STATE OF MICHIGAN
IN THE SUPREME COURT

BRIAN McLAIN,

Plaintiff-Appellant,

v

THE ROMAN CATHOLIC ARCH-DIOCESE OF BALTIMORE,

and

THE ROMAN CATHOLIC DIOCESE OF LANSING,

Defendants-Appellees.

Supreme Court
No. 165741

Court of Appeals
No. 360163

Lower Court
No. 21-31108-NO

AMICUS CURIAE BRIEF OF THE MICHIGAN CATHOLIC CONFERENCE IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether the three-year period to commence an action set forth in MCL 600.5851b(1)(b) renders Plaintiff's lawsuit timely due to his alleged recent discovery of the causal relationship between his purported injuries and the alleged criminal sexual conduct.

The trial court answered: Yes
The Court of Appeals answered: No
Amicus curiae MCC answers: No

2. Whether, under an analysis of the factors set forth in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 28-39; 852 NW2d 78 (2014), MCL 600.5851b(1)(b) applies retroactively to the time of the wrong such that Plaintiff's claims were timely filed.

The trial court answered: Yes
The Court of Appeals answered: No
Amicus curiae MCC answers: No

INTEREST OF AMICUS CURIAE[1]

The Michigan Catholic Conference (MCC) serves as the official voice of the Catholic Church in Michigan on matters of public policy. Michigan's large and diverse Catholic population includes nearly one out of every five adults in the State.

The MCC has an interest in the interpretation of legislatively crafted compromises through statutes. Its work helps individuals and organizations determine whether to support or oppose proposed legislation.

The MCC participated in the effort to draft and enact MCL 600.5851b in 2018. The MCC continues to regularly advise stakeholders of proposed legislation and its import and therefore has a keen interest that MCL 600.5851b be interpreted consistent with those who drafted and voted for it.

[1] Pursuant to MCR 7.312(H)(4), no party, nor any party's counsel, authored this brief in whole or in part nor did any party or its counsel make any monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION

Plaintiff alleges that he was abused a quarter-century ago, at age 16 or 17, by a priest of the Roman Catholic Archdiocese of Baltimore while that priest resided at the W.J. Maxey Boys Training School in Livingston County, Michigan. At the longest, the relevant statute of limitations for Plaintiff's negligence claim is three years from the time it accrued. And his claim accrued in 1999, "at the time the wrong upon which the claim is based was done *regardless of the time when damage* results." MCL 600.5827 (emphasis added). Assuming Plaintiff was 16 at the time of the alleged harm, that means he had to file his claim no later than 2005—a three-year limitations period plus three more years because he was a minor, see MCL 600.5851(1). Yet Plaintiff did not file his Complaint until April 2021, at least 16 years too late. Accordingly, the Court of Appeals correctly held that the claims were time-barred.

Plaintiff says he satisfies MCL 600.5851b(1)(b), enacted in 2018, because he did not discover the causal connection between his mental health issues and the alleged abuse until a discussion with his therapist in November 2020. But this allegation does not change the analysis. This Court has long held that sexual assaults "inflict *immediate* damage." *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995) (emphasis added). "Subsequent damage"—in the form of alleged mental health issues or otherwise—"would not give rise to a new cause of action or renew the running of the limitations period." *Id.* Accordingly, Plaintiff's purported discovery of the connection between his mental health issues and the alleged abuse is irrelevant for analyzing the statute of limitations.

Alternatively, Plaintiff argues that MCL 600.5851b(1)(b) changed the accrual date. That's wrong. A claim is governed by the statute of limitations in effect at the time the claim accrued, *not* the statute in

effect when the lawsuit was filed. MCL 600.5869. And there is nothing in the text or history of MCL 600.5851b(1)(b) suggesting that the Legislature intended it to apply retroactively. Quite the opposite, the Legislature expressly rejected most calls to expand the limitations period for sexual assault and instead gave retroactive effect to MCL 600.5851b in only a narrow class of claims—those involving Dr. Nassar at Michigan State University. This Court should not rewrite the statute as though the Legislature made a different choice.

Transmogrifying MCL 600.5851b(1)(b) into something it doesn't say and which its drafters and ratifiers never intended would have deleterious effects. To begin, a judicial rewrite of MCL 600.5851b(1)(b) would have colossal consequences for many Michigan public and private organizations, including schools, colleges, universities, churches, overnight camps, youth homes, and civic youth organizations. Under Plaintiff's theory, all it would take to assert a claim is for a plaintiff to assert a "newly discovered" connection between a mental health issue and alleged abuse, and an organizational employer would be unable to mount a statute-of-limitations defense. For cases of alleged abuse that happened 50, 60, or 70 years ago or more, the organizational employer of the abuser would have no realistic ability to defend itself; potential witnesses would be deceased or unreachable, preventing the employer from mounting any kind of merits defense even in fraudulent cases.

