SUPREME COURT OF LOUISIANA

No. 2023-CC-01194

DOUGLAS BIENVENU, et al

Plaintiffs/Respondents
VERSUS

THE SOCIETY OF THE ROMAN CATHOLIC CHURCH
OF THE DIOCESE OF LAFAYETTE and
ST. MARTIN DE TOURS CATHOLIC CHURCH

Defendants/Applicants

ON SUPERVISORY WRIT TO THE THIRD CIRCUIT COURT OF APPEALS HONORABLE SHANNON J. GREMILLION, VAN H. KYZAR & CHARLES G. FITZGERALD CASE NO. 22-00542
AND
SIXTEENTH JUDICIAL DISTRICT JUDGE ANTHONY J. SALEME, JR. DOCKET NO. 87184 C/W 87515

PLAINTIFFS/RESPONDENTS' APPLICATION FOR REHEARING

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STATEMENT OF THE CASE

On March 22, 2024, a majority of this Court ("the Majority") held in this case that the look-back window (which allowed survivors of childhood sexual abuse the opportunity to file suit until June 14, 2024) enshrined in La.R.S. § 9:2800.9 was unconstitutional.[1] The Majority ruled that the Lafayette Diocese enjoyed a "vested property right" to "plead prescription" as a defense and that the Legislature's unanimous attempt to infringe on this right for those accused of sexually abusing children (or enabling the abuse) violated the due process clause found in Article I, Section 2 of the Louisiana Constitution.

The Majority constituted four justices in favor of striking down the look-back window for survivors of childhood sexual abuse. The Majority was comprised of Justice Genovese who authored the decision, Justice Crichton who concurred and assigned reasons, Justice Griffin who concurred, assigned reasons, and agreed with Justice Crichton, and Justice Hughes who did not write separately but joined the Majority.

Three justices dissented who would have found the look-back window constitutional. Chief Justice Weimer dissented and assigned reasons, Justice Crain dissented and assigned reasons, and Justice McCallum dissented without writing separately. The dissenting justices agreed that the look-back window passed constitutional muster under Article I, Section 2. They found that the look-back window satisfied a substantive due process test. Justices Weimer and Crain did disagree as to whether a vested property right existed, with Justice Weimer finding that a property right existed, and Justice Crain finding that a property right did not vest. Justice McCallum's opinion on these two issues is not known.

[1] Appellees, survivors of repeated childhood sexual abuse at the hands of Father Kenneth Morvant and enabled by Appellant the Diocese of Lafayette, adopt and incorporate by reference the factual recitation of their abuse from their Original Brief. Appellees further adopt the procedural history as stated therein.

SUMMARY OF THE ARGUMENT

In its March 22, 2024 decision, the Majority committed three legal errors. First, the Majority legally erred by supplanting the Legislature's exclusive policy-making function on a uniquely legislative matter (prescription) with its own. Instead of deferring to the unanimous Legislature's sole responsibility, the Majority directly contradicted the Legislature. Where the Legislature weighed the policy interests of reviving expired childhood sex abuse claims for and against the survivors and the perpetrators, the Majority only looked to the impact on the perpetrators, ultimately concluding in effect that the interests of the accused to plead prescription were greater than those of the survivors to revive expired claims. The Majority's reliance on policy when it was not its to give ended with a results-oriented decision not based on the Louisiana Constitution, statutory law, the will of the people, or civil justice.

Second, the Majority's discussion of vested property rights contained a central contradiction. The Majority found that the "right to plead" prescription "vested" with the passage of time but at the same time ruled that the right could then be "divested" through *contra non valentem*. However, the very ability of the property right to be vested and then divested is inherently contradictory. "Vesting" requires absolute finality that is not capable of being later "divested" from. The Majority committed the error because it assumed (without explanation) that vesting and accrual were the same despite the plain language of the Civil Code which establishes that upon "accrual" only the defendant can divest itself of the property right. The Majority's opinion contradicted this principle by finding that even after the right to plead prescription "accrued", it could still be divested pursuant to *contra non valentem*.

Third, the Majority legally erred by failing to identify any textual support (in the Louisiana constitution or any statute) that supported its finding of an Article I, Section 2 due process violation. The Majority conducted no constitutional analysis and engaged no constitutional test. Instead, the Majority solely relied upon dicta in its earlier rulings that had borrowed from constitutional language that was deliberately removed in 1974. This resulted in a legal error because the Majority elevated dicta above the clear language of a statute concerning prescription. Substantive due process analysis requires that jurisprudence must yield to the clear language of a statute unless a textual constitutional challenge can be supported. The Majority failed to point to any textual constitutional support because no language in Article I, Section 2 supports a conflict.

Ultimately, the Majority's constitutional analysis is most notable for what it failed to say. The Majority failed to conduct a substantive due process analysis. The Majority failed to discuss due process guarantees. The Majority failed to quote the Louisiana Constitution's clear language that permits infringement of property rights upon due process of law. LA. CONST. ART I, Section 2 (emphasis supplied) ("No person shall be deprived of life, liberty, or property, except by due process of law."). The Majority failed to define the alleged property interest as economic or otherwise. The Majority failed to identify whether the State was exercising its police power. The Majority failed to find any textual support anywhere in the Louisiana Constitution to support its reasoning. The Majority failed to address *Chance v. Am. Honda Motor Co.*, 635 So. 2d 177, 178 (La. 1994), and its progeny. The Majority failed to address the legal basis for the Third Circuit denying writs in this case, namely, *Sam Doe v. Diocese of Lafayette*, No. 22-120 (La. App. 3rd Cir. 08/17/23), despite this Court remanding *Sam Doe* to specifically address *Chance's* impact on the constitutionality of the look-back window. The Majority left unanswered why it elevated a property interest to plead prescription by those accused of sexually assaulting children above all other constitutional (and property) rights, including the right to religion, the right to free speech, and the right to bear arms.

I. The Majority improperly supplanted the Legislature's exclusive policy-making function over prescription with its own.

The Majority legally erred by supplanting the Legislature's exclusive policy-making function on a uniquely legislative matter (prescription) with its own. Instead of deferring to the Legislature's exclusive responsibility, the Majority directly contradicted it. Where the unanimous Legislature twice weighed the policy interests of reviving expired childhood sex abuse claims for and against the survivors and the perpetrators, the Majority only looked to the impact on the perpetrators, ultimately concluding that the interests of the accused to plead prescription were greater than those of the survivors to revive expired claims. The Majority's reliance on policy when it was not its to give ended in a results-oriented decision not based on the Louisiana Constitution, statutory law, the will of the people, or civil justice.

