a vested right. This Court has never added to that principle any qualification saying, "except when the State has a rational basis for impairing it."

B. <u>The Order on Report is Erroneous as a Matter of Law</u>.

The Diocese's motions rest upon four propositions: (1) that multiple Maine decisions, including *NECEC*, establish that the Maine Constitution prohibits retroactive legislative nullification or confiscation of any "thing of value," (2) that the

immunity established on expiration of the allowable time under any statute of limitations is a "thing of value," (3) that the Diocese has had a vested right in the immunity since the deadlines in these cases elapsed decades ago, and (4) that the statute, especially in combination with novel theories of liability, effects an unconstitutional retroactive imposition of liability.

1. The Business Court Erroneously Determined that a Statute of Limitations Immunity is not a Thing of Value.

In *NECEC*, the Law Court reaffirmed that Maine due process protection extends to anything of value broadly meaning anything to which a person might attach a value. *See NECEC*, 2022 ME 48, ¶¶ 42-50, 281 A.3d 618. The Court explained:

> "Vested rights are rights vested in specific individuals in accordance with the law in what the law recognizes as *property*." Critical to the application of the doctrine of vested rights, then, is a definition of what constitutes property. . . . James Madison viewed property as embracing "everything to which a man may attach a value and have a right." (quoting Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 271 (1914) (footnotes omitted)).

Id. ¶ 44 (quoting J. Spencer Hall, *State v. Vested Rights Statutes: Developing Certainty and Equity and Protecting the Public Interest*, 40 URB. LAW. 451, 455-56 (2008)).

Since time immemorial, courts and legislatures have treated the economic and operational effects of a legal status or a legal process in reified terms as things of value. A deed is only a piece of paper. The value of a deed lies in the title it transfers. The title is a juridical "thing." In turn, the title is a "thing of value" because it confers

enforceable rights of possession and use. The Maine Constitution recognizes and protects titles and their associated rights, and it protects immunities and their associated freedom from liability.

Appellees would no doubt agree that their causes of action are things of great value. *See* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 359, 362 (1st ed. 1868) ("[A] vested right of action is property in the same sense in which tangible things are property and is equally protected . . . ."); *Sawyer v. Leg. Council*, No. CV-04-97, 2005 WL 2723817, at *10 (Me. Super. Ct. Mar. 16, 2005) (concluding that plaintiffs had a vested right in their cause of action if it accrued prior to a change in the law). Therefore, a defense to any cause of action is necessarily also a thing of at least equivalent value. *Campbell*, 115 U.S. at 631 (Bradley, J., dissenting):

> The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the courts to adopt strict rules of pleading and proof to be observed when the defence of the statute is interposed. But it is, nevertheless, a right given by a jury and politic law, and, when vested, is as much to be protected as any other right that a man has.

The immunity that arises at the end of the limitations period is assertable in litigation as an affirmative defense. An affirmative defense is a thing of value. The right to retain the benefit of the immunity and the affirmative defense is as much a

thing of value as the cause of action that it bars. Immunity from liability necessarily has the same value as the claim, i.e., the asserted liability, plus the additional value of the avoided cost of defending the claim. Because the economic value of an immunity cannot be doubted, the only question is whether its value is a "thing" protected by Maine's Constitution. The Business Court erred in deciding that it is not.

In *NECEC*, the Law Court explicitly and clearly embraced the broad view of things of value that are constitutionally protected by Maine's due process protections. *NECEC*, 2022 ME 48, ¶¶ 44, 46, 281 A.3d 618 (recognizing as a protectable right the intangible right to proceed with construction). The Court applied that analysis to a Certificate of Public Convenience and Necessity ("CPCN"), issued by the Maine Public Utilities Commission ("PUC"). Like a deed to real estate, the CPCN is of little intrinsic value. Its value lies in the authorization to construct and operate a transmission line.

The Business Court erroneously failed to follow *NECEC*, stating instead that the Law Court had not yet had the opportunity to "extend" the holding of *NECEC* to statute of limitations immunities. (App. 8 (referencing the holding in *NECEC,* 2022 ME 48, ¶ 42, 281 A.3d 618)). The Business Court wrongly thought that the broad general rule of *NECEC* needs any case-by-case Law Court extension. There is no need to "extend" the broad holding of *NECEC* item by item. Rather, that opinion's broad holding already means that *all* things (i.e., *any* things) of value are protected by the Maine Constitution. *See id.* ¶ 45 ("the focus of a vested rights analysis

must be upon the *specific entitlement* that is affected by the retroactively applied legislation.") (Emphasis added.) Perhaps ironically indeed, the CPCN was accorded different constitutional protection from other things of value.

