STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-23-122

Robert E. Dupuis, et al.,

Plaintiff-Appellees,

v.

Roman Catholic Bishop of Portland,

Defendant-Appellant.

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

REPLY BY APPELLANT ROMAN CATHOLIC BISHOP OF PORTLAND TO AMICI CHILD USA, MAINE COALITION AGAINST SEXUAL ASSAULT, PINE TREE LEGAL ASSISTANCE, INC., MAINE TRIAL LAWYERS ASSOCIATION, PUBLIC JUSTICE, AND AMERICAN ASSOCIATION FOR JUSTICE

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I. GENERAL INTRODUCTION

Defendant-Appellant Roman Catholic Bishop of Portland ("Diocese") submits this Reply to two briefs – one by CHILD USA, Maine Coalition Against Sexual Assault, and Pine Tree Legal Assistance, Inc., (collectively, "CHILD USA-Amici" and "CHILD USA Brief"); and the other by Maine Trial Lawyers Association, Public Justice, and American Association for Justice (collectively, "MTLA-Amici" and "MTLA Brief").[1] This Reply more specifically supplements the Reply to the Appellees which is incorporated herein by reference.

II. ARGUMENT

A. MTLA-Amici and CHILD USA-Amici Ignore Maine Law.

On the dispositive issues of Maine constitutional law, these Amici have said little. Their respective discussions of the Maine Constitution are conspicuous by their brevity. Neither the MTLA Brief nor the CHILD USA Brief make any mention at all of *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, 281 A.3d 618 ("NECEC") or *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814 (Me. 1980) or the line of cases stemming from *Dobson*, though those cases are critical to the analysis here. As demonstrated in the Diocese's reply to the Appellees, the laws of other states do not control and have utility in this setting only to the extent that the analyses of the other

[1] The Diocese does not respond herein to the brief of Amici American Tort Reform Association and American Property Insurance Association other than to say that the Diocese agrees with and incorporates the arguments made by the American Tort Reform Association and American Property Insurance Association.

courts are persuasive, which in turn requires that they interpret a constitution that is not different from Maine's. The Briefs of these Amici are devoid of any such careful analysis of the many cases they cite from other states or the United States Supreme Court. They should receive no greater weight in the Court's analysis than is consistent with their attention to the law of Maine, including particularly the role of primacy in the Court's focus on Maine's Constitution. (Blue Br. at 11-14.)

This year, the Law Court has further pointedly expounded on its primacy jurisprudence and the advocacy it expects to assist the Court's analysis under the Maine Constitution. If a party fails to develop its argument under the Maine Constitution, it may be deemed to have waived that argument. *See State v. Norris*, 2023 ME 60, ¶¶ 33-34, ___A.3d ___.

In *State v. Norris*, the Court reiterated its commitment to the primacy approach, stating that "we consider state constitutional claims before reaching concomitant federal constitutional claims." *Id.* ¶ 33 (citing *State v. Moore*, 2023 ME 18, ¶ 17, 290 A.3d 533). For an appellant to preserve an issue on appeal, for example, the *Norris* Court required that "the party advancing the claim cannot merely allude to or cite the Maine Constitution but must develop his argument." *Id.* As reasoning for that standard, the Court quoted a concurrence by Justice Souter from when he served on New Hampshire's Supreme Court:

> It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere

> is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.

Id. (quoting *State v. Bradberry*, 129 N.H. 68, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

Although *Norris*, and *Moore* before it, addressed what is required of an appellant to preserve and avoid waiving a state constitutional argument, the obligation to address the Maine Constitution is no less for an appellee, and especially an Amicus, speaking as a friend of the Court. Here, the MTLA-Amici and CHILD USA-Amici, or the Appellees for that matter, may be deemed to have waived argument on the dispositive Maine constitutional issues when they rely on authority from other states and federal decisions and dismiss the Maine Constitution as merely "coextensive" with the federal Constitution. As the *Norris* Court said:

> Generally, an independent analysis of a provision of our state constitution requires "an examination of the text, legislative history, and general historical context of the state constitutional provision; relevant common law, statutes, and rules; economic and sociological considerations; and precedent from jurisdictions with similar provisions to the extent that precedent is deemed persuasive."

