SUPREME COURT

STATE OF LOUISIANA

No. 2023-CC-01194

DOUGLAS BEINVENU, ET AL.
Plaintiff/Appellant,

versus

THE SOCIETY OF THE ROMAN CATHOLIC CHURCH
OF THE DIOCESE OF LAFAYETTE, ET AL.
Defendants/Appellees.

On Application for Rehearing from the Supreme Court of the State of Louisiana

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MOTION FOR LEAVE OF COURT TO FILE *AMICI CURIAE* BRIEF ON REHEARING ON BEHALF OF AMERICAN TORT REFORM ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, LOUISIANA LEGAL REFORM COALITION, AND LOUISIANA ASSOCIATION OF SELF-INSURED EMPLOYERS IN SUPPORT OF APPELLEES

Submitted By:

ROEDEL PARSONS BLACHE FONTANA PIONTEK & PISANO, A L.C.
Wayne J. Fontana, La. Bar No. 5648
Stephen G. Collura, La. Bar No. 36417
1555 Poydras Street, Suite 1700
New Orleans, Louisiana 70112
Telephone: (504) 566-1801
Facsimile: (504) 565-5626
Email: wfontana@roedelparsons.com
scollura@roedelparsons.com

Counsel for Prospective Amici Curiae

American Tort Reform Association ("ATRA"), American Property Casualty Insurance Association ("APCIA"), Louisiana Legal Reform Coalition ("LLRC"), and Louisiana Association of Self-Insured Employers ("LASIE") respectfully move for leave of Court to file an *amici curiae* brief in support of the position of Defendants/Appellees. In support of their motion, prospective *amici* represent as follows:

1.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases involving important liability issues.

2.

APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 65 percent of the U.S. property-casualty insurance market, including more than 70 percent of the liability insurance market in the State of Louisiana. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus curiae* briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law.

3.

LLRC is a coalition of businesses, corporations, and trade associations doing business in Louisiana with an interest in improving the efficiency and fairness of the civil justice system in the state. LLRC files amicus curiae briefs in cases involving liability issues that are important to its mission.

4.

LASIE was formed to protect and promote the right of businesses to self-insure, to represent the self-insurance industry on issues affecting workers' compensation, general liability and self-insurance, and to seek balanced treatment of employers and employees. LASIE represents the interests of Louisiana employers who are partially or wholly self-insured, either individually

or through several authorized group self-insurance funds. LASIE members employ a significant portion of Louisiana's workforce and the thousands of businesses represented encompass a broad spectrum of trade and diverse business fields.

5.

Prospective *amici* request leave to file their brief because "there are matters of fact or law that might otherwise escape the court's attention" and because they have "substantial legitimate interests that will likely be affected by the outcome of [the rehearing of] this case." La. Sup. Ct. r. VII, § 12. Prospective *amici* are a diverse collection of Louisiana, national, and international businesses, including self-insured employers and associations with a vested interest in this case because a reversal of this Court's decision would dramatically expand the power of the Legislature to revive prescribed causes of action. Such a ruling could permit the Legislature to revive any prescribed cause of action no matter how long ago it had prescribed and no matter whether a defendant has any remaining evidence or witnesses available for its defense. *Amici* submit that their brief will prove helpful in the Court's analysis.

PRAYER

Prospective *amici* pray that this Court grant their motion and permit the filing of their brief, which is conditionally filed with this motion.

* * *

Dated: May 20, 2024

Respectfully submitted,

/s/ Wayne J. Fontana

ROEDEL PARSONS BLACHE FONTANA PIONTEK & PISANO, A L.C.
Wayne J. Fontana, La. Bar No. 5648
Stephen G. Collura, La. Bar No. 36417
1555 Poydras Street, Suite 1700
New Orleans, Louisiana 70112
Telephone: (504) 566-1801
Facsimile: (504) 565-5626
Email: wfontana@roedelparsons.com
scollura@roedelparsons.com

Counsel for Prospective Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served by U.S. Mail and/or electronic means to the following persons on May 20, 2024:

Clerk of Court
Louisiana Third Circuit Court of Appeal
1000 Main Street
Lake Charles, LA 70615

Honorable Anthony J. Saleme, Jr.
16th Judicial District Court
Parish of St. Martin
415 S. Main Street
St. Martinville, LA 70582

Gil H. Dozier
Law Offices of Gil Dozier
625 Jefferson Street
Lafayette, LA 70501
gil@gildozierlaw.com

Chimene St. Amant
Assistant Attorney General
Office of Attorney General Liz Murrill
P.O. Box 94005
Baton Rouge, LA 70802
StAmantC@ag.louisiana.gov

Kevin R. Duck
Duck Law Firm, L.L.C.
5040 Ambassador Caffery Parkway
Abraham Center – 2nd Floor
Lafayette, LA 70508
krd@ducklawfirm.com