The Law Court ruled that the right conferred by the issuance of a permit, or the CPCN in that case, did not "vest" until after a suitable amount of eligible construction activity had occurred. This rule of deferred vesting originated in municipal building permit and zoning ordinance cases. *See Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (citing *Town of Sykesville v. W. Shore Commc'ns, Inc.*, 677 A.2d 102, 104 (Md. 1996)); *Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 164 (Me. 1988).

The Court ruled that the CPCN did not immediately vest. *NECEC*, 2022 ME 48, ¶¶ 46-47, 281 A.3d 618. Subsequently, the Business Court conducted a jury trial that determined that the right conferred on issuance of the CPCN had become vested by sufficient good faith construction. The immunity arising on expiration of the statute of limitations, however, vests immediately. The statute is self-executing on passage of the specified time and there is no time interval between inception of the immunity and some later event needed to complete its vesting. Unlike a building permit or a CPCN, there is no time when the right to immunity is unvested.

2. The Law Court has Spoken Often About Vested Rights in Statute-of-Limitations Immunities.

After reading *NECEC* too narrowly, the Business Court wrongly disregarded as inapplicable to the analysis several Law Court decisions speaking specifically to the

"vested right" acquired on expiration of a statute of limitations. Before addressing those important opinions, it is important to consider some pertinent history.

The Law Court first addressed vested rights in the context of bars to litigation in 1825 in *Lewis*, 3 Me. at 335-37 (holding that a special resolve in the Legislature in 1824, to give appellants a new right to appeal, could not apply retroactively). Appellants had missed their original deadline to appeal a debt judgment against them from 1819 when, therefore, the creditor's rights under that judgment had vested. Obviously, the judgment, including its *res judicata* effect, was recognized in *Lewis* as a thing of value. All these cases were filed only after and only because of this statute. If the retroactive amendment to § 752-C had not been enacted, the Diocese would be entitled to judgments in all these cases. The right to those judgments is a juridical thing of value for purposes of Maine constitutional analysis on authority of *Lewis* and *NECEC*.

In 1936, the Law Court expressly held that the six-year statute of limitations for a medical malpractice action that had accrued in 1929 could not constitutionally be retroactively reduced by a 1931 law to two years. *Miller v. Fallon* 134 Me. 145, 148-153, 183 A. 416, 417-419 (1936) (overruled in part on other grounds by *Norton*, 511 A.2d 1056). The *Miller* action related to surgery in 1929 and treatment in January 1930. *Id.* at 146. Between the alleged malpractice and commencement of the action in 1935, a 1931 statute enacted a two-year statute of limitations on such claims. *Id.* at 147. The Court held that the 1931 statute could not apply retroactively for two reasons.

First, the statute did not expressly state that it did so and "makes no reference to causes of action which had already accrued." *Id.* at 148. Second, and more to the point here, the Court reasoned that retroactive legislation shortening a statute of limitations to two years would be "unconstitutional" as to "actions which had accrued two years or more before its passage, or at a time which did not allow a reasonable period for their prosecution thereafter." *Id.* at 153, 183 A. 419. The *Miller* opinion cited to case law derived from the Maine Constitution dating from 1823 for the proposition that retroactive legislation that extinguishes a cause of action or that leaves only an unreasonable amount of time to bring an action must be unconstitutionally void. *Id.* 147-48, 183 A. 417. Therefore, every cause of action is a constitutionally protected thing of value. Whether as a matter of due process, or of equal protection, or of mere logic, immunity from a cause of action is also a thing of at least equal value.

Many Law Court opinions discussing statutes of limitations and vested rights in the last 43 years conflict with the Business Court's orders on these dispositive motions and no Law Court opinion supports them. *See, e.g.*, *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816-17 (Me. 1980) ("Legislation which lengthens the limitations 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*.") (Emphasis

added); *Rutter v. Allstate Auto. Ins.*, 655 A.2d 1258, 1259 (Me. 1995) ("[I]n the absence of a legislative statement to the contrary [indicating the legislation applies only to future claims], amendments 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); *see also Danforth v. L.L. Bean, Inc.*, 624 A.2d 1231, 1232 (Me. 1993); *Harvie v. Bath Iron Works Corp.*, 561 A.2d 1023, 1025 (Me. 1989). "It is . . . well settled that statutes of limitation may be made applicable to existing rights and causes of action, provided a reasonable time is allowed for the prosecution of claims thereon *before the right to do so is barred*." *Miller*, 134 Me. at 183.