Id. ¶ 34 (quoting *Moore*, 2023 ME 18, ¶ 18, 290 A.3d 533). The Diocese's appeal here is based on the Maine Constitution, yet both MTLA-Amici and CHILD USA-Amici

declined to engage in any analysis of Maine's due process protections and Maine's vested rights doctrine.

Overall, little more needs to be said about the CHILD USA Brief. When not ignoring the law of Maine, it mischaracterizes Maine's statute of limitations prior to the recent change as short when in fact, it was abolished in 2000 for all claims that had not been barred by 1988. It presents policy arguments and asserts as incontrovertible generalizations or characterizations about a large number of people, the sort of assertions that are at best non-adjudicative legislative facts, including quoting Plaintiff-Appellees' lead counsel's testimony to the Judiciary Committee. It wrongly asserts that Maine's Constitution is coextensive with the federal Constitution when the opposite is explicitly true. It erroneously argues that rational basis is the correct framework for analysis. (*See* Reply to Appellees 8-10.)

It makes assertions about fairness to persons whose claims were barred 35 or more years ago, after they were adults, without considering any of the countervailing fairness considerations of any organization attempting to defend itself after witnesses have died or become incapacitated by advanced age. Again, it bears emphasis that the organization's difficulties are quite different from those of the alleged abuser who at least can show up and testify. But it would be a mistake to get too far into the debate about the wisdom or fairness of any policy choice by the legislature. This is a question of Maine Constitutional law, and Maine Constitutional law is derived from the settled culture and practice of the people of Maine as shown in multiple decisions over the

course of 200 years, including last year in *NECEC*, a case not even mentioned in the CHILD USA submission.

As demonstrated in the Diocese's other filings, nothing other states do under other constitutions matters unless the other constitutions are sufficiently like Maine's in their meaning and import. Nothing in the CHILD USA Brief even attempts to demonstrate that this is so in any of the other states cited, much less than in all of them. As shown in the Reply to the Appellees, reliance on *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945) ("Chase") is inadvisable when one thinks clearly enough about the premise of *Chase* that there is no property interest in freedom from ruinous financial liability in dozens of cases claiming multiple millions in the aggregate.

B. MTLA- and CHILD USA-Amici Cite Inapposite and Doubtful Authorities.

As is demonstrated in the Blue Brief and the Diocese's other Reply, the fundamental problems with *Chase* and indeed all the other cases authorizing retroactive "revival," are the misconception that every operational consequence of every rule denominated "procedural" is vulnerable to retroactive change and the erroneous idea that there is no property interest at stake. (See Blue Br. 14-19.) These claims in the aggregate are for tens or hundreds of millions of dollars (i.e., valuable property). If Plaintiffs prevail, they will win judgments that will support writs of execution that will authorize seizure and sale of Diocesan assets to satisfy the

judgments. It is at odds with economic reality to say that there is no property interest in an expired statute of limitations precluding such liability.

The metaphysics of common law procedure concerning different states' different statutes of limitations are explained in the Reply to the Appellees at Pages 16-17 and need nothing further here except to reemphasize that Maine's Constitution prohibits retroactive legislation (especially legislation having no prospective applicability at all) if it disturbs vested rights or if its effect is that a party has liability where there had been none before enactment. Maine's Constitution does not have an exception for things that courts have called "procedural" in other litigation settings, that do not involve or even address retroactive revival of barred claims.

From *Chase* to the Orders on Report, far too much work is being done by overloading the word, "procedural," with meaning it does not have. *See Guaranty Trust Co. v. York*; 326 U.S. 99 (1945), 108-12; Blue Br. 16-17. That case holds that characterization of the New York statute of limitations as "procedural" and not "substantive," even if accurate in other respects, did not mean that it could be disregarded in a federal court after the jurisprudential sea change worked by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and the promulgation that same year of the Federal Rules of Civil Procedure. Similarly, calling a statute "procedural" does not decide the constitutionality of its retroactive repeal to "revive" a barred action. Indeed, the word "revive" is a loaded term begging the precise question needing decision. However, if careful constitutional analysis is to yield to label-pasting

vocabulary duels, these actions were "commenced," *see* M.R. Civ. P. 3, after they were "barred," not "revived." Maine's Constitution prohibits all legislation that impairs vested rights or renders a party liable for long-ago events whether procedural or not. The constitutionality or not of entirely retroactive legislation with no prospective function is determined by its effects in reality, not its label.