The uncapped liability that would result from such a rule would likely bankrupt many public and private organizations. This is the type of policy consideration that the Legislature carefully weighed before rejecting all invitations to abolish the limitations period for alleged abuse claims and instead giving MCL 600.5851b only limited retroactive effect—for the victims of Dr. Larry Nassar. The Court should not second-guess the Legislature's policy decision.

In addition, judicially amending the limitations period would invite arguments that the statute violates due-process rights by retroactively reviving claims that have long since been time-barred. If successful, such an argument could have the effect of nullifying MCL 600.5851b altogether, even for the class of individuals the Legislature intended to help.

Accordingly, this Court should affirm the Court of Appeals or deny the application for leave as improvidently granted.

SUMMARY STATEMENT OF FACTS AND PROCEEDINGS

The relevant facts are few. Plaintiff asserts a negligence claim arising out of alleged sexual abuse committed by Defendant Father Richard Lobert, a priest of the Roman Catholic Archdiocese of Baltimore, between March and July 1999. Compl ¶¶ 8-10, Pl's App'x 002a-003a. Plaintiff was 16 or 17 years old.

Although the relevant limitations period would have expired at the latest in July 2005, Plaintiff failed to file suit until April 15, 2021. Pl's App'x 001a-006a. Trying to plead around the 16-year gap between the limitations period and the filing of the Complaint, Plaintiff alleges that in late 2020, he "revealed to his therapist for the first time" that Fr. Lobert abused him and that subsequent therapy "revealed to Plaintiff" that the alleged incident caused or aggravated "Plaintiff's history of adjustment disorder, anxiety, bipolar disorder, and the requirement for medication." Compl ¶¶ 11-12, Pl's App'x 003a. Plaintiff does not allege new incidents or new injuries. Instead, Plaintiff alleges a later-realized consequence of an already completed injury.

In the trial court, Defendants moved for summary disposition, including under the three-year statute of limitations specified in MCL 600.5805. The trial court denied that motion, holding that MCL 600.5851b(1)(b) created a new rule under which claims of sexual abuse of a minor accrue three years "after the date the individual discovers, or through the exercise of reasonable diligence should have discovered, both the individual's injury and the causal relationship between the injury and the criminal sexual conduct." Pl's App'x 122a-124a (quoting MCL 600.5851b(1)(b)). In so holding, the trial court overlooked that the relevant limitations period and accrual statute are *not* those that exist today but those that existed at the time of the injury. And it is undisputed that under the limitations period and accrual statute that existed in 1999, Plaintiff's Complaint is barred.

Alternatively, the trial court held that MCL 600.5851b(1)(b) should be given retroactive effect. Pl's App'x 124a. In so doing, the trial court failed to apply the so-called "*LaFontaine* factors" that this Court has emphasized must govern such an inquiry. *Buhl v City of Oak Park*, 507 Mich 236; 968 NW2d 348 (2021), discussing *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38-39; 852 NW2d 78 (2014).

Defendants the Roman Catholic Diocese of Lansing and the Archdiocese of Baltimore filed applications for leave which the Court of Appeals granted and consolidated on June 7, 2022. The Court of Appeals reversed in a unanimous, per curiam opinion. *McLain v Roman Catholic Diocese of Lansing*, __ Mich App __; __ NW2d __; 2023 WL 3131974 (2023).

The Court of Appeals began by rejecting Plaintiff's argument that "retroactivity is not an issue because MCL 600.5851b(1) changed when claims such as his—that is, claims to recover damages sustained by an individual who, while a minor, was the victim of criminal sexual

conduct—accrued." *Id.* at *3. The Court of Appeals emphasized that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id.* (quoting MCL 600.5827). Here, Plaintiff's claimed sexual assault "accrue[d] at the time of the assault, and '[s]ubsequent damages arising after the initial assaults would not give rise to a new cause of action or renew the running of the limitation period." *Id.* (quoting *Lemmerman v Fealk*, 449 Mich 56, 64; 534 NW2d 695 (1995)).

The Court of Appeals rejected Plaintiff's argument that MCL 600.5851b(1)(b) "changed the accrual date." *Id.* Indeed, "nothing in MCL 600.5851b supports plaintiff's argument." *Id.* To begin, "MCL 600.5851b never explicitly states that it changes the general rule for when a claim accrues." *Id.* Moreover, "while MCL 600.5851b(1) clearly indicates that it is an exception to the general statute of limitation in MCL 600.5805 and any tolling of that statute as provided in MCL 600.5851, *nothing in MCL 600.5851b(1) suggests that it is an exception to the statute governing the general accrual of claims*—MCL 600.5827." *Id.* (emphasis added). "Rather, MCL 600.5851b(1)(b) simply extends the time that an individual has to bring such a claim, i.e., it extends the statute of limitations" for claims that accrue after the statute's effective date. *Id.*

That makes this case easy, the Court of Appeals reasoned. "Plaintiff's claims are premised on criminal sexual conduct that occurred in 1999, meaning that plaintiff's claims accrued in 1999." *Id.* (citing MCL 600.5827; *Lemmerman*, 449 Mich at 64; 534 NW2d 695). "It is well accepted that 'the pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose.'" *Id.* (citing *Davis v State Emps' Ret Bd*, 272 Mich App 151, 163; 725 NW2d 56 (2006) (quotations and additional citations omitted)). "Any statute of limitations applicable to plaintiff's claims when they accrued in 1999 had long since expired by

the time he filed his complaint in 2021." *Id.* "Thus, the *only* way for plaintiff's claims to survive is if MCL 600.5851b(1)(b)—which was not enacted until after the acts giving rise to plaintiff's claims took place—applies retroactively." *Id.* (emphasis added) (citing *Buhl*, 507 Mich at 243; 968 NW2d 348).