The Business Court erred in disregarding the careful reasoning from these cases, chiefly *Dobson* and *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123, stating that the Law Court's essential reasons were "dicta." (*See* App. 8 ("the Law Court's discussions of vested rights in *Morrissette* and *Dobson* are dicta which are neither central nor necessary to the holdings")). To the contrary, that reasoning was the Court's essential rationale for the holding as evidenced by how often and how readily the Law Court has cited and followed that reasoning in other cases.

Specifically, the Business Court (App. 8), disregarded the following reasoning:

> 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.

Dobson, 415 A.2d at 816.

The only point of that carefully drafted language is to explain that the *extension* of an *unexpired* statute is *not* unconstitutional *because* the statute being extended had *not* run. The only meaning of that language is that, correlatively, *expiration* of the limitations period *does* confer a vested right that *cannot* be *retroactively* destroyed. The Law Court obviously well understood that an *unexpired* limitation that had not yet barred future litigation – therefore – had not yet generated a vested right to immunity.

Morrissette treated the Law Court's prior statements as authoritative:

> In an analogous context in 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. *Rutter v. Allstate Auto. Ins.*, 655 A.2d 1258, 1259 (Me. 1995); *Danforth v. L.L. Bean, Inc.*, 624 A.2d 1231, 1232 (Me. 1993); *Harvie v. Bath Iron Works Corp.*, 561 A.2d 1023, 1025 (Me. 1989); *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816 (Me. 1980). Unlike the expiration of the statute of limitations, which results in a final disposition of the case, the level of an employee's prospective benefits is never final, and statutory amendments may be applied retroactively to alter the level of benefits for injuries predating those amendments.

2003 ME 138, ¶ 15, 837 A.2d 123. (This case does illustrate how remedies relating to entitlements accruing before the law changed may be adjusted in pending cases and cases not yet barred.)

Decisions involving future benefits are not unlike divorce judgments involving child support, or spousal support, or injunctions requiring an extended period of

required performance or forbearance, all of which may justify adjustment over time because, by their very nature, they are ongoing. *See, e.g.*, *Thut*, 281 A.2d at 7. A civil action for damages by contrast does not involve such adjustments. If an action is timely commenced and tried, all future damages are liquidated at present value in the judgment. An accrued action that is not timely commenced becomes barred, i.e., no longer viable. Justice Godfrey's use of the phrase, "existing viable claims" in *Dobson* was not *dictum*, but a careful differentiation of the constitutional adjustment of benefits in viable actions from the unconstitutional revival of barred, i.e., nonviable, actions. *Dobson*, 415 A.2d at 816.

The inescapable logical consequence of *Dobson* is that the Maine Constitution prohibits retroactive repeal or amendment of an expired statute of limitations to revive a cause of action *after* the prior time limit has expired. Several later cases followed it for exactly that proposition. The Court was careful to differentiate between the constitutional and the unconstitutional. In *Dobson*, the legislation *was* constitutionally applicable *because* it was enacted *before* the defendant's immunity defense had vested. In *Morrissette*, likewise, the Law Court ruled that the defendant did not have a vested right in *how* workers' compensation benefits should be calculated because the case was not yet barred. The statements in both *Dobson* and *Morrissette* that the Business Court disregarded were not *obiter dicta*. They were integral to the reasoning, i.e., the rationale, i.e., part of the holdings as much as the tail and the head comprise the coin. The Business Court wrongly declined to follow them.

As the First Circuit has said: "'In evaluating dicta, 'much depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . . though technically dictum, must carry great weight, and may even . . . be regarded as conclusive.'" *McCoy v. Mass. Inst. of Tech.*, 950 F.3d 13, 19 (1st Cir. 1991) (quoting Charles A. Wright, *The Law of Federal Courts* § 58 (4th ed. 1983)); *see generally* Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75, 90-94 (2008) (on the distinction between *obiter dicta* and authoritative *dicta*) ("The degree of respect afforded to such *dicta* is, in turn, directly proportional to the quantity and quality of discussion it originally received."). The U.S. Supreme Court appears to agree. *See Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996) (stating it adheres, "not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions"); *Hawks v. Hamill*, 288 U.S. 52, 59 (1933) (noting that considered *dicta*, contrasted with *obiter dicta*, has "capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement").