The Majority elevated its policy over a unanimous Legislature in decisive fashion:

> The legislation before us has the effect of reviving claims which defendants reasonably believed were reposed for half a century or more. To require defendants to now defend such claims after such a long period of time, where witnesses have died and critical documents have been lost, effectively destroys their ability to mount a viable defense. We must conclude such legislation is unreasonable and violative of substantive due process.

Opinion, at 14 n.15 (emphasis supplied).[2]

To get to this sweeping conclusion, the Majority relied upon a dissenting opinion from more than 100 years ago. *Id.* (quoting *Campbell v. Holt*, 115 U.S. 620, 631 (1885)). However, the United States Supreme Court has held in modern times that the United States Constitution does not bar the revival of expired civil claims. *Int'l Union of Elec. v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (emphasis supplied) (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945)) ("[c]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.").

Justice Griffin followed suit in her concurrence: "I also recognize the quagmire this legislation creates for defendants who will be faced with having to mount a defense after so much

[2] It is unclear from what authority the Court decided that "defendants reasonably believed [claims against them for enabling sexual abuse] were reposed for half a century or more". If the defendants were aware of these claims existing for this long, and silently hiding its knowledge from the public and the plaintiffs in hopes they were prescribed, then this could also be a basis for fraudulent concealment to toll the running of prescription under *contra non valentem*. Regardless, this is a factual determination without any evidentiary support in the record.

time has passed." *Id.* at 2 (Griffin, J., dissenting). Justice Griffin did not cite to any statute or case law in support.

Prescription and policy decisions are exclusively the purview of the Legislature in that the Legislature is the body with the authority to establish prescriptive periods. Only the Legislature is empowered to establish, limit, or remove prescriptive periods. This Court is incapable of establishing or removing prescription.

Louisiana Civil Code Article 3457 makes this clear: "There is no prescription other than that established by legislation." LA. CIVIL CODE art. 3457 (emphasis supplied). *See also SS v. State ex rel. Dept. of Soc. Serv.*, 2002-0831 (La. 12/04/02), 831 So.2d 926, 931 (emphasis supplied) ("It is also well accepted that the Legislature has the authority to set time limitations on legal actions. Legislation also governs the renunciation, suspension or interruption of prescription.") (citing La. C.C. arts. 3449, 3462, 3464, and 3469).

When deciding whether a particular legislative enactment is unconstitutional, this Court has repeatedly stated that it is not the court's "duty to determine the wisdom behind the enactment of [the] legislation." *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So.2d 16, 34 (La. 2008). Thus, so-called "policy considerations" are not relevant to the decision, as such considerations are more appropriately presented to the Legislature in the first instance, when the pros and cons of a proposed law are being debated:

> The rules of statutory construction are designed to ascertain and enforce the intent of the Legislature. *Succession of Boyter*, 99-0761 (La. 1/7/00), 756 So. 2d 1122, 1128; *State v. Piazza*, 596 So. 2d 817, 819 (La. 1992). Legislation is the solemn expression of legislative will and, thus, the interpretation of legislation is primarily the search for the legislative intent. *Boyter*, 756 So. 2d at 1128; *Cat's Meow, Inc. v. City of New Orleans through Dep't of Fin.*, 98-0601 (La. 10/20/98), 720 So. 2d 1186, 1198. We have often noted the paramount consideration in statutory interpretation is ascertainment of the legislative intent and the reason or reasons which prompted the Legislature to enact the law. *State v. Johnson*, 03-2993 (La. 10/19/04), 884 So. 2d 568, 575; *Theriot*, 694 So. 2d at 186.

M.J. Farms, Ltd., 998 So. 2d at 26-27 (emphasis supplied). A prescriptive period is by its very nature a policy decision. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) ("Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles.").

In its Opinion, the Majority only considered the policy determinations from the perspective of those accused of sexually assaulting children. The Majority failed to consider any policy determinations from the perspective of those who were raped as children, instead offering

statements of pity and general sadness for their pain or disgust with the allegations. The Majority ignored the legislative history which considered policies and consequences from both the plaintiffs' and the defendants' perspectives.

The Legislature considered the unique and significant nature of the harm caused by defendants who rape children and weighed them against the evidentiary challenges that both a plaintiff and defendant would need to grapple with for something that may have happened some time ago:

> You know, we're talking about prescription, but there is no prescription for the person, the child, who suffered that injury, did you know. They continue to suffer and I know the concerns that I've heard voiced by some is that it would be difficult to defend cases years and years later, but it would also be tremendously difficult to prove. So, it's not like you're giving something away to anyone. If they've been harmed, the burden of proof falls on that victim.

Representative Johnson, R. at 894 (emphasis supplied).

The Legislature made a clear policy decision in favor of extending the prescriptive period pertaining to the sexual abuse of minors, so that such claims are now imprescriptible. Thus, the Legislature found that the general policy in favor of protecting defendants from "stale claims" was overridden by the necessity of protecting the survivors in these cases and allowing them an opportunity to bring their claims.[3]

Because the legislature has determined that sexual abuse against minors is such a heinous violation, the Legislature established a limited revival period of three years to allow survivors of sexual abuse an opportunity to file a claim even though their claims may have prescribed long ago under previous statutes of limitation:

> This bill is to give some sense of justice and closure to children that have been maliciously and heinously robbed of their innocence, period. That is all I'm trying to do. They were robbed of their voice. I did not seek this bill. In many ways it sought me and Members, all I am seeking to do, is give the voiceless some sense of justice, some sense of closure.

Statement of Representative Hughes, R. at 887 (emphasis supplied).

Perhaps the most compelling were the public policy reasons enunciated in 2021 when the bill first was introduced:

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[3] At the time the look-back window was passed, the Legislature was aware that the Archdiocese would use prescription to dismiss the more than 450 childhood abuse claims filed into the bankruptcy. *See Archdiocese of New Orleans Objection to Motion to Compel*, at 3 (04/08/21) [Rec. Doc. 814], *In re Archdiocese of New Orleans*, No. 20-10846 (E.D. La.) (Grabill, B.J.) ("At the appropriate time, if mediation is not successful, the Debtor will object to all or most of the abuse proofs of claims because, among other things, the vast majority of them are prescribed on their face.").

> [T]here are three compelling public purposes served by child sex abuse statute of limitation reforms. Number one, statute of limitation reform identifies hidden child predators that allow the abuse to the public so children will not be abused in the future; two, it shifts the costs of the abuse from the victims and society to those that actually caused it; and three, it educates the public about the prevalence and harm from child sexual abuse to prevent future abuse.