Turning to retroactivity, the Court of Appeals applied the *LaFontaine* factors and concluded that the Legislature did not intend MCL 600.5851b(1)(b) to be applied retroactively. 2023 WL 3131974, at *4.

First LaFontaine *factor: clear, manifest intent*

"Nothing in the plain language of MCL 600.5851b(1)(b) suggests that it was intended to apply retroactively." *Id.* That lack "stands in stark contrast to Subsection (3), in which the Legislature made abundantly clear its intent for *that* subsection to apply to claims that accrued *before* the statute was enacted." *Id.* (emphasis added). Specifically, subsection (3) applies "[r]egardless of any period of limitation under subsection (1) or sections 5805 or 5851." *Id.* (quoting MCL 600.5851b(3)).

"Moreover, like the statute at issue in *Buhl*, MCL 600.5851b was to be given immediate effect without further elaboration, which supports that it was intended to be applied prospectively only unless the text of the statute clearly indicates otherwise (like it does in Subsection (3))." *Id.* "Furthermore, MCL 600.5851b(1)(b) makes no mention of whether it applies to a cause of action that had already accrued before its effective date." *Id.* (quoting *Buhl*, 507 Mich at 245; 968 NW2d 348). This conclusion is buttressed by MCL 600.5851b(1)(b)'s application to "'an individual who, while a minor, *is* the victim of criminal sexual conduct,' as opposed to an individual who, while a minor, is *or was* a victim of criminal sexual conduct." *Id.* (quoting MCL 600.5851b(1)(b)).

The Court of Appeals' supported its conclusion with the statute's legislative enacting context. "In versions of MCL 600.5851b that were not enacted, the Legislature proposed language that would have made retroactive *all* claims premised on criminal sexual conduct committed against minors reaching back to a certain date." 2023 WL 3131974, at *5. "For instance, one version proposed enacting language that would have made MCL 600.5851b 'apply to actions to recover damages for conduct that constitute criminal sexual conduct that occurred after December 31, 1992.'" *Id.* "In a different version, the Legislature proposed language that would have made MCL 600.5851b(1) apply to all claims that accrued 'after December 31, 1996' with limited exceptions." *Id.* "In contrast to these alternative legislative drafts, MCL 600.5851b(1) as enacted was given immediate effect[ ] *and did not state that it applied to claims that previously accrued*." *Id.* (emphasis added).

The Court of Appeals rejected Plaintiff's argument "that MCL 600.5851b(1)'s use of the phrase 'at any time' shows 'an intent to have the statute apply both 'retroactively' to sexual assaults that occurred before the effective date of the statute and prospectively to protect future minor victims of sexual abuse." *Id.* Plaintiff "concede[d] that this language does not demonstrate the Legislature's express intent to have the statute apply retroactively, but emphasize[d] that such intent can be implied." *Id.* The Court of Appeals explained that "[r]etroactivity by implication will not be lightly presumed." *Id.* Indeed, "[r]etroactivity can only 'be inferred by necessary, unequivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention.'" *Id.* (quoting *Ramey v State*, 296 Mich 449, 460; 296 NW2d 323 (1941)). And the Legislature's use of the phrase "at any time" here, in this

context, "does *not* lead to a necessary, unequivocal, and unavoidable implication that the statute is to be applied retroactively." *Id.*

Second LaFontaine *factor: relation to an antecedent event*

After both parties conceded in their briefs that the second *LaFontaine* factor is not applicable here, Plaintiff's counsel changed course at oral argument. No matter said the Court of Appeals. "Plainly, the issue in this case does not 'relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute,' and so the second *LaFontaine* factor is inapplicable. 2023 WL 3131974, at *6 (quoting *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571; 331 NW2d 456 (1982)).