Instead, the Business Court wrongly based its decision on inapposite opinions. One of those is *Norton*. In that opinion, the Law Court carefully stated that neither party had raised a due process argument. *Norton*, 511 A.2d at 1061 n. 7. Because *Norton* explicitly did not address the due process vested rights issue, that case cannot support, much less require, rejection of a due process vested rights argument.

The Business Court's reliance on *State v. LVI Group*, 1997 ME 25, 690 A.2d 960, ("*LVI*") is also misplaced. *LVI* was a 4-3 decision in which the majority opinion expressly took its analytical approach from *Norton*, a case that involved no vested rights due process argument or decision. More importantly, it is not necessary for the Diocese to distinguish *LVI* from the instant cases because the *LVI* majority opinion did that work itself. Succinctly, the *LVI* Court said:

> Nor could the Legislature 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….The plaintiffs in this case were not parties in *Curtis* [*v. Lehigh Footwear, Inc.*] and brought the action before the expiration of the applicable statute of limitations.

Id. ¶ 11 n.4. That footnote echoes *Dobson* and recognizes the *Dobson* line of cases as needing no citation or explanation.

Additionally, and importantly, the statutory amendment at issue in *LVI* was not retroactive in any constitutional sense. The legislation that was amended always imposed a statutory liability for severance pay obligations on parties owning businesses directly or indirectly. In *Curtis v. Lehigh Footwear, Inc.*, 516 A.2d 558, 560 (Me. 1986), however, the Law Court ruled that the Legislature had not intended the statute's explicit inclusion of indirect ownership to reach corporate parents of wholly owned subsidiaries. The Legislature then enacted legislation to make clear that its intention from the beginning was to impose severance pay liability on such corporate parents. *LVI*, 1997 ME 25, ¶ 11, 690 A.2d 960. Subsequently, the State brought an action for severance benefits, within the original statute of limitations, for parties who

were not in the *Curtis* case. The statute was not retroactively applied except insofar as the law's original meaning was clarified before the statute of limitations ran.

Although three justices dissented, the result in *LVI*, that a parent corporation and its subsidiary both have a statutory severance pay obligation, is not unreasonable as a matter of corporate or employment policy and law. That was the intended meaning of the statute before any of the events in suit. The Legislature's clarification of its original intention, before the statute ran on other former employees at *LVI*'s subsidiary, was at least arguably not retroactive in any constitutional sense. In the footnote quoted above, however, the Law Court made clear that it would have been unconstitutionally retroactive if it had purported to revive claims against the parent corporation after the statute of limitations had run. *Id.* ¶ 11 n.4. Accordingly, *LVI* is not authority for the Business Court orders. It is instead further vindication of *Dobson* and many other Maine cases. It recognizes and reinforces the long-settled principle of Maine due process jurisprudence that reviving (or creating) liability, after any possible statute of limitations has run, is an unconstitutional overreach by the Legislature.

Neither *Norton* nor *LVI* involves retroactive repeal of an expired statute of limitations. Indeed, *LVI* says explicitly that retroactive repeal of an expired statute of limitations is impermissible, and *Norton* expressly disclaims any opinion concerning due process under the Maine Constitution. Every published opinion of the Law Court that does speak to retroactive legislation affecting statutes of limitations does address vested rights and does conflict with the Business Court's orders. There is no opinion

of the Law Court speaking to vested rights and statutes of limitations that supports those rulings.

3. The Statute Would Unconstitutionally Authorize Retroactive Liability on Novel Tort Theories Not Available When the Claims Were Barred.

Retroactive application of this statute is doubly constitutionally offensive. It does not merely attempt to revive actions long after they were barred but it also retroactively attempts to retrofit new primary or substantive law in the form of a novel ground for a new liability that was not legally available to these plaintiffs before these cases were all time-barred.

There has never been vicarious organizational liability for the criminal sexual misconduct of a human actor outside the scope of the actor's authority or duties. *See Mahar v. StoneWood Transport*, 2003 ME 63, ¶ 14, 823 A.2d 540, 544 ("Acts relating to work and done in the workplace during work hours are within the scope ... while serious intentional wrongdoing is outside it.")(citing *Lyons v. Brown*, 158 F.3d 605, 609-10 (1st Cir. 1998); Restatement (Second) of Agency §§ 228-229, 231 & cmt. a, 233-234); *Vanetten v. Daigle*, No. 2:22-cv-00291-JDL, 2023 U.S. Dist. LEXIS 107746, at *12 (D. Me. June 22, 2023)); *see also id.* (quoting *Mahar*, 2003 ME 63, ¶ 14, 823 A.2d 540, as settled Maine law).