Rep. Jason Hughes, May 3, 2021 Hearing at the House of Representatives, Bill 492, at 6-7 (emphasis supplied), R. at 885. However, the Majority overruled the Legislature's policy functions and failed to even mention them.[4]

These legislative policy decisions form the bedrock of the constitutional analysis of legislation pertaining to prescription. All statutory enactments are presumed constitutional and every presumption of law and fact must be indulged in favor of legality. *Moore v. RLCC Technologies, Inc.*, 95-2627 (La. 2/28/96), 668 So.2d 1135. This presumption is especially forceful in the case of statutes enacted to promote a public purpose. *Polk, et al v. Edwards, et al.*, 626 So.2d 1128, 1132 (La. 1993) (citing *Board of Directors of Louisiana Recovery Dist. v. All Taxpayers, Property Owners, etc.*, 529 So.2d 384, 387 (La. 1988); *See also United States v. Jacobs*, 306 U.S. 363, 369-70 (1939).

Because a constitutional challenge such as this one frontally attacks the Legislature's policy-making function for an exclusively legislative role (establishing and removing prescription), this Court must rely upon a constitutional provision that restricts the legislature's authority to enact the particular legislation and must establish that the legislation is barred by such provision. *Polk*, 626 So.2d at 1132 (citing *In re American Waste & Pollution Control Co.*, 588 So.2d 367 (La. 1991)). *See also State Bond Comm'n*, 525 So.2d 521, 525 (La. 1988). Any doubt as to the legislation's constitutionality must be resolved in favor of constitutionality. *Board of Directors of La. Recovery District*, 529 So.2d at 387-88. This Court "must construe a statute so as to preserve its constitutionality when it is reasonable to do so." *M.J. Farms*, 998 So.2d at 31. Prescription statutes are strictly construed against prescription and in favor of the claim sought to be extinguished by it; thus of two possible constructions, that which favors maintaining, as

[4] At its most basic level, the Legislature's stated policy reasons to pass the look-back window were designed to reduce the future risk of the sexual assault of children by remedying past abuse. Without these important measures, institutions like the Lafayette Diocese will continue to enable the abuse of children. *See, e.g., Ex Louisiana Deacon Whose Son Was Sexually Abused By a Priest is Excommunicated from Church*, at 1-4 (03/22/24), https://www.theguardian.com/us-news/2024/mar/22/louisiana-deacon-excommunicated-son-sexual-abuse.

opposed to barring, an action should be adopted. *Wells v. Zadeck*, 2011-1232 (La. 3/30/12), 89 So.3d 1145, 1149; *Bailey v. Khoury*, 2004-0620 (La. 1/20/05), 891 So.2d 1268, 1276 (La. 2005).

In its decision, the Majority ignored these fundamental constitutional principles. The Majority failed to acknowledge whether the decision was a close call or whether prescription is the sole province of the Legislature. No discussion occurred about any constitutional provisions that prevent or limit the Legislature's authority to enact legislation within the context of prescription. The Majority mainly cited to dicta in earlier cases while ignoring an entire line of other cases in which this Court had favorably stated that the Legislature possessed the authority to revive expired claims.

The Majority also ignored the strict safeguards included in the same statute that established the look-back window. Section 9:2800.9 includes three safeguards to ensure that frivolous claims are not filed. First, every plaintiff over the age of 21 must file a certificate with the petition from a Louisiana certified mental health provider that the provider "has interviewed the plaintiff and is knowledgeable of the relevant facts and issues . . . and concluded that in his professional opinion there is a reasonable basis to believe that the plaintiff has been subject to criminal sexual activity" during his childhood. LA. REV. STAT. § 9:2800.9(B)(2). Second, the attorney representing the plaintiff must submit his own certification at the time of filing the petition that states he consulted with a medical health professional and concluded that "there is reasonable and meritorious cause for the filing of the petition". LA. REV. STAT. § 9:2800.9(B)(1). Third, the petition must not name the defendant until the district court has independently verified that the first two safeguards have been met and that "there is reasonable and meritorious cause for filing the action". LA. REV. STAT. § 9:2800.9(D).

Finally, the Majority failed to recognize (unlike the Legislature) that a defendant in these cases will still retain the full slate of substantive defenses. Any defendant can still argue that a plaintiff failed to satisfy his burden of proof, failed to support his claim, failed to adequately remember what happened, and/or failed to adequately identify the alleged perpetrator(s). Any institutional defendant can still argue that it is not responsible for the intentional, criminal acts of its employees and/or that it never knew its employee was sexually assaulting children.[5]

[5] The Majority also seemed to imply that some of these stale documents that would be difficult to locate could include insurance policies. However, in addition to locating insurance policies in this case which provide coverage for the Lafayette Diocese's misconduct dating from 1971-79 (and naming the insurers as defendants), the Archdiocese of New Orleans in its bankruptcy had very little problem identifying insurance policies to provide coverage for its own misconduct dating

The Legislature weighed these considerations and created a limited three-year look-back window. It was inappropriate for the Majority to replace the Legislature's unanimous decision to make policy over prescription with its own. *See Opinion*, at 4 n.3 (Weimer, C.J.) (dissenting) ("these problems of proof are policy considerations that were vetted by the legislature in its deliberations. It is not a court's role to second guess the legislature's resolution of these concerns. The legislature determined that it was in the public interest to identify hidden child predators so as to prevent future abuse, shift the costs of the abuse, including therapy and medical expenses, to those who directly caused or facilitated the abuse, and educate the public about the prevalence of the problem. This reflects an overriding governmental interest enacted to address a hidden and systemic societal problem impacting children. Insofar as problems of proof, it remains the plaintiff's burden to prove the fact of abuse, damages, and explain the reason for the delay in bringing suit. That proof is equally subject to the passage of time and loss of evidence.").[6]

II. The Majority committed legal error by contradictorily holding that a property interest in prescription could "vest" with "absolute finality" but immediately thereafter be "divested" through *contra non valentem*.

In its decision, the Majority's discussion of vested property rights contained a central contradiction. The Majority found that the "right to plead" prescription "vested" with the passage of time but at the same time ruled that the right could then be "divested" through *contra non valentem*. However, the very ability of the property right to be vested and then divested is inherently contradictory. "Vesting" requires absolute finality that is not capable of being later "divested" absent some action by a defendant. The Majority committed the error because it over-extended its analysis by finding that prescription always "accrues" with absolute finality as a matter of law even though three out of the four bases for *contra non valentem* are due to circumstances outside a defendant's control.