Soren Gisleson
Herman, Herman & Katz, L.L.C.
909 Poydras, Suite 1860
New Orleans, LA 70112
sgisleson@hhklawfirm.com

John H. Denenea, Jr.
Shearman-Denenea, L.L.C.
4240 Canal Street
New Orleans, LA 70119
jdenenea@midcitylaw.com

Cle Simon
Simon Law Offices
122 Representative Row
Lafayette, LA 70508
cle@simonlawoffices.com

Richard C. Trahant
2908 Hessmer Avenue
Metairie, LA 70002
trahant@trahantlawoffice.com

/s/ Wayne J. Fontana
WAYNE J. FONTANA

SUPREME COURT

STATE OF LOUISIANA

No. 2023-CC-01194

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Plaintiff/Appellant,

versus

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Defendants/Appellees.

ORDER

Considering the foregoing motion for leave of court to file an *amici curiae* brief for consideration on rehearing of the above captioned matter filed on behalf of American Tort Reform Association ("ATRA"), American Property Casualty Insurance Association ("APCIA"), Louisiana Legal Reform Coalition ("LLRC"), and Louisiana Association of Self-Insured Employers ("LASIE"),

IT IS ORDERED that the motion is **GRANTED** and that the *amici curiae* brief filed by ATRA, APCIA, LLRC, and LASIE be and is hereby deemed filed.

New Orleans, Louisiana, this _____ day of _____, 2024.

For the Court:

_____
JUSTICE, SUPREME COURT OF LOUISIANA

SUPREME COURT

STATE OF LOUISIANA

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***AMICI CURIAE* BRIEF ON REHEARING ON BEHALF OF AMERICAN TORT REFORM ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, LOUISIANA LEGAL REFORM COALITION, AND LOUISIANA ASSOCIATION OF SELF-INSURED EMPLOYERS IN SUPPORT OF APPELLEES**

Submitted By:

ROEDEL PARSONS BLACHE FONTANA PIONTEK & PISANO, A L.C.
Wayne J. Fontana, La. Bar No. 5648
Stephen G. Collura, La. Bar No. 36417
1555 Poydras Street, Suite 1700
New Orleans, Louisiana 70112
Telephone: (504) 566-1801
Facsimile: (504) 565-5626
Email: wfontana@roedelparsons.com
scollura@roedelparsons.com

Counsel for Prospective Amici Curiae

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INTEREST OF AMICI CURIAE

American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases involving important liability issues.

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Louisiana Legal Reform Coalition ("LLRC") is a coalition of businesses, corporations, and trade associations doing business in Louisiana with an interest in improving the efficiency and fairness of the civil justice system in the state. LLRC files amicus curiae briefs in cases involving liability issues that are important to its mission.

Louisiana Association of Self-Insured Employers ("LASIE") was formed to protect and promote the right of businesses to self-insure, to represent the self-insurance industry on issues affecting workers' compensation, general liability and self-insurance, and to seek balanced treatment of employers and employees. LASIE represents the interests of Louisiana employers who are partially or wholly self-insured, either individually or through several authorized group self-insurance funds. LASIE members employ a significant portion of Louisiana's workforce and the thousands of businesses represented encompass a broad spectrum of trade and diverse business fields.

SUMMARY OF THE ARGUMENT

Amici Curiae contend that the Court's original ruling on this matter following extensive briefing and oral argument was based in a sound application of the law. In 2021, the Louisiana

Legislature amended La. R.S. 9:2800.9 to include a revival provision that attempts to revive prescribed claims related to the sexual abuse of minors. In 2022, the Legislature amended La. R.S. § 9:2800.9 again to broaden the language of the revival window. *Amici* strongly condemn the sexual abuse of minors and do not condone, in any way, the abhorrent acts of any persons who have caused such abuse. The Court's original ruling and opinion properly interpreted Louisiana's longstanding jurisprudence that Louisiana's Constitution does not permit the revival of prescribed claims or the elimination of vested rights. It protected the doctrine of vested rights, limited the Legislature from reviving prescribed claims and thereby prevented far-reaching consequences for defendants, the Louisiana insurance industry, and Louisiana's legal system. This Court should affirm its prior decision holding that the revival provision is unconstitutional and a violation of the long-established vested right to a prescription defense.

ARGUMENT

I. This Court's Original Decision was Not Based upon Policy

In their application for rehearing, the plaintiffs list a series of assertions identifying purported errors in the Court's majority decision. The first assertion is that the majority improperly supplanted the legislature's exclusive policy making function over prescription with its own. Plaintiffs accuse the majority of only looking "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."