Concepts of supervisory negligence as alternative theories of organizational tort liability emerged and evolved relatively recently and long after all these cases were already time-barred. They do not declare organizations vicariously liable for the acts

of abusers but allow organizational liability for the provably unreasonable omissions or acts of supervisors who did not prevent the abuse. Crucially, it was explicitly the law of Maine at all material times, until long after all claims by these plaintiffs had been time-barred, that the Law Court had never recognized a tort of negligent supervision. Multiple pronouncements of the Law Court expressly and clearly say that, before 2005, the Law Court did not recognize any tort liability for an organization for the conduct of an associated individual that was neither authorized by the organization nor beneficial to it. *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶19, 871 A.2d 1208. Indeed, in *Fortin*, the Court was careful to find a "special relationship" to which the organizational liability might be attached. *Id.* ¶¶ 39, 75.

The plain meaning of *Fortin* is that, if these Plaintiffs had brought these cases at any time before *Fortin* was decided, they would have lost them and would now be barred by *res judicata*. *Lewis,* in 1825, held that retroactive legislation to revive an action over a *res judicata* bar is unconstitutional. Before *Fortin*, *Swanson v. Roman Catholic Bishop*, 1997 ME 63, 692 A.2d 441, precluded diocesan liability in cases like this on any theory and multiple Maine cases cited in *Fortin* clearly declared that the Law Court had never embraced any theory of organizational supervisory liability. *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 -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, *Mahar*, 2003 ME 63, ¶ 10, 823 A.2d 540, *Napieralski v. Unity Church of Greater Portland,* 2002 ME 108, ¶ 6, 802 A.2d at 391; *Hinkley v. Penobscot Valley Hosp.*, 2002 ME 70, ¶ 16, 794 A.2d 643, *Swanson*, 1997 ME 63, ¶ 9, 692 A.2d at 441.

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. *Fortin*, 2005 ME 57, ¶ 39, 871 A.2d 1208. Until then, generally, no organizations were subject to liability for negligent supervision. Under *Swanson*, moreover, before *Fortin*, churches specifically had no such liability. And if the Restatement rule had been enacted by the Legislature in 2005, it could not constitutionally have been applied retroactively at all, much less to stale claims barred decades earlier. New § 752-C is void for the very same reasons.

The chronology of these Law Court decisions is acutely relevant to the constitutional impropriety of retroactivity here. This statute's asserted retroactivity exposes organizations to tort liabilities *that did not exist at the time of any alleged sexual abuse, that did not exist at the time of any alleged supervisory acts or omissions, and that did not exist when these actions were time-barred*. This is doubly problematic on the basic point that the Law Court reaffirmed as recently as last summer, that retroactivity may not impose liability for completed events. *NECEC*, 2022 ME 48, ¶ 39, 281 A.3d 618.

If liability of an organization may now be predicated upon failure to observe some yet-to-be-developed standard of care, first used in Maine decades after these cases were barred, and much longer after they accrued, the denial of due process lies both in usurping a vested right to defeat a barred action, and also in retroactive authorization of a new substantive ground for tort liability first identified by the Law Court long after the alleged occurrences.

The Maine Constitution prohibits retroactively subjecting any organization, not just a church, to litigation, decades after a human actor allegedly covertly committed a crime, on the theory that someone in authority in the organization 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 over 20 years ago *and over five years before the Law Court recognized a tort named "negligent supervision."* It is not constitutionally possible to subject any organization to litigation and liability decades

after any litigation on any theory was barred *and* where the only plausible tort theory of liability was first recognized long after the events to be litigated.

4. Charitable Immunity Was Recently, Selectively, Retroactively, and Unconstitutionally Abolished Even for Certain Past Occurrences.

On June 28, 2023, the Governor signed into law Chapter 351 of the Public Laws of 2023. It is headed, "An Act to Limit the Immunity of Charitable Organizations." Obviously, this enactment was not before the Business Court at the time of the orders that are now in the Law Court on report. Notwithstanding the fact that this Chapter 351 is not yet effective and was not considered by the Business Court, it is nevertheless directly connected to the new § 752-C. The Legislature, apparently or presumably, recognized that the cases intended to be allowed by lifting this statute of limitations retroactively might run aground on charitable immunity. While not literally an *ex post facto* bill of attainder, it resembles one, excepting only that the Diocese will not be criminally convicted but only financially ruined.