The legal support for this central contradiction runs throughout the Majority's decision and each of the concurrences. The Majority continuously stated that for prescription to "vest" and become a property right the "vesting" must be "absolute", final, and without "contingency". The absolute finality of this right is quoted (then disregarded) by the Majority:

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from 1963-2020. *See Insurance Coverage Chart, In re Roman Catholic Church for the Archdiocese of New Orleans*, No. 20-10846 (E.D. La.) (Bkrptcy Ct.) (Grabil, B.J.) [Rec. Doc. 348], submitted into evidence as Joint Exhibit 24 to the evidentiary hearing for the *Motion to Dismiss Bankruptcy*.

[6] Following the Majority's reasoning to its logical conclusion, cold case murder and rape cases would be too difficult to defend due to the passage of time and should not be pursued.

> "[V]ested right" is defined as an unconditional right; it is a: "[r]ight accrued to possessor with no condition." Black's Online Law Dictionary (2nd ed. 2024), http://thelawdictionary.org/. "Vested" is defined as: "accrued; fixed; settled; absolute; having the character or giving the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent."

Opinion, at 6 n.7 (emphasis supplied). *See also id.* at 7 ("To satisfy this definition, defendants must establish that their interests in accrued prescription has become an absolute property right.") (emphasis supplied).

In the same paragraph, the Majority contradicts the finality needed for a right to "vest" by conceding that prescription is an "inchoate [incomplete] right", *id.* at 7, that can be "renounced, interrupted, or suspended" through *contra non valentem*. *Id.* The Majority seemingly acknowledges this inherent contradiction by seizing on a comment to La. C.C. 3447 that prescription "**is a mode of extinguishing claims**". *Id.* at 7 (emphasis in original).

However, the Majority's attempt to correct this contradiction led it to assume that prescription "accrues" whenever the time expires. The Majority's assumption that a defendant has an "accrued" right to prescription whenever time passes is used as a bridge to support its proposition that "once accrued, prescription may only be renounced by a defendant". *Id.* at 8 (emphasis supplied).

This is the rub. Prescription cannot accrue if *contra non valentem* applies. *Contra non valentem* suspends the running of prescription to prevent accrual. The Majority assumed that accrual of prescription is achieved merely by the passage of time by operation of law (like peremption), allowing it to declare that "under civilian principles, prescriptive periods that have accrued act to extinguish the civil obligation to which they apply". *Opinion*, at 9. However, in a claim where a child is sexually assaulted, the accrual does not occur because *contra non valentem* interrupts and/or suspends tolling. Without tolling, accrual is not achievable by operation of law.

Civil Code Article 3449 makes clear in its comments that "prescription does not take place by operation of law. It must be set up by the party. The Court cannot do so of its own motion." LA. CIV. CODE Art. 3449 (comment d). Accrual is the lynchpin. If prescription has not accrued, then there is no property interest for renunciation. *Id.* at (comment b) ("one may not renounce prescription prior to accrual."). Without operation of law, accrual cannot legally transpire as a right holdable by a defendant that is "vested". This is not a tautology. "Prescription must be pleaded. Except as otherwise provided by legislation, courts may not supply a plea of prescription." LA. CIVIL CODE art. 3452 (emphasis supplied).

The Majority's decision assumes that prescription had accrued in every situation through the mere passage of time (like peremption), such that it destroyed the civil obligation and was left with a natural one. *Id.* at 8. However, in the context of prescription, accrual is a factual animal, not a legal one. Article 3449 states that "prescription does not take place by operation of law". Whether accrual has occurred is determined based on whether prescription has been interrupted or suspended. *Contra non valentem* prevents accrual.

Nor is this a "which-came-first, chicken-or-egg" problem. Louisiana's doctrine of peremption demonstrates the clarity with which property rights vest through operation of law without involving factual questions surrounding accrual and found in *contra non valentem*. This Court has explained the crucial difference between prescription and peremption:

> As an initial matter, we are mindful of the difference between prescription and peremption. Although related, the two are not the same and should not be confused; what is true of prescription may not be true of peremption. Peremption differs from prescription in two respects: (1) the expiration of the peremptive time period destroys the cause of action itself; and (2) nothing may interfere with the running of a peremptive time period. *Naghi v. Brener*, 08–2527 (La.6/26/09), 17 So.3d 919, 926.

Ebinger v. Venus Const. Corp., 2010-2516 (La. 7/1/11), 65 So. 3d 1279, 1286 (emphasis supplied).

Unlike prescription, the factual principle of accrual is not a problem for peremption. No evidentiary hearing needs to be conducted. The mere passage of time destroys the underlying obligation regardless of the defendant's conduct or the equitable principles enunciated in *contra non valentem*. The property right is forever vested as a result. The same is not true of prescription.

Of particular importance is that Louisiana law allows situations outside the control of the defendant to interrupt or suspend prescription for victims of childhood sexual abuse. The plaintiff's age at the time of the sexual abuse, the plaintiff's mental capacity, or even whether the plaintiff suffered from the psychological condition of repressed memory – all situations outside the control of the defendant, demonstrate that prescription cannot accrue "by operation of law" (and as a result fails to vest). *See, e.g., Doe v. Archdiocese of New Orleans*, 823 So. 2d 360, 366 (La. App. 4th Cir. 2002) ("In this case, the issue of prescription depends on whether Doe can prove that his memories of the alleged abuse by Prinz are true repressed memories. This issue is a question of fact.").

Stated another way, liberative prescription would not extinguish these claims. This Court has enunciated entire tests to be conducted to determine whether prescription may be equitably tolled:

> We have recognized four factual situations in which *contra non valentem* prevents the running of liberative prescription:
>
> (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
> (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting;
> (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; or
> (4) where the cause of action is neither known nor reasonably knowable by the plaintiff even though plaintiff's ignorance is not induced by the defendant.

Marin v. Exxon Mobil Corp., 2009-2368 (La. 10/19/10), 48 So. 3d 234, 245 (quoting *Plaquemines Parish Com'n Council v. Delta Development Co., Inc.*, 502 So.2d 1034 (La. 1987)).

Three of the four conditions for *contra non valentem* are outside of defendants' control. In other words, prescription is not able to "accrue" by operation of law in any scenario where *contra non valentem* exists. If prescription did not accrue, then the property right did not vest. If the property right did not vest, then the look-back window did not violate any right that is entitled to due process protection. Without a due process argument, the look-back window is constitutional and must be upheld.[7]

The ability of circumstances outside the defendants' control to interrupt or suspend prescription directly contradicts the Majority's assumption that prescription accrues regardless of individualized facts and destroys the underlying obligation. Consequently, "vesting" of a property right is impossible. Without accrual, the Majority loses Civil Code article 3449's pronouncement that "prescription may be renounced only after it has accrued". The defendant does not enjoy the absolute finality enjoyed with a "vested property right" to determine whether to renounce prescription because it never accrued.