In the same way, some attention should be given to the misuse of the Law Court's decision in *Myrick v. James*, 444 A.2d 987 (Me. 1982), in the Amici's briefs. (*See* MTLA Br. 4; CHILD USA Br. 10, 12.) *Myrick v. James* is both distinguishable and instructive at the same time. It is distinguishable because it is about the Court's authority to reconsider and adjust Maine's common law concerning the time of accrual of actions as the beginning point for computing the allowable time under the applicable statute of limitations. *Compare with Williams v. Ford Motor Co.*, 342 A.2d 712, 715 (Me. 1975). No expired statute of limitations was repealed or even mentioned, and no barred action was permitted to go to judgment. Under the Court's ruling in *Myrick*, the limitations time never began to run until discovery of the harm.

What is more important about *Myrick* is also what is instructive. In *Myrick* the Court was careful to limit the effect of the decision to the parties before the Court in that case and to cases arising subsequently. Consistent with the analysis in the Blue Brief at pages 8-11 concerning the pervasive fundamental role of stability, predictability, and reliability at the core of our jurisprudence and, therefore, central to Maine's due process protections, the Law Court has often introduced changes as a

matter of common law development but limited their applicability to the litigants before the Court and future cases. As a matter of fundamental fairness (the essence of due process), the Law Court has repeatedly and expressly rejected unlimited retroactive application of changes in the common law. *See, e.g., Black v. Solmitz*, 409 A.2d 634, 640 (Me. 1979) ("[F]ully retroactive abrogation of the rule of parental immunity would open the door to claims for alleged personal injuries including many years ago."); *Davies v. Bath*, 364 A.2d 1269, 1273 (Me. 1976) ("The normal practice in cases such as this in which we make a departure from the rules of the past is to limit the applicability of the decision to causes of action arising after a certain date and to grant relief to the instant parties."); *Jones v. Billings*, 289 A.2d 39, 43 (Me. 1972) (applying a change of tort rules for injuries that occurred on or after the effective date of the change). The Law Court's "normal practice" as shown in *Myrick* itself is to forgo retroactive effect of changes to common law rules. This is strong evidence that retroactivity is anomalous and seldom legitimate. It also corroborates that the Legislature drafting the 2000 law knew it could not constitutionally do what the recent enactment purports to do.

C. The History of §752-C Informs the Maine Constitutional Analysis.

One function of a reply brief is to clarify apparent misunderstandings, and the Diocese takes this opportunity to clarify its position with respect to the constitutionality or not and the applicability or not of the new 14 M.R.S. §752-C to organizations. In Maine, no legislation may be applied or employed retroactively if it

will impair a vested right, or if it will expose a party previously without a liability to money judgments supporting writs of execution to be levied on that party's property. *NECEC*, 2022 ME 48, ¶ 39, 281 A.3d 618. This statute's unconstitutionality is established under both standards. The history of §752-C over nearly forty years, especially between 1985 and 2000, illuminates and strengthens the analysis of Maine's constitutional prohibition of retroactive legislation that changes no-liability to liability.

No previous version of §752-C applied to any defendant except those accused of having committed the specific criminal sexual misconduct identified in the statute as an important limitation on its scope. (Blue Br. 37-39; *see also* App. 78-86 (the Diocese's Rule 12(c) motion, providing greater historical detail about prior iterations of §752-C)). As the Blue Brief acknowledges, this recent iteration of §752-C is primarily, if not exclusively, targeted at organizations like the Diocese, which presents other constitutional problems if it survives this challenge. Nevertheless, the point that apparently was not clearly enough made is restated here.

This statute repealed the previous §752-C that was expressly not applicable to any party with respect to claims previously barred. That proviso was a specific and explicit reaffirmation of the previously vested right of any affected defendant to be free from these asserted liabilities on any theory. Additionally, at the time the 2000 statute was enacted, the state of the law with respect to the specific theory of organizational tort liability for negligent supervision, not vicarious liability for the sex crimes of individuals, was as described at length in *Fortin v. Roman Catholic Bishop of*