Third LaFontaine *factor: whether retroactive application would impair a vested right*

The Court of Appeals declined to resolve "contradictory statements" in "two binding, published [Court of Appeals] cases" as to whether there is a "vested right to assert the statute of limitations to defeat a claim," because "it would not affect the outcome of this case" given the analysis of the other *LaFontaine* factors. *Id.*

Fourth LaFontaine *factor: whether the injury is antecedent to the statute's enactment*

Finally, the Court of Appeals recognized that "'the general remedial-procedural exception to prospective application' does not apply to statutes of limitations that had completely run." *Id.* (quoting *Davis v State Emps' Ret Bd*, 272 Mich App 151, 162; 725 NW2d 56 (2006)). "Accordingly, the fourth factor does not support retroactive application of MCL 600.5851b(1)(b) in this case." *Id.*

* * *

In sum, the Court of Appeals held, "Plaintiff's claims can only proceed if MCL 600.5851b(1)(b) applies retroactively. Yet MCL 600.5851b(1)(b) contains no clear and unequivocal manifestation suggesting that the Legislature intended for it to apply retroactively." 2023 WL 3131974, at *7. Accordingly, the Court of Appeals reversed. *Id.*

ARGUMENT

I. The statute of limitations bars all of Plaintiff's claims.

A. Plaintiff's claims are time-barred.

All of Plaintiff's claims are barred by the statute of limitations because each claim accrued in 1999. The relevant limitations period for his claims is, at the longest, three years. Plaintiff turned 19—the age of majority plus one year, see MCL 600.5851—in 2002 at the latest. That means he had until 2005, at most, to file his lawsuit. His Complaint filed more than a decade-and-a-half later is time-barred, and this Court should so hold.

"The period of limitations runs from the time" a plaintiff's "claim accrues." MCL 600.5827. Furthermore, a "cause of action accrues when all the elements have occurred and can be alleged in a complaint." *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 78; 592 NW2d 112 (1999). Accord, e.g., *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 639-640; 692 NW2d 398 (2004), citing *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995). A claim thus "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827.

A claim is governed by the statute of limitations in effect at the time the claim accrued, not the statute in effect when the lawsuit is filed. MCL 600.5869 ("All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the

limitations of such actions or right of entry."); *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999) ("The applicable statute of limitations is the one in effect when the plaintiff's cause of action arose.") (cleaned up).

The "test to be applied in determining when a cause of action accrued is an objective one, based on objective facts, and not on what a particular plaintiff subjectively believed." *Id.* That "[a]pplication of the test is a matter of law for the court in the absence of any issue of material fact." *Id.* Thus, where there is no factual dispute that a claim "is barred under a principle set forth in MCR 2.116(C)(7)," the question is one of law for the court to decide. *RDM Holdings, LTD v Cont'l Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008).

Here, Plaintiff's Complaint includes a single count of negligence asserted against all three Defendants. All three counts relate to acts that occurred in 1999. Under MCL 600.5805(2), any action brought to recover damages for injuries to a person must be filed within three years after the time of injury. As noted, that time is tolled until a person reaches the age of 19. MCL 600.5851. That means, under the most favorable application of tolling, Plaintiff had until 2005 to file his lawsuit. Plaintiff did not file a lawsuit within that time, and Plaintiff's claims are time-barred. That should be the end of the matter.

B. Plaintiff's alleged connection of his mental health issues with the alleged assault in November 2020 does not resurrect his time-barred claims.

Plaintiff tries to salvage his claims by alleging that he only made the connection between his mental health issues and the alleged assault in November 2020. This allegation does not change the analysis.

This Court has held that sexual assaults "inflict *immediate* damage on the children so abused." *Lemmerman*, 449 Mich at 64 (emphasis added). This means that "[s]ubsequent damage arising after the initial assaults would *not* give rise to a new cause of action or renew the running of the limitation period." *Id.* (emphasis added). A sexual abuse claim accrues when the abuse occurred. And Michigan law "compels strict adherence to the general rule that 'subsequent damages do not give rise to a new cause of action.'" *Moll v Abbott Labs*, 444 Mich 1, 18; 506 NW2d 816 (1993) (quoting *Larson v Johns–Manville Sales Corp*, 427 Mich 301, 315; 399 NW2d 1 (1986)).

Thus, any alleged delay in connecting Plaintiff's mental health issues with the alleged assault is legally irrelevant for analyzing the statute of limitations. "Harm is established not by the *finality* of the damages, but by the occurrence of identifiable and appreciable loss." *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994) (cleaned up, emphasis added); accord, e.g., *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 291; 769 NW2d 234 (2009) ("Subsequent claims of additional harm caused by one act do not restart the claim previously accrued."). When Plaintiff was allegedly abused in 1999, he was injured immediately. Whether he may have realized the *extent* of the injury 20 years later does not change the date his claims accrued as a matter of law. Rather, it is enough that he was aware of a "'possible' cause of action" at the time of the alleged abuse. *Gebhardt*, 444 Mich at 544.

The "discovery rule" that Plaintiff attempts to invoke with his allegation that he did not connect his mental health issues with the alleged assault until November 2020, see Compl ¶¶ 11-13, Pl's App'x 003a, "applies to the *discovery of an injury*, not to the discovery of a *later realized consequence* of the injury." *Moll*, 444 Mich at 18 (emphasis

added). Accordingly, those allegations have no effect on the statute of limitations.