The recent change to charitable immunity relates only to tortious negligent supervision of persons who allegedly commit one of the specified sex crimes, regardless of when the crime occurred. This also amounts to unconstitutional retroactive liability on a theory of negligent supervision that did not exist at the time of any of the occurrences by removing the affirmative defense that otherwise would preclude liability excess of available insurance proceeds. *See Jensen v. Me. Eye & Ear Infirmary*, 78 A. 898, 107 Me. 408 (1910) (adopting the defense of charitable immunity)

and 14 M.R.S. § 158-B (1965) (modifying the doctrine to waive immunity for organizations to the extent of their applicable liability insurance).

The Court need not adjudicate (yet) the unconstitutionality of retroactive elimination of charitable immunity to recognize it as an extension or reinforcement of new § 752-C. The overall effect of these two unconstitutional retroactive enactments is to impose a liability, at least a contingent unliquidated liability, in the tens of millions of dollars on a party that, prior to the two enactments, was fully immune because of the statute of limitations and immune except for insurance proceeds as a matter of settled common law rules. This selective retroactive destruction of two immunities from liability is not merely "procedural." It is not just the revival of a claim that was barred to be litigated on the law of the time with the defenses of the time. It is multi-factorial time travel, authorizing litigation that has long been barred on new substantive law of duty and liability, and retroactively eliminating defenses that were available until these laws were enacted.

C. The History of Section 752-C Supports Reversal of the Orders.

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 1985 version of 14 M.R.S. § 752-C was new, 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, instead of two-year limitations period for sexual abuse of a minor. It is also the origin of the phrase "based upon," meaning that any tort and not just battery would be covered. The only affected defendant was the abuser "upon" whose conduct the action was "based." The legislation made no mention of retroactivity, and it made no mention of organizations. The reference to the criminal law textually limited the new § 752-C to persons accused of those crimes. Organizations do not commit those crimes.

In 1989, the Legislature amended § 752-C only to add a discovery rule. Law Court recognition of negligent supervision was still years in the future.

In 1991, the Legislature doubled the six-year statute of limitations to twelve years and doubled the discovery feature of the statute. The session law stated that the legislation would apply to "[a]ll actions based upon sexual intercourse or a sexual act occurring after the effective date of this Act" and all actions for which the claim was not yet barred by the statute of limitations in force on the effective date.

The 1993 legislation restated the specific cross-reference to the criminal code but otherwise made no changes. Four years later, in *Swanson*, the Law Court explicitly rejected ecclesiastical liability.

Two years after *Swanson*, the 1999 legislation repealed § 752-C as amended in 1993 and replaced it with the language that was in effect from August 11, 2000, until it was repealed and replaced by the current iteration of § 752-C. The 1999 legislation,

effective in 2000, again is expressly limited to conduct defined with specific reference to Title 17-A, affects only actions not yet barred, and makes no mention of organizations. But, in any event, there was not yet any tort of negligent supervision and *Swanson* meant that no such claims against a church were viable in 1999 anyway. These amendments, including the specific anti-retroactive language of the several session laws, support the conclusion that the innovation in 1985 was to make clear that it encompassed all causes of action, whatever the theory or label, including battery, that plaintiff victim may have against an abuser. Nothing in the legislative history or the text suggests that the Legislature intended or even anticipated liability of organizations for the sexual behavior of human actors. In 1999, the Legislature, presumably mindful of *Swanson,* surely was not intending to authorize any claims against any church, much less a previously barred claim. Every time the Legislature explicitly precluded retroactivity it only strengthened the case for denying it here. *Dobson, Dobson's* progeny, and cases from 1823 to 2022, declaring the meaning of the Maine Constitution, were reinforced each time the Legislature conformed to them by expressly limiting earlier iterations of § 752-C.

There is no Law Court decision concerning the applicability of former § 752-C to organizational defendants. The Superior Court has issued conflicting decisions. *See 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)(holding 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); *Boyden v. Michaud*, Nos. CV-07-276 & CV-07-331, 2008 Me. Super. LEXIS 88 *13-15, 15 n.6 (May 14, 2008)(holding the opposite). In the *Boyden* opinion, however, the Superior Court (Jabar, J.) characterized the closeness of the question at issue as "razor thin" and suggested that reporting the question to the Law Court "might be prudent." *Id.* at *13.