Portland, 2005 ME 57, ¶¶ 8-30, 871 A.2d 1208. Before 2005, Maine had not embraced, adopted, or recognized liability for organizations for a theory generally characterized as negligent supervision. More to the point, at the time the 2000 legislation was under consideration in the Legislature and enacted, the law of Maine was as stated in *Swanson v. Roman Catholic Bishop of Portland*, 1997 ME 63, ¶ 9, 692 A.2d 441 (declining to recognize tort of negligent supervision); *see also Mahar v. StoneWood Transp.*, 2003 ME 63, ¶ 10, 823 A.2d 540 (citing *Swanson* and stating that the Law Court had "not yet recognized the independent tort of negligent supervision of an employee"). Even then, in 2005, the Law Court did not overrule *Swanson,* choosing more narrowly to identify a "special relationship" with Mr. Fortin. *Fortin*, 2005 ME 57, ¶ 39, 871 A.2d 1208. In short, in 2000 no church had liability on any alleged failure of ecclesiastical governance and no organization had liability for its leaders' or managers' negligent recruitment, training, retention, or supervision of individuals who commit crimes outside the scope of their employment. There was no reason for the prior versions to apply to any defendant other than the abuser because no other defendant was subject to liability under *Swanson* and as explained in *Fortin*. Therefore, in addition to the linguistic implausibility of stretching "based on…" to mean "based on supervisory negligence of the abuser" any suggestoin that any prior iteration of §752-C applied to any organization is, at best, ahistorical.[2]

[2] As stated in the Blue Brief at Pages 39-40, 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.*

The question before the Court is whether these actions and others like them are wholly barred and cannot constitutionally be revived. It does not matter what specific theory or theories of liability are asserted in the pleadings because the only facts that matter concerning a time bar to the entire action are the Plaintiff-Appellees' respective dates of birth. The Diocese has pointed out, however, that likely the only basis and certainly the primary basis for any asserted diocesan liability is the relatively recent innovation of negligent supervision as a theory of organizational responsibility. This is an added reason why the Constitution must be respected, not an independent ground of constitutional infirmity.

Maine law was clear in 2000, the last previous time §752-C was amended, from the 1997 *Swanson* opinion that claims against churches for failures of ecclesiastical governance were barred by religious liberty considerations and that Maine had not yet explicitly adopted a theory of negligent supervision as a ground for organizational liability. This is why affirming these orders and upholding this retroactive legislation would be even worse than retroactively repealing a different statute of limitations barring, for example claims grounded in medical negligence or product liability or even car crashes. Those kinds of claims were viable when the actions were barred. "Revival" of a barred action for trial on legal grounds explicitly not available before

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); *Boyden v. Michaud*, Nos. CV-07-276 & CV07-331, 2008 Me. Super. LEXIS 88, at *13-15, 15 n.6 (May 14, 2008).

the bar fell is doubly offensive to the constitutional principle that embodies a pervasive societal understanding of finality and fairness inherent in the very notion of due process. *See NECEC*, 2022 ME 48, ¶ 39, 281 A.3d 618 (citing *Coffin v. Rich*, 45 Me. 507, 514-16 (1858); *Mahar*, 2003 ME 63, ¶ 10, 823 A.2d 540.

It remains the position of the Diocese that the history of this legislation since 1985, in the context of the parallel evolution of Maine's law of organizational liability for negligent supervision, shows that the Diocese will or may *now* have liability, *as a consequence of this enactment*, that it would not have had if these claims had been adjudicated before they were barred. At all times before 2000, the only party affected by the 2000 law or any of its antecedents was the abuser, given the context of the law applied and described in *Swanson* and *Fortin*. The current law purports to repeal the 2000 law retroactively, including repeal of the express assurance in the 2000 law that the Diocese and any other organization, as well as any abuser, were without judicially enforceable liability to these plaintiffs and others similarly situated.

As a brief aside, on the subject of history, it appears that the CHILD USA Brief may have been written at a different time for a different case. It speaks of the shortness of Maine's statute of limitations. For decades, there has been no statute of limitations on actions not yet barred in August 1988. Before that, the statute of limitations was twelve years, double the normal six years in Maine, which is itself longer than many statutes of limitations in other states.