This conclusion is consistent with other precedents of this Court. For instance, in *Stephens v Dixon*, the Court held that the "discovery rule is not available in a case of ordinary negligence where a plaintiff merely misjudges the severity of a known injury." 449 Mich 531, 537; 536 NW2d 755 (1995). The discovery rule does not extend the statute of limitations where a "plaintiff knew or should have known from the day of the accident that a possible cause of action existed for [an] injury resulting from [an] accident." *Id.* at 538. So:

> Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but *they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred*. [*Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972) (emphasis added).]

Here, Plaintiff's claims accrued in 1999, when he alleges the assault took place. His allegations of latent mental-health issues or the late discovery of the connection between any mental-health issues and the alleged assault do not resuscitate Plaintiff's time-barred claims.

C. MCL 600.5851b(1)(b) does not apply to Plaintiff's claims.

Recent revisions to Michigan's statute of limitations—enacted in 2018 by the Michigan Legislature and signed by Governor Snyder—do not change the result either. "Statutes of limitations are generally limited to prospective application unless the Legislature *clearly and unequivocally* manifests a contrary intent." *In re Gerald L Pollack Tr*, 309 Mich App 125, 137; 867 NW2d 884 (2015) (emphasis added; cleaned up). That is why "there exists a plethora of cases extending over 100

years of jurisprudence that provide that statutes of limitations enacted by the Legislature are to be applied prospectively absent a *clear and unequivocal manifestation* of a legislative preference for retroactive application." *Davis v State Emps' Ret Bd*, 272 Mich App 151, 161; 725 NW2d 56 (2006) (emphasis added); accord, e.g., *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999) ("statutes of limitation … operate prospectively unless an intent to have the statute operate retrospectively *clearly and unequivocally* appears from the context of the statute itself" (emphasis added)).

In the wake of the Larry Nassar scandal, the Michigan Legislature enacted MCL 600.5851b. That statute states, in relevant part:

> (1) Notwithstanding sections 5805 and 5851, an individual who, while a minor, is the victim of criminal sexual conduct may commence an action to recover damages sustained because of the criminal sexual conduct at any time before whichever of the following is later:
>
> (a) The individual reaches the age of 28 years.
>
> (b) Three years after the date the individual discovers, or through the exercise of reasonable diligence should have discovered, both the individual's injury and the causal relationship between the injury and the criminal sexual conduct.
>
> * * *
>
> (3) Regardless of any period of limitation under subsection (1) or sections 5805 or 5851, an individual who, while a minor, was the victim of criminal sexual conduct after December 31, 1996 but before 2 years before the effective date of the amendatory act that added this section *may commence an action* to recover damages sustained because of the criminal sexual conduct *within 90 days after the effective date of the amendatory act that added this section if the person alleged to have committed the criminal sexual conduct was convicted of criminal sexual conduct* against any person under section 520b of the Michigan penal code,

> 1931 PA 328, MCL 750.520b, *and* the defendant admitted either of the following:
>
> > (a) That the defendant was in a position of authority over the victim as the victim's physician and used that authority to coerce the victim to submit.
> >
> > (b) That *the defendant engaged in purported medical treatment or examination of the victim* in a manner that is, or for purposes that are, medically recognized as unethical or unacceptable. [MCL 600.5851 (emphasis added).]

From a high-level view, MCL 600.5851b has two primary goals. First, it provides an extended statute of limitations for individuals who were victims of criminal sexual conduct as minors *after* 2018 and includes a discovery-rule tolling provision. MCL 600.5851b(1). Second, it provides that, insofar as someone was a minor when the victim of criminal sexual conduct perpetrated by a physician between 1997 and 2016 (subject to certain qualifiers), that victim may commence an action for damages suffered because of such misconduct *within 90 days of the statute becoming effective*. The second portion was intended to allow Dr. Larry Nassar's victims to sue him notwithstanding the fact that their claims were time-barred under then-governing law. MCL 600.5851b(3).

Crucially, the Legislature did *not* include the same sort of retroactive language in subsection 1, i.e., authorizing an alleged victim to file suit "within 90 days of the statute becoming effective." On its face, MCL 600.5851b demonstrates that the Legislature contemplated the issue of retroactivity and decided to revive *only* a narrow category of time-barred claims—those against Dr. Larry Nassar. The statute does not "clearly and unequivocally manifest[ ]," *Pollack Tr*, 309 Mich App at 137, the Legislature's intent to apply the new, extended limitations period retroactively in *all* cases, only the Dr. Nassar cases. Plaintiff is wrong that the 2018 amendments revive his time-barred claims.