This is in marked contrast to how a plaintiff's right to a cause of action "vests". The Majority took pains in its decision to equate vesting of the defense of prescription with vesting of a plaintiff's cause of action. *Opinion*, at 10 & 14. However, they are fundamentally different. When a plaintiff's cause of action "vests" (or accrues), the property right remains with him regardless of the actions of third parties. On the other hand, pursuant to *contra non-valentem*, a number of factors outside of a defendant's control can interrupt and/or "divest" a defendant of the defense.

[7] Nor is there a "vested" property right to "plead" the defense of prescription. The property right attaches to the right of ownership, not filing a piece of paper in a courthouse. The ability to "plead" the exception of prescription is contained in La. C.C.P. art 927 which also supports the proposition that "the court may not supply the objection of prescription, which shall be specifically pled".

In this case, Plaintiffs did raise *contra non valentem* allegations in their lawsuit in the form of fraudulent concealment. Their Petition alleges that the Lafayette Diocese fraudulently concealed its enabling of sexual abuser Father Morvant, and, as a result, prescription should not run. *See Petition*, ¶¶ 17-23, ROA 000028-31. Because of the nature of the cause of action, the absence of peremption, and the allegations in the Petition, the Lafayette Diocese has never enjoyed a "vested" or "accrued" property right.

III. The Majority legally erred by relying on dicta without engaging in a substantive due process analysis.

The Majority legally erred by failing to identify any textual support (in the Louisiana constitution or any statute) that supported its finding of an Article I, Section 2 due process violation. The Majority conducted no constitutional due process test. Instead, the Majority solely relied upon dicta in its earlier rulings that had borrowed from constitutional language that was deliberately removed from the Louisiana Constitution in 1974. This resulted in a legal error because the Majority elevated dicta above the clear language of a statute concerning prescription. Substantive due process analysis requires that jurisprudence must yield to the clear language of a statute unless a textual constitutional challenge can be supported. The Majority could not point to any textual constitutional support because no language in Article I, Section 2 supports a conflict.

The Majority primarily based its finding of unconstitutionality on the discussion of three supporting cases: (1) *Elevating Boats, Inc., v. St. Bernard Par.*, 00-3518 (La. 2001), 795 So.2d 1153 (La. 2001), *overruled on other grounds*; (2) *Lott v. Haley*, 370 So.2d 521, 524 (La. 1979); and (3) *Burmaster v. Placquemines Par. Gov't*, 2007-2432, 982 So.2d 810 (La. 2008). However, these cases' discussion on the authority of the Legislature are either dicta or inapposite, insofar as it does not concern reviving expired claims. The Court's distinguishment of *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus. In State*, 2006-2030 (La. 8/25/06), 937 So.2d 313, missed the crucial point that that the Legislature enjoys the power to affect "vested rights" of any nature, even contractual ones enshrined in the clear language of the state Constitution.

The Majority also omitted any discussion about whether the Legislature was exercising its police power when unanimously reviving expired claims. The Majority omitted any discussion about *Chance v. Am. Honda Motor Co.*, 635 So. 2d 177, 178 (La. 1994), and its progeny, despite this Court's numerous holdings (as recently as 2022) that the Legislature enjoys the authority to revive expired claims if stated with clear legislative intent. The Majority ignored without mention the exhaustive analysis by the Third Circuit Court of Appeal in *Sam Doe* v. *Diocese of Lafayette*,

No. 22-120 (La. App. 3rd Cir. 08/17/23), which was the sole basis for *Bienvenu's* denial in the Third Circuit. The Majority also disregarded how protection for "vested rights" were removed from the 1974 Louisiana Constitution, leaving Article I, Section 2 to simply read that "No person shall be deprived of life, liberty, or property, except by due process of law". Consequently, the Majority's opinion elevates the rights of pedophiles not to be sued above those sacrosanct fundamental rights enshrined in our Constitution, such as free speech, the right to religion, and the right to bear arms.

Despite *Elevating Boats* having been overruled, the Majority decided to place it first in its constitutional analysis, focusing on that Court's pronouncement – "**Thus, we have noted that the Legislature is without the authority to revive prescribed claims**." *Opinion*, at 10 (emphasis in original). This statement is dicta. *Elevating Boats* used the term "noted" because this Court has never "held" or "ruled" that the Legislature is without authority to revive prescribed claims. This is an undisputed claim because the look-back window in this case is the first time the Legislature has passed a law explicitly intending to revive expired tort claims. The law at issue in *Elevating Boats* did not attempt to revive prescribed claims. The Majority never claimed that it did. Consequently, the Majority's bolded pronouncement above is mere dicta.

In *Elevating Boats*, this Court was not called on to decide whether legislation reviving prescribed claims based on expressed legislative intent is constitutional. Rather, the Court had to decide whether a claim for unpaid taxes had prescribed when, before the claim had prescribed, a new law providing for interruption and suspension of prescriptive periods was passed. This Court held that claims that had prescribed under the old law were not subject to the newly passed law regarding the prescriptive period. There was no expression in the new statute of legislative intent to make it retroactive. Thus, comments in *Elevating Boats*—or any other case—about reviving a prescribed claim where the legislature did not express an intent for retroactivity offer no guidance.

Furthermore, as articulated by Chief Justice Weimer in his dissent, the Majority's reliance on *Elevated Boat* is misguided since Planiol, *Elevating Boat's* cited authority, was merely referring to the general rule, whereas Planiol recognized that there were exceptions:

> Certain laws, as exceptions to the rule, produce their effect retroactively and apply to old facts, regardless of their date. This is so in three cases: 1st, when the law-maker has expressly so declared; 2nd, when the law is interpretive; and 3rd when it is a penal law which suppresses or lessens a penalty."

Id. at 7 (Weimer, C.J.) (dissenting) (quoting PLANIOL, § 249) (emphasis in original).