In the aggregate, this history shows that every enactment of every version of § 752-C from 1985 to 1999 occurred (1) when there was no tort liability for any Maine organizations for negligent supervision and (2) when there was no action against a church concerning selection or supervision of clergy. Charitable immunity also remained in full effect. Neither organizations nor their insurers nor their lenders or other creditors had any reason to plan around a perpetual risk of ruinous financial exposure for occurrences long in the past. Considered in the broader context summarized at pages 5-11 *ante*, this history is added reason to recognize anew and reaffirm the timeless wisdom of Maine's Constitution and centuries of Law Court decisions that have identified and protected all things of value from retroactive laws.

D. <u>Limited Further Proceedings</u>.

Obviously, if the Court affirms the orders of the Business Court, these cases and many others will return to the Superior Court. As demonstrated above, however, the Law Court should reverse the order of the Business Court, after which questions may arise about what, if anything, remains to be done. In the Business Court, these plaintiffs stated or implied that all of them would be asserting a right to tolling under

14 M.R.S. § 859 for "fraudulent concealment" and under Section 14 M.R.S. § 853 for "mental illness." These contentions are addressed in the paragraphs to follow.

1. Tolling Claims Must Satisfy Rule 9 Pleading Requirements.

Because the most recently amended version of § 752-C is unconstitutional and because the version of § 752-C that became effective in 2000 explicitly never applied to any of these plaintiffs, the operative statute of limitations is § 752. That six-year statute of limitations obviously bars all these cases unless a few of these plaintiffs can succeed with a tolling claim. For reasons addressed in the paragraphs to follow, these tolling claims cannot succeed, but if there is to be a remand to allow these plaintiffs to try, the Court should make clear that the pleading requirements of Rule 9, and not the requirements of Rule 8, apply and provide meaningful guidance as to what it will take for any tolling claims to be successful.

2. Tolling Claims Based on Allegations of Fraudulent Concealment Fail as a Matter of Law.

Title 14 M.R.S. § 859 provides: "*If a person, liable to any action mentioned, fraudulently conceals the cause thereof from the person entitled thereto*, …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). This tolling, of course, follows the tolling for minority under 14 M.R.S. § 853. And the thing concealed is the "cause," i.e., the basis of an "action."

Section 859 tolls the applicable statute only until 6 years after a plaintiff "discovers … just cause for action." These plaintiffs had no cause of action for

negligent supervision, but assuming *arguendo,* that they had some cause of action against the Diocese, it accrued at the time of any abuse. *See Williams v. Ford Motor Co.*, 342 A.2d 712, 715 (Me. 1975). Section 859 clearly states that anyone who reasonably should have known of a cause of action before 2016 is time-barred.

Apart from general knowledge of public controversy or available judicial opinions, every plaintiff always had personal knowledge of the abuse now being alleged. Once any incident of abuse happened, the affected plaintiffs were, at a minimum, on notice of sufficient material facts to preclude tolling. In rejecting a similar tolling 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).

The Circuit's analysis, published 24 years ago, should be adopted because it is sound. If not, or in addition, there was also abundant media 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*, 1997 ME 63, ¶ 9, 692 A.2d 441. Of course, *Swanson* held that no action would be maintainable. Therefore, there was no action to be concealed but, that aside, the clock would have had to begin to run. At the outside, if there was any tolling attributable to § 859 in any of these cases, the time for commencing an action would have expired in 2003, years before any of these cases.

Moreover, the allegations 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).[3] The 2013 decision in *Picher II* alone should preclude any claim for fraudulent concealment asserted after 2019.

Mr. Picher's case, like these cases, could not allege any affirmative misrepresentation of any material fact, but asserted instead on a duty to disclose, or to warn, or some such characterization relating to "propensities" or perhaps prior sexual misconduct. In Mr. Picher's case, after extensive discovery, the Superior Court granted, and the Law Court affirmed, summary judgment for the Diocese. The undisputed material facts showed that the Diocese knew nothing of any prior misconduct by the accused priest until three years after the latest date on which Mr. Picher alleged to have been abused.

[3] 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.

In these cases, of course, there has been no discovery. Nevertheless, the relevant pleading rule requires the plaintiffs to allege specific facts and notice pleading under Rule 8 is insufficient. Plaintiffs must allege and be prepared to prove that they had insufficient information before 2016 to take to a lawyer. Considering the extensive media coverage, including reports of the Law Court's decisions in 1997 in *Swanson* and in 2009 and 2013 in *Picher v. Roman Catholic Bishop of Portland*, 2009 ME 67, 974 A.2d 286 ("*Picher I"),* and *Picher II*, it is not plausible that any of these plaintiffs lacked a sufficient basis to conduct appropriate due diligence many years before enactment of this statute.