The statute's legislative enactment context confirms this, as the Court of Appeals explained below. The Legislature revised the proposed bill that became MCL 600.5851b, Senate Bill No. 872, while it was considering it. Among other things, these revisions *narrowed the bill's retroactive application*. As initially proposed in the Senate, the bill provided that *all* its provisions would "apply to actions to recover damages for conduct that constitute criminal sexual conduct that occurred after December 31, 1992." 2018 SB 872 (February 27, 2018, version). Note that this more liberal version of the bill would have changed the result here. As amended and later passed by the Senate, the bill specified that section 5851b would apply "to a claim based on criminal sexual conduct that accrues after December 31, 1996," subject to certain generally applicable limitations. 2018 SB 872 (March 14, 2018, version). Again, this version would also have changed things here. But the House then modified the bill by *eliminating* across-the-board retroactivity and adding the physician-targeted provision that ultimately appeared in subsection (3) of the statute. 2018 SB 872 (May 24, 2018, version). During the vote in the House, Representative John Chirkun, who disagreed with the proposed change, stated regarding the narrowing of the bill's retroactivity provision:

> It is a sad day in the legislature when they don't treat all people the same way in the state of Michigan, I could not vote in favor of this bill because we are not treating all the residents of Michigan (Juvenile ,and Adults) [sic] that have been sexually assaulted IE:(By priests coaches ,teachers, social workers etc.) ,equally as the same rights as the ones involved in the MSU Dr. Nassar scandal." [2018 HJ No. 53, p 1074 (errors in original).]

Over the objection of Representative Chirkun and Several Senators, see Diocese of Lansing Br 17-18, the Senate passed the House's narrowed version of the bill. 2018 SB 872 (May 29, 2018,

version). That final version ultimately was signed by the Governor and became MCL 600.5851b.

In sum, this legislative enactment context shows exactly what the statute's plain language means: that the Legislature considered whether to apply the extended statute of limitations retroactively in all cases and deliberately chose not to do so. Instead, the Legislature narrowed the statute's retroactive application significantly. 2018 SB 872 (March 14, 2018, version). Then, the Legislature narrowed it some more, to apply only to Larry Nassar's victims. 2018 SB 872 (May 24, 2018, version). The statute's text does not apply to Plaintiff. As the Court of Appeals put it below, "MCL 600.5851b(1)(b) simply *extends* the time that an individual has to bring such a claim, i.e., it extends the statute of limitations." 2023 WL 3131974, at *3 (emphasis added). The statute does not resurrect claims that were already time-barred at the time the Legislature enacted the provision.

Plaintiff devotes a mere two-and-one-half pages of his briefing to arguing that MCL 600.5851b(1)(b) changed the accrual date for claims of sexual abuse of a minor. Appellant's Appeal Br 14-17. With good reason. The statute governing the accrual of Plaintiff's claims is MCL 600.5827. And MCL 600.5851b says nothing about amending the accrual statute. Instead, MCL 600.5851b(1) begins, "Notwithstanding sections 5805 and 5851." Both MCL 600.5805 and MCL 600.5851 are statutes of limitations. So MCL 600.5851b(1) was changing the limitation period, *not* the accrual date. Indeed, nothing in MCL 600.5851b even mentions accrual. It would be passing strange to construe MCL 600.5851b as amending MCL 600.5827 through silence.

And we know that Plaintiff's interpretation must be wrong because otherwise, the Legislature would not have had to enact MCL 600.5851b(3), the portion of the statute that provided relief for Dr.

Nassar's victims. That provision applied to individuals who, while a minor, were victims of criminal sexual conduct *after December 31, 1996*. A gymnast who was six years old (the age of Dr. Nassar's youngest known victim) in 1997 would have been 27 years old in 2018, younger than the extended 28-years-of-age cutoff in MCL 600.5851b(1)(a). So if Plaintiff was correct, MCL 600.5851b(3) would be rendered nugatory and superfluous because the gymnast, not having yet turned 28 in 2018, would be within the limitations period specified in subsection (1). She—and her fellow Dr. Nassar victims—would not have to rely on subsection (3) at all.

Indeed, subsection (3) is the longest portion of the statute, yet it would have all been for naught if the Legislature intended its work the same way that Plaintiff characterizes it. Moreover, Plaintiff's interpretation would require the nullification of decades of this Court's accrual cases, something that the Legislature never indicated it was trying to accomplish.

D. MCL 600.5851b(1)(b) cannot be applied retroactively.

Plaintiff's more fulsome argument is that MCL 600.5851b(1)(b) should be applied retroactively. Appellant's Appeal Br 17-23. But the unanimous Court of Appeals thoroughly debunked that argument. In brief:

- MCL 600.5851b(3) plainly includes language that gives that subsection retroactive effect. The fact that MCL 600.5851b(1) does not contain language suggesting retroactivity is strong evidence the Legislature did not intend subsection (1) to be retroactive.
- MCL 600.5851b was given immediate effect, without further elaboration, supporting the notion that the Legislature intended it to be prospective only.

- MCL 600.5851b(1) makes no mention of whether it applies to a claim that accrued before the statute's effective date.
- MCL 600.5851b(1) is written in the present tense ("an individual who, while a minor, is the victim") rather than the past tense ("an individual who, while a minor, is or was a victim").
- The legislative enactment context shows that the Legislature considered several different versions of the statute that would have applied retroactively to time-barred claims and rejected each and every one of those proposals.
- Any argument that retroactivity can be implied (including the statute's use of the phrase "at any time") does not come anywhere close to showing the necessary, unequivocal, and unavoidable implication this Court has required for retroactivity.
- And the general remedial-procedural exception to prospective application does not apply here, where the statute of limitations has completely run.