The Majority's second discussed case, *Lott v. Haley*, 370 So.2d 521 (La. 1979), is inapposite because it applied to an attempt to shorten the prescriptive period for an accrued cause of action without providing a grace period. *Id.* at 524. However, as the above discussion concerning accrual of property rights articulates, the look-back window in this case differs because the defendant's property right did not accrue or vest, since *contra non valentem* precludes it from doing so. In *Lott*, there was no dispute that the plaintiff's cause of action had accrued and vested.[8]

The Majority's third discussed case, *Burmaster v. Plaquemines Par. Gov't*, No. 2007-2432, 982 So.2d 795 (La. 2008), is distinguishable because it failed to conduct a due process analysis and failed to find any textual support in the Louisiana Constitution. Even *Burmaster's* logic was flawed as it failed to explain why it elevated the property right above all liberty interests as well as other property rights.[9]

As explained by Chief Justice Weimer in his dissent:

> In *Burmaster*, the court acknowledged that the issue was *res nova*, noting that "[w]hether the police powers of the state should be considered in a case involving a legislative enactment that divests plaintiffs of vested rights has apparently not been addressed directly by this court, presumably because it has never before been raised as an issue in cases before the court." *Id.*, 07-2432 at 23, 982 So.2d at 811. Inexplicably, however, after acknowledging the issue as *res nova*, the court went on to conclude that, because the court had not engaged in the due process analysis before in considering vested rights, it must not be necessary to do so at all. *Id.*, 07-2432 at 23, 982 So.2d at 811-12 (citations omitted). Thus, Burmaster recognized that the analysis ceased, potentially prematurely, but concluded that was consistent with prior jurisprudence.

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[8] In its decision, the Majority repeatedly equates the authority of the Legislature to revive an expired claim with the authority of the Legislature to infringe on an accrued cause of action. However, the two are materially different and should be treated differently. Treating them as the same in the abstract for purposes of a due process violation under Article I, Section 2 analysis deprives the Legislature (and this Court) of treating the language, purpose, and impact of different laws, thereby creating a bright-line rule without context, and creates absurd results like elevating the right to plead prescription above all other property rights and fundamental constitutional rights. Legislation affecting any property right, vested or otherwise, needs to be measured against a due process analysis the same way liberty interests are -- identify the importance of the property, the affect it may have on the parties, and determine whether the Legislature properly exercised its authority. In this case, the "property right" at issue is of the lowest kind. The Lafayette Diocese did not pay money to acquire the "property right", the Lafayette Diocese did not perform any act, and the Lafayette Diocese likely did not even know it had such a "right" until this lawsuit was filed. In fact, the Lafayette Diocese did nothing to acquire such a "property right". The mere passage of time conferred such a "right". Certainly, this is not a "property right" that should be elevated above the fundamental rights to religion, free speech, or to bear arms. Regardless, like its counterpart for shortening the time frame to file suit for a cause of action which this Court has repeatedly held will pass constitutional muster, the look back window is narrowly tailored to close after three years and is limited to victims of childhood sexual abuse, even though the statute at issue, Section 9:2800.9, applies to childhood victims of physical as well as sexual abuse.

[9] *See Opinion*, at 6 (Weimer, C.J.) (dissenting) ("However, it is difficult to understand how such a conclusion is justified; and how the purely economic interest represented by the right to plead prescription is protected above all others, especially without any language in the Constitution expressly extending such protection.").

Opinion, at 4 (Wiemer, C.J.) (dissenting).

The Majority's decision to elevate inapposite dicta in these three cases and ignore the language in countless other Supreme Court decisions that included language permitting reviving claims created a one-sided, result oriented analysis. Since the inception of the look-back window in 2021, its constitutionality has generally been phrased as pitting two lines of this Court's cases against each other -- *Elevating Boats* versus *Chance v. Am. Honda Motor Co.*, 635 So. 2d 177, 178 (La. 1994). But, the Majority failed to cite or even mention *Chance*.

In *Chance*, this Court approved of the principle that the Legislature has the authority to revive expired claims:

> The matter before us presents a different question**: does the retroactive application referred to in article 6 extend to revive previously time barred causes of action**. Although prescriptive statutes are generally procedural in nature, the revival of an already prescribed claim presents additional concerns. For while the defendant does not acquire anything during the running of the prescriptive period, once the time period has elapsed, the legislature grants the defendant the right to plead the exception of prescription in order to defeat the plaintiff's claim. La. Code Civ. P. arts. 927 & 934. Because the defendant acquires the right to plead the exception of prescription, a change in that right constitutes a substantive change in the law as applied to the defendant. *See St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 817 (La.1992) ("Substantive laws either establish new rules, rights, and duties or change existing ones."); *Thomassie v. Savoie*, 581 So.2d 1031, 1034 (La. App. 1st Cir.1991) ("[I]f a statute which is remedial or procedural also has the effect of making a change in the substantive law, it must be construed to operate prospectively only."). Thus, were we to interpret the amendment at issue to allow the revival of prescribed causes of action, the substantive rights of the defendant would be materially changed because he would be stripped of this acquired defense. Guided by the principles established in article 6, **we require, at the very least, a clear and unequivocal expression of intent by the legislature for such an "extreme exercise of legislative power."**

Chance v. Am. Honda Motor Co., 635 So. 2d at 178 (emphasis supplied).

The *Chance* Court was interpreting the plain language of Louisiana Civil Code article 6 which provides the black letter law for interpretation of statutes: "In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary." LA. CIVIL CODE Art. 6.

As recently as 2022, Justices Genovese, Griffin, Hughes, and Weimer re-affirmed this reasoning in *Chance*, and lower courts have similarly applied it. *See In re Succession of Lewis*, 2022-0079 (La. 10/21/22), 351 So.3d 336, 339-40 (La. 2022); *Cameron Par. Sch. Bd. v. ACandS, Inc.*, 96-0895 (La. 1/14/97), 687 So. 2d 84, 91. *See also State v. All Prop. & Cas. Ins. Carriers*