The Law Court should rule that no plaintiff any longer can claim fraudulent concealment in these kinds of cases. The First Circuit's analysis 24 years ago concerning reasonable due diligence ought to be adopted here to preclude any claim of fraudulent concealment, especially with the many facts that can be judicially noticed including the published decisions of this Court which any lawyer would know to consult if any client asked before 2016.

The fact that the filing of these cases, along with dozens of other claims asserted but not yet in suit, all followed so quickly after the enactment of this statute also refutes any suggestion that all these plaintiffs recently, suddenly, and virtually simultaneously became aware of information that had been concealed by the Diocese in violation of a duty to disclose it. Substantial information has been the subject of public attention for decades. Alternatively, if the Court is disinclined to rule globally as

a matter of law, the Law Court should make clear that any complaint asserting fraudulent concealment, subject to Rule 11, must assert specific facts to support an allegation of fraud. Generic assertions about a failure to discern and act upon apparent "propensities" are facially insufficient to satisfy Rule 9(b).

3. Tolling For Mental Illness Will Not Save These Cases.

In the Business Court, arguments were also presented to the effect that all the Plaintiffs are entitled to tolling for "mental illness" under 14 M.R.S. § 853. Apart from the fact that none of these complaints contain adequate allegations for such tolling, it is vanishingly unlikely that any of these Plaintiffs, on remand with leave to amend, could legitimately make the kinds of allegations necessary to satisfy M.R. Civ. P. 9(a) and Rule 11. If any such amendment on any such remand is to be possible, the Diocese respectfully asks the Law Court to make clear what is needed to satisfy § 853 and the pleading requirements of Rule 9(a).

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 terms in Section 853 are "accrued" and "disability," which the Law Court has interpreted to mean "an overall inability to function in society." *See Douglas,* 433 F.3d at 144 (citing *McAfee*, 637 A.2d at 466). The term "disability" must therefore mean that the statute of limitations is tolled *only* when a plaintiff was continuously *unable* to proceed from the date of initial abuse until recently, *not* when a plaintiff has been *unwilling* or *reluctant*.

Absent evidence of guardianship or disability precluding employment, the level of mental illness that must have occurred from the time of the incident to within six years of filing is unlikely to save more than one or two of these cases, if any.

Because the issue of mental illness for purposes of the tolling statute is one 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, these plaintiffs cannot escape judgment on the pleadings or dismissal by resort to 14 M.R.S. § 853. Here, the Complaints make no claim that any plaintiff was prevented from commencing an action within the original statute of limitations by any disability, much less that any plaintiff was suffering from any such disability at the time any cause of action accrued. There is also no allegation in any complaint that, if there was any such overall inability to function in society, it was not "removed" long ago.

V. CONCLUSION

To summarize, for 200 years the Legislature did not attempt to repeal retroactively a lapsed statute of limitations, implying that the Legislature understood the constitutional limit to its authority. No Law Court decision holds that such

retroactive legislation is constitutionally permissible. In 1991 and 1999, in prior iterations of § 752-C, consistent with *Dobson,* the Legislature made explicit that those enactments affected only cases not yet barred. *Dobson, Morrissette,* other cases cited in *Morrissette*, and even *LVI* in a footnote, all say it cannot constitutionally be done. Long before the Fourteenth Amendment was ratified and longer before it was applicable to the states, the Maine Court, applying the Maine Constitution, protected reified juridical things of value from retroactive legislation. That was the obvious and only import of *Lewis* (res judicata bar). This statute-of-limitations bar is no different. The 1936 decision in *Miller* is the same (cause of action). It is impossible to distinguish the limitations bar from a res judicata bar or to distinguish a lapsed-limitations defense to an action from the action itself. In Maine, all are constitutionally protected things of value, like the CPCN in *NECEC*.

The Diocese respectfully asks the Law Court to reverse the Business Court's orders and direct judgment on the pleadings or dismissal unless a plaintiff presents an amended complaint meeting the requirements of M.R. Civ. P. 9(a) sufficiently alleging a disabling mental illness at the accrual of the action that continuously prevented that plaintiff from conducting litigation until within six years before the filing. The Court should also rule as a matter of law that it is not possible, given decades of public attention to these issues, for any person today to assert a lack of knowledge that was not cured or corrected more than six years before the dates of these complaints.

Respectfully Submitted,

July 31, 2023
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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, Esq. hereby certify that two copies of the Brief of Appellant Roman Catholic Bishop of Portland were 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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