Moreover, if MCL 600.5851b(1)(b) applies retroactively, then the Legislature's carefully crafted provisions governing sexual abuse of minors by physicians in subsection (3) would be purposeless, as discussed above, because MCL 600.5851b(1)(a)'s 28-years-of-age provision would control.

If the Court of Appeals made any misstep, it was in examining only its own precedent to determine whether there is a vested right to assert the statute of limitations to defeat a claim, the third *LaFontaine* factor. 2023 WL 3131974, at *6 (discussing *Bessmertnaja v Schwager*, 191 Mich App 151, 154; 477 NW2d 126 (1991), and *Gorte v Dep't of Transp*, 202 Mich App 161, 167; 507 NW2d 797 (1993)). As the Diocese of Lansing explains in its brief, "*this* Court's precedents establish that Defendant has a vested right in the running of the statute of limitations *because it had already completely run*, and the action was barred." Diocese of Lansing Br 19 (emphasis added) (citing *People v Russo*, 439

Mich 584, 594; 387 NW2d 698 (1992), itself citing *In re Straight's Estate*, 329 Mich 319, 325; 445 NW2d 300 (1951)). In *Straight's Estate*, this Court put it this way: "There is no vested right in the running of the statute of limitations *unless* it has completely run and barred the action." 329 Mich at 325 (emphasis added). Plaintiff cites no contrary authority of this Court, only the *Bessmertnaja* decision on which the Court of Appeals erroneously relied in concluding this *LaFontaine* factor three was a wash. Appellant's Br 21.

For all these reasons, this Court should reject the invitation to apply MCL 600.5851b retroactively.

II. Plaintiff's interpretive and retroactivity arguments raise troubling public-policy problems that the Legislature should resolve.

Judicially rewriting MCL 600.5851b(1)(b) to reopen claims that are already time-barred would have substantial consequences for many public and private Michigan institutions. Doing so would create a massive liability tail for schools, colleges, universities, churches, youth houses, overnight camps, and civic organizations, just to name a few. (Regarding the magnitude of that liability tail, consider that some researchers estimate that "one in ten American students will experience sexual abuse or misconduct at the hands of a K-12 school employee." Abstract, Billie-Jo Grant & Walter Heinecke, *K-12 School Employee Sexual Abuse and Misconduct: An Examination of Policy Effectiveness*, 28 Journal of Child Sexual Abuse 200-221 (Feb 2019), abstract available at http://bit.ly/3Tfm7nR.) A plaintiff with a claim long since time-barred under Michigan law would be able to assert a claim under Plaintiff's theory if they merely "connect" any ongoing mental-health issues with a decades-old assault.

As the Legislature surely recognized in evaluating options for modifying the limitations period for abuse claims, such an environment would be ripe for fraud. If a plaintiff files a fraudulent claim a quarter-century after an incident of abuse took place, it is unlikely the defending organization will be able to identify any witnesses to mount a defense. Memories fade, witnesses die, and evidence disappears. There have been abuse allegations made in the last several years where witnesses are in memory-care facilities or deceased, and files are simply gone given the length of time. (There is no way to know ahead of time what files should have been kept when the accused had no history of abuse allegations made against him or her.) This is why public policy, enacted through statutes of limitation, encourages plaintiffs to diligently pursue their claims. And of course, under Plaintiff's theory, there's no reason why 25 years would be the outer edge for such a claim. So long as a plaintiff alleges a newly discovered "connection" between mental health and alleged abuse, the claim could be 50, 60, or even 70 years old or more.

Such a revolution in the limitations period would have a devastating impact on organizations that serve youth. Uncapped liability would likely lead to many bankruptcies. At a minimum, substantial resources would be devoted to defending against old claims in the face of great difficulty. And inevitably good names of deceased would be smeared when they have no ability to defend themselves.

There are a variety of ways to ensure that only actual victims are compensated. A statute that lifts the statute of limitations (assuming there are no constitutional barriers) could require that the alleged abuser or his employer acknowledge that the abuse actually took place. Or a statute could require that the alleged abuser have been criminally convicted for the abuse. Or a statute could be limited in time, similar to the two proposals the Legislature considered and rejected before

enacting MCL 600.5851b. At minimum, these approaches would eliminate the alleged cases that are most likely to lack witnesses. Alternatively, the statute could impose retroactive liability only on the abuser rather than the employer, acknowledging the principle that employers are generally not responsible for the criminal acts of their employee and may not have witnesses or records with which to defend themselves at the time an untimely claim is made.

All these options are policy choices for the Legislature, not legal questions for the Court. And if the Court throws open the door for time-barred claims by rewriting MCL 600.5851b or applying it retroactively, contrary to the Legislature's intent, it will have no ability to draw those difficult policy lines itself. Nor should it. If Michigan is going to allow plaintiffs to open alleged-abuse cases that were time-barred many decades ago, then it is the Legislature that should take that action, provided it acts in accord with due process, as outlined in the next section.