Authorized & Licensed To Do Bus. In State, 2006-2030 (La. 8/25/06), 937 So. 2d 313, 323; *Home Bank v. Marcello*, 2017-0281 (La. App. 4 Cir. 10/18/17), 316 So. 3d 1161, 1166 (quoting the above language in *Chance*); *Kelleher v. Custom Homes By Jim Fussell, Inc.*, 2015-1798 (La. App. 1 Cir. 6/3/16) ("guided by the principles established in La. C.C. art. 6, the court in *Chance* . . ."); *In re Succession of James*, 2007-2509 (La. App. 1 Cir. 8/21/08), 994 So. 2d 120, 123, writ denied, 2008-2302 (La. 12/12/08), 996 So. 2d 1119 ("Based on its analysis and a finding that the legislature had not provided a clear expression of any intent to make the change in a prescriptive article retroactive, *Chance* held that the barred action could not be revived."); *In re Succession of Faget*, 2005-1434 (La. App. 1 Cir. 6/9/06), 938 So. 2d 1003, 1007, *writ denied sub nom. Succession of Faget v. Faget*, 2006-1719 (La. 11/9/06), 941 So. 2d 40 (explaining and then following the holding in *Chance*); *Matter of Brinkman*, 98-0159 (La. App. 4 Cir. 8/5/98), 717 So. 2d 681, 682 (explaining, quoting, and following *Chance* and reasoning "absent a clear and unequivocal expression of legislative intent to apply a prescriptive statute to revive a cause of action, the Supreme Court declined to retroactively apply the statute or address the legislature's authority to revive a cause of action"); *Gaffney for Succession of Regan v. JPMorgan Chase Bank, N.A.*, No. CV 16-802-SDD-RLB, 2018 WL 3717109, at *5 (M.D. La. July 31, 2018) (restating quoting the above *Chance* quote); *Succession of Pelt*, 2017-860 (La. App. 3 Cir. 4/11/18), 244 So. 3d 476, 484 (citing *Chance* for the proposition: "Once a party acquires the right to plead prescription, a statute cannot apply retroactively to revive a prescribed cause of action, absent clear language of the legislature as to the retroactive application of the statute."); *Holland v. Holland*, 2017-231 (La. App. 3 Cir. 11/2/17) (following *Chance's* analysis and finding that the statute at issue "is silent as to its retroactive or prospective effect"); *Succession of Pelt*, 2017-860 (La. App. 3 Cir. 4/11/18), 244 So. 3d 476, 484; *Succession of Younger*, 50,876 (La. App. 2 Cir. 9/28/16), 206 So. 3d 1088, 1091, *writ denied*, 2016-2202 (La. 1/25/17), 215 So. 3d 685 (citing *Chance* for the proposition that "once a party acquires the right to plead prescription, a statute cannot apply retroactively to revive a prescribed cause of action, absent clear language of the legislature as to the retroactive application of the statute"); *Meaux v. Guidry*, 2014-155 (La. App. 3 Cir. 6/4/14), 140 So. 3d 871, 874, *writ denied*, 2014-1389 (La. 10/3/14), 149 So. 3d 799 (favorably quoting *Chance* "Guided by the principles established in [La.Civ.Code] article 6, we require, at the very least, a clear and unequivocal expression of intent by the legislature for such an 'extreme exercise of legislative power.'"); *Thomas v. Roberts*, 47,411 (La. App. 2 Cir. 9/26/12), 106 So. 3d 557, 560 (quoting and

following *Chance's* above analysis); *Henry v. SBA Shipyard, Inc.*, 2009-426 (La. App. 3 Cir. 11/10/09), 24 So. 3d 956, 961, *writ denied,* 2009-2693 (La. 2/12/10), 27 So. 3d 853 (same); *Morgan v. Louisiana Dep't of Pub. Safety & Corr.*, 2008-750 (La. App. 3 Cir. 12/10/08), 24 So. 3d 208, 211, *on reh'g* (Nov. 25, 2009), *writ denied,* 2009-2834 (La. 3/5/10), 28 So. 3d 1012 (same); *In re Succession of McKay*, 2005-603 (La. App. 3 Cir. 2/1/06), 921 So. 2d 1219, 1223, *writ denied,* 2006-0504 (La. 6/2/06), 929 So. 2d 1252, and *writ denied,* 2006-0631 (La. 6/2/06), 929 So. 2d 1253 (same); *State v. Lee*, 31,859 (La. App. 2 Cir. 2/24/99), 728 So. 2d 1042, 1045 (same).

In its decision, the Majority deliberately ignored *Chance* and its progeny. The Majority's willful exclusion of these cases is inexplicable, especially since this Court remanded to the Third Circuit Court of Appeal in *Sam Doe* v. *Diocese of Lafayette*, No. 22-120 (La. App. 3rd Cir.), to consider the constitutionality of the same look-back window within the context of *Chance*:

> In its opinion, the court of appeal should discuss whether the 2021 amendment to La. R.S. 9:2800.9 manifested an express intent to revive all claims prescribed under the prior law. *See Cameron Par. Sch. Bd. v. ACandS, Inc.*, 96-0895 (La. 1/14/97), 687 So.2d 84; Chance v. American Honda Motor Co., Inc., 93–2582 (La. 4/11/94), 635 So.2d 177.

Sam Doe v. Diocese of Lafayette, No. 2022-829 (La. 10/04/22) (emphasis supplied) (granting the Lafayette Diocese's supervisory writ and ordering the Third Circuit to answer the above question).

Not only did it ignore *Chance* and its progeny, the Majority also ignored the Third Circuit's decision in *Sam Doe* which formed the very basis in the Third Circuit to deny the writ in this case. In an exhaustive analysis, the Third Circuit found that the look-back window was constitutional. The Third Circuit conducted a traditional due process analysis. The Third Circuit addressed the nature of the Diocese's alleged "vested right". The Third Circuit contextualized the alleged vested right within the framework of prescription and peremption. The Third Circuit applied its discussion to the Diocese's constitutional due process challenge and found the lack of any textual support in the 1974 Louisiana Constitution.

The Third Circuit ruled:

> We find the following: (1) courts have failed to consider that prescription is inchoate and only "an expectancy of future benefits", (2) only the running of peremption, not prescription, extinguishes a right by operation of law, and (3) opinions have been issued that reflect a misplaced reliance on *McNamara*, 561 So.2d 712, which was quickly denounced by the supreme court as being an inaccurate statement of the law. For these reasons, prior jurisprudence on this issue is confusing and, therefore, fails to establish a long line of cases following the same reasoning which would establish jurisprudence constante under Louisiana law. Considering all of the above, we determine that the retroactive application of Acts 322 and 386 does not violate any constitutionally protected right to assert a defense of liberative prescription. In reaching this conclusion, we are mindful that Acts 322 and

> 386 revive claims for sexual abuse of minors only for a limited period of three years, the Diocese did not protect children from priests reported to have sexually abused minors thereby allowing such abuse to continue, and the Diocese can assert prescription against claims asserted after June 14, 2024.

Sam Doe, at *16 (emphasis supplied).

The Third Circuit turned to the traditional Louisiana due process analysis. *Id.* at *17-*20. Understanding that the revival clause sought to uncover child sexual abusers who had hidden for decades behind their victim's silence, move the financial burden onto the abusers, and prevent future abuse, the Third Circuit found that the "caselaw requires us to consider a due process claim in light of the state's police power". *Id.* at *17 (emphasis supplied). Specifically, the Third Circuit noted that both the United States Supreme Court and this Court have "recognized the importance of the police power with regard to sexual offenses committed against children". *Id.* at *19 (citing *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), and *State v. Golston*, 2010-2804 (La. 7/1/11); 67 So. 3d 452).