In addition, as argued in the Blue Brief at page 11, it is important to consider this legislation with due regard for its operational effect upon an organization as opposed to the individual abuser. Statutes of limitations in England and America have been in effect for at least 400 years. England adopted the Limitation Act of 1623. Wm. Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice-of-Law Regimes Approach Statutes of Limitation*, 65 Syracuse L. Rev. 491, 496 (2015) (citing *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1178 (1950) (noting that most American statutes of limitations were patterned after the Limitation Act of 1623). A core policy of every statute of limitations is well-understood to recognize that the fairness of any trial, and the effectiveness of any defense, deteriorates with the passage of time as memories fade, or witnesses disappear or die, or evidence is lost. (Blue Br. 9-10.) Every claim in this case was time-barred over 35 years ago. Therefore, it is appropriate appellate judicial practice to understand that none of these cases will be tried in the same way as if they had been timely brought. The highly detailed allegations of these complaints are to be tested at a fair trial in our system if this law stands. A trial in 2024 or later concerning facts alleged to have occurred between 1945 and 1985 is especially unfair to any organization because the organization's leaders in those years must have been middle-aged or older. At least an individual accused defendant is alive to testify.

All Amici urging affirmance, understandably enough, emphasize that these Plaintiffs were children at the time of the events alleged in their respective complaints.

It is also important to note that the statute of limitations was tolled until each of these plaintiffs reached their respective ages of majority. And so, a plaintiff who attained majority at age 18 and who had the benefit of a twelve-year statute of limitations, had a right to commence action up to the age of 30. To the extent that the Court chooses to get into these policy issues, it is appropriate to have the correct chronological perspective.

D. Amici's Presumption of Constitutionality Arguments Are Misplaced.

The CHILD USA Brief asserts that claim revival provisions enjoy a presumption of constitutionality. There is a single citation to *In re Evelyn A.*, 2017 ME 182, ¶25, 169 A.3d 914. Other than the perfectly routine mention of the ordinary presumption of constitutionality, there is nothing in that case that speaks to this one. It certainly does not say that any presumption of constitutionality applies to "revival" of barred actions. It has nothing to do with the retroactive repeal of a statute of limitations or the revival of an action. As noted in the Blue Brief on Pages 6-7, the presumption of constitutionality is principally an interpretational device to prefer interpretations that are constitutional over those that are not or may not be. The cited case has nothing to do with retroactive revival of a long-barred statute of limitations. It is a thorough and learned discussion of a statute concerning evidentiary presumptions and inferences, and effective assistance of counsel, in difficult child protection cases.

Indeed, after thinking further about the proposition that "*revival*" statutes, like prospective legislation, enjoy a presumption of constitutionality, the opposite should be true. Legislation is almost always prospective and occasionally *also* works in ways that are called retroactive when it affects only procedure or remedy. There is no Maine case saying that a revival of an expired statute of limitations is constitutional and many that say it is not. A presumption of constitutionally, if any even applies to legislation that is *only* retroactive, is at its weakest here.

III. CONCLUSION

In short, enthusiasm is not a proxy for analysis. The Amici supporting the Appellees and urging affirmance have ignored the applicable Maine constitutional law and ask the Law Court to do the same. The Court should decline the invitation. Consistent with its several recent pronouncements about primacy, consistent with the decision in *NECEC* making clear that Maine's due process provisions protect all things of value, consistent with the economic reality of the value of an affirmative defense grounded in an expired statute of limitations, consistent with the *Dobson* line of cases and 200 years of Maine jurisprudence, and consistent with pervasive norms and principles of finality, predictability, and stability throughout English and American history, the challenged legislation before the Court is constitutionally invalid. The orders must be reversed, and any remand must be scrupulously limited as suggested in the Blue Brief.

Respectfully submitted,

OCTOBER 06, 2023

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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, Esq. hereby certify that two copies of the Reply by Defendant-Appellant Roman Catholic Bishop of Portland to Amici CHILD USA; Maine Coalition Against Sexual Assault; Pine Tree Legal Assistance; Maine Trial Lawyers Association; Public Justice; and American Association for Justice, were served upon counsel for Amici American Tort Reform Association; American Property Casualty Association; CHILD USA; Maine Coalition Against Sexual Assault; Pine Tree Legal Assistance, Inc.; Maine Trial Lawyers Association; Public Justice; and American Association for Justice. Two copies were also served to Plaintiff-Appellees Robert Dupuis, et al. and State of Maine. Copies were served at the addresses set forth below by email and first-class mail, postage prepaid on October 6, 2023:

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