III. Plaintiff's interpretive and retroactivity arguments raise troubling due-process problems.

When construing statutes, this Court applies the "constitutional-doubt canon" when a particular interpretation raises significant doubts about a statute's constitutional validity. *Sole v Michigan Econ Dev Corp*, 509 Mich 406, 419; 983 NW2d 733 (2022). Specifically, "When the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* (cleaned up). Here, Plaintiff's interpretation of MCL 600.5851b(1)(b) raises serious due-process questions.

The Due Process Clause of the Fourteenth Amendment states that no one shall be "deprived of life, liberty, or property without due process of law." US Const, Am XIV. Under the Clause's original understanding, it meant that a "legislature could not retrospectively divest a person of vested rights that had been lawfully acquired under the rules in place at the time. Nathan S Chapman & Michael W McConnell, *Due Process As Separation of Powers*, 121 Yale LJ 1672, 1781-1782 (2012).

As this Court has held as a matter of Michigan law, see Section I.D, *supra*, a ripened limitations defense is a vested right beyond the Legislature's reach. *Russo*, 439 Mich at 594; *Straight's Estate*, 329 Mich at 325. Full stop. Construing MCL 600.5851b(1)(b) as abrogating that ripened defense would raise a serious question as to whether the statute violates defendants' due-process rights. See also, e.g., *Johnson v Killy*, 823 SW2d 883, 885 (Ark, 1992) ("we have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred") (collecting cases); *Wiley v Roof*, 641 So 2d 66, 68 (Fla, 1994) ("Once barred, the legislature cannot subsequently declare that 'we change our mind on this type of claim' and then resurrect it. Once an action is barred, a property right to be free from a claim has accrued."); *Doe A v Diocese of Dallas*, 917 NE2d 475, 484 (Ill, 2009) ("[O]nce a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action. That right cannot be taken away by the legislature[.] . . . These principles date back more than a century. They remain valid today.") (cleaned up); *Henry v SBA Shipyard, Inc*, 24 So 3d 956, 960-961 (La Ct App, 2009) (en banc) ("there are constitutional problems with retroactively taking away a defendant's right to have a case dismissed for abandonment once he has

acquired that right"); *Givens v Anchor Packing, Inc*, 466 NW2d 771, 774-775 (Neb, 1991) ("we have consistently stated that a completed bar is a' substantive, vested right which the Legislature cannot abrogate"); *Colony Hill Condo Ass'n v Colony Co*, 320 SE2d 273, 276 (NC Ct App, 1984) ("Once the 1963 statute of repose barred the plaintiffs' suit, however, a subsequent statute could not revive it. . . . Failure to file within that period gives the defendant a vested right not to be sued. Such a vested right cannot be impaired by the retroactive effect of a later statute.") (cleaned up); *Kelly v Marcantonio*, 678 A2d 873, 883 (RI, 1996) (due process "precludes legislation with retroactive features permitting revival of an already time-barred action that would impinge upon a defendant's vested and substantive rights"); *Doe v Crooks*, 613 SE2d 536, 538 (SC, 2005) (new statute of limitations "cannot operate to revive an action for which the limitations period has already expired. Such a result would violate the defendant's rights under the Due Process Clause"); *State of Minnesota ex rel Hove v Doese*, 501 NW2d 366, 370 (SD, 1993) ("Amendments extending the time of a filing of a lawsuit will not be applied retroactively to revive causes of action previously barred") (collecting cases); *Roark v Crabtree*, 893 P2d 1058, 1062-1063 (Utah, 1995) ("In refusing to allow the revival of time-barred claims through retroactive application of extended statutes of limitations, this court has chosen to follow the majority rule."); *Starnes v Cayouette*, 419 SE2d 669, 675 (Va, 1992) (holding that retroactive lifting of the limitations period for sexual abuse offends due process); 51 Am Jur 2d, Limitation of Actions § 44 (1970) ("[T]he great preponderance of authority favors the view that one who has become released from a demand by the operation of the statute of limitations is protected against its revival by a change in the limitations law."); but see *Campbell v Holt*, 115 US 620 (1885).

This Court should not call MCL 600.5851b(1)(b)'s validity into constitutional question by interpreting it to apply to claims that are already barred, contrary to the Legislature's intent. Doing so could have the effect of nullifying MCL 600.5851b altogether, even for the class of individuals the Legislature intended to help.

CONCLUSION

For the above reasons, and those articulated in the Diocese of Lansing's merits brief, the Michigan Catholic Conference respectfully requests that the Court affirm the Court of Appeals or dismiss the application for leave as improvidently granted.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief has 7,094 countable words (exclusive of the title page, table of contents, index of authorities, statement of the basis of jurisdiction, statement of the questions involved, signature block, listing of counsel, certificate of compliance and exhibits) and is prepared in 12-point Century Schoolbook typeface.

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