The Majority also failed to address the generations of cases supporting the requirement for a substantive due process analysis when a substantive due process constitutional challenge is being made to a state law concerning a "property right". *See, e.g.*, *Med. Exp. Ambulance Service, Inc. v. Evangeline Parish Police Jury*, 96-0543, p. 7 (La. 11/25/96), 684 So. 2d 359, 365 (holding that for legislation involving economic and social welfare interests, as opposed to fundamental rights, the test of substantive due process is whether the regulation is rational in relation to the goal sought to be attained and is adopted in the interest of the community as a whole); *Fields v. State ex rel. Dep't of Pub. Safety & Corrections*, 714 So.2d 1244, 1250 (La. 1998) (same); *Toney v. Whitfield*, 531 So. 2d 445, 446-47 (La. 1988) (same); *Hayden v. Louisiana Public Service Com.*, 553 So. 2d 435, 440 (La. 1989) ("In the area of substantive due process, courts look only to see if a particular legislative measure was a rational way to correct a problem."); *Hooter v. Wilson*, 273 So. 2d 516, 522 (La. 1973) ("Any right the creditor has acquired is subject to a proper exercise of the police power for legitimate purposes when the exercise of the power is not unreasonable."); *State v. Brown*, 94-1290 (La. 1/17/95); 648 So. 2d 872, 877 ("It is well settled that the substantive guarantee of due process in the federal and state constitutions requires only that the legislation have a rational relationship to a legitimate state interest. It is equally well settled that an ordinance will be upheld if there exists a reasonable relationship between the law and public good."); *Bd. of Barber Exam'rs of La. v. Parker*, 190 La. 214 (1938), 182 So. 485, 490 (emphasis added) ("This

Court has recognized that private citizens' rights of property must yield to the public good, so long as doing so comports with the due process guarantees in both the Louisiana and Federal Constitutions. As far back as 1938, this Court stated that rights and privileges guaranteed by the Constitution "cannot be taken from a citizen without the due process of law. But the right to contract, to own and use property, is not absolute. Private rights must always yield to the public good.").

The Majority also failed to recognize the importance of *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus. In State*, 2006-2030 (La. 8/25/06), 937 So.2d 313. In its Opinion, the Majority dismissed *All Property* as a case that does not apply to prescription and so is unhelpful. However, the importance of *All Property* is that this Court was dealing with a state law that fundamentally changed a vested contractual right. Unlike vested property rights, vested contractual rights are specifically protected by name in the Louisiana Constitution granting them a higher status than "vested" property rights. Article I, Section 23 specifically excludes the infringement of vested contractual rights: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted."

In *All Property*, the Louisiana Legislature extended the prescriptive period from one year to two years. However, the insurance policies already had a clause that contractually bound its insureds to file suit under the policy within one year. Accordingly, the insurers had a vested contractual right with their Louisiana citizens to file suit within one year, regardless of what the new law stated. The insurers argued that the new law violated their vested contractual right textually protected in the Louisiana Constitution. *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus. In State*, 2006-2030 (La. 8/25/06), 937 So.2d 313.

After discussing *Chance* as precedent, this Court noted that the statutes' retroactive application would qualify as "substantive" under Article 6, thereby raising constitutional concerns under the Due Process and Contracts Clauses. *Id.* at 323. Applying the modern federal approach to retroactivity, *All Property* reasoned that even though the prohibition "appears unambiguously absolute 'the Contract Clause does not operate to obliterate the police power of the states'" and its protections "'must be accommodated to the inherent power of the state to safeguard the vital interests of its people.'" *Id.* at 322-23 (citations omitted).

In analyzing the law at issue, *All Property* determined that the statutes in question substantially impaired the defendants' "vested" and constitutionally protected right to assert the

one-year contractual period in effect when the policies were issued. *Id.* at 326-27. It acknowledged that each insurer had "reasonably expected" claims filed after that year to be unenforceable, but nevertheless upheld the statutes' constitutionality and applied it retroactively in accordance with legislative intent. *Id.* at 325-27.

This Court ruled:

> Insofar as the defendant insurers claim imposition of the extended prescriptive period violates constitutional due process concerns, our conclusion that no unconstitutional violation occurred would be the same because the tests are similar. The Supreme Court has held "[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process": a legitimate legislative purpose furthered by rational means.

Id. at 327-28 n.14. (emphasis added) (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)). *See also Morial v. Smith & Wesson Corp.*, 785 So.2d 1, 19 (La. 2001); *Rousselle v. Plaquemines Parish Sch. Bd.*, 633 So.2d 1235, 1246-47 (La. 1994); *Progressive Sec. Ins. Co. v. Foster*, 711 So.2d 675, 688 (La. 1998).

In this case, the Majority also tried to distinguish *All Property* by claiming that the insurance industry is heavily regulated such that there was some expectation that insurers should expect something like this. However, every citizen and business in Louisiana should also be aware that if they rape children or enable it to happen, that the State would use its police power to enforce criminal and civil justice provisions to remedy the harms. "Insurance" as an industry is not more important or significant to Louisiana than protecting children from sexual abuse and mitigating the harm caused by childhood sexual assault. To reason otherwise is to elevate money over children.

Ultimately, the Majority's constitutional analysis is most notable for what it failed to do. The Majority failed to conduct any substantive due process analysis. The Majority failed to discuss due process guarantees. The Majority failed to quote the Louisiana Constitution's clear language that permits infringement of property rights upon due process of law. LA. CONST. ART I, Section 2 (emphasis supplied) ("No person shall be deprived of life, liberty, or property, except by due process of law."). The Majority failed to define the alleged property interest as economic or otherwise. The Majority failed to identify whether the State was exercising its police power. The Majority failed to find any textual support anywhere in the Louisiana Constitution to support its reasoning, especially because the theory of "vested rights" does not exist in the Constitution. The

Majority failed to address *Chance* and its progeny. The Majority failed to address *Sam Doe's* holding and reasoning by the Third Circuit. The Majority left unanswered why a property interest to plead prescription by those accused of sexually assaulting children is elevated above all other constitutional rights, include the right to religion, the right to free speech, and the right to bear arms.

CONCLUSION

For the foregoing reasons, this Court should reconsider and reverse its March 22, 2024 decision in this case. Alternatively, this Court should order additional briefing and oral argument to reconsider its legal errors.

Respectfully submitted:

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CERTIFICATE

STATE OF LOUISIANA

PARISH OF ORLEANS

The undersigned counsel, Soren E. Gisleson, personally came, appeared, and declared that:

He is an attorney for Plaintiff-Respondent, Douglas Bienvenu. The allegations contained in the foregoing Application for Rehearing are true and correct to the best of his information, knowledge, and belief. Further, he certifies that he has served a copy of the above and foregoing by placing same in U.S. Mail and/or by electronic means, to the following:

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New Orleans, Louisiana, this 4th day of April, 2024.

S/Soren E. Gisleson
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