Such an assertion is nothing short of a gross misinterpretation of the majority opinion. The original opinion in no way discussed, examined or sought to establish policy. It may be the legislature's exclusive responsibility to enact laws but it is the exclusive responsibility of the Court to determine if those laws are constitutional. The Court did not choose between perpetrators and victims, it merely performed its correct function of painstakingly applying a constitutional examination to the legislative act in question. The implication of the Court steering its decision to achieve "a results oriented result" is both absurd and insulting. To the contrary, the majority concluded that it was "constrained to find the statutory enactment is contrary to the due process protections enshrined in our constitution and must yield to that supreme law." *See*, Slip Opinion, p. 1. By accusing the Court of making policy decisions, plaintiffs fail to recognize that the majority merely considered the statute, Louisiana's Constitution, and legions of jurisprudence when it

considered the constitutionality of the legislature's ability to take away the vested right of an accrued prescription defense by permitting claim revival of previously prescribed claims.

There is an additional assertion that the majority relied (solely or primarily) upon an 1885 dissent in *Campbell v. Holt*, 115 U.S. 620, 631 (1985). Nothing could be further from the truth. The majority opinion reviewed a litany of Louisiana cases dating back to the 1830s before arriving at its conclusion that the legislative enactment failed to pass constitutional muster. Plaintiffs have continued to dance around the separation of powers issue and spend a great deal of time discussing legislative intent and which arm of government has the ability to establish policy. It is not the legislature's intent that is in question here. That intent is evident. What was in question, at least until the majority's recent decision, was the legislature's authority to revive previously prescribed claims within the boundaries of due process constitutional protections. The majority's conclusion properly applied the separation of powers doctrine. Courts are not permitted to write law from the bench, impose their own will, change or modify legislative intent, or establish policy on their own. The legislature, conversely, even in its role of policy maker, is not permitted to violate constitutional rights by mere statute. The legislature is permitted to write any law they so desire as long as it is constitutional. The legislature can likewise change laws at any time, and they have attempted to do so in this case. What they cannot do, however, is violate constitutional rights without going through the proper constitutional amendment process.

Plaintiffs further assert the inappropriateness of the majority opinion's replacement of the legislature's unanimous decision to make policy over prescription with its own policy decision. Again, this Court did not decide policy or replace policy. It simply determined that legislation passed by the legislature was unconstitutional. Likewise, the Court did not second guess the legislature. The Court properly fulfilled its role of applying a constitutional test to a measure enacted by the legislative branch of government. The Court is prohibited from applying its own balancing test and weighing the interests of plaintiffs and defendants in determining whether the legislature may revive claims by eliminating vested rights.

II. This Court's Original Decision Correctly Interpreted the Louisiana Constitution as Prohibiting the Legislative Revival of Prescribed Claims.

As well intentioned as the Revival Act is, and as heinous the acts for which it seeks redress, constitutional principles stand as a safeguard against any legislation passed, unanimous or otherwise, when such legislation is violative of constitutionally protected rights. If the legislature,

because of policy considerations or otherwise, is permitted to discard the due process rights of civil defendants, could the legislature not then be permitted to pass additional legislation affecting other constitutional rights? Where would it end? Would the legislature be permitted to do the absurd like prohibit the worship of a particular religion, abolish women's right to vote, or return to Jim Crow laws? Obviously not. The legislature is prohibited from creating unconstitutional laws whether unanimously or by one vote majorities.

This Court has consistently ruled that the Due Process Clause of the Louisiana Constitution prohibits the retroactive revival of prescribed claims: "[S]tatutes of limitation, like any other procedural or remedial law, cannot consistently with state and federal constitutions apply retroactively to disturb a person of a pre-existing right." *Lott v. Haley*, 370 So. 2d 521, 523–24 (La. 1979). The right to plead prescription which has fully accrued as a defense is the type of vested right that may not be retroactively disturbed. *Elevating Boats, Inc. v. St. Bernard Par.*, 00-3518, p. 14 (La. 2001), 795 So. 2d 1153, 1164, *overruled in part on other grounds by Anthony Crane Rental, L.P. v. Fruge*, 03-0115 (La. 2003), 859 So. 2d 631 ("[A]fter the prescriptive period on an obligation has run, an obligor gains the *right* to plead prescription. In such a situation, that *right* to plead prescription has already accrued and application of a lengthened prescriptive period to revive the obligation, and effectively remove the right to plead prescription, would 'modify or suppress the effects of a right already acquired.' Thus, we have noted that the Legislature is without the authority to revive a prescribed claim.") (citation omitted) (emphasis original).

Even when the Legislature makes its intent clear to apply a law retroactively, the law cannot operate retroactively if doing so would violate vested rights. *Bourgeois v. A.P. Green Indus., Inc.*, 01-1528, p. 7 (La. 2001), 783 So. 2d 1251, 1257 ("[E]ven where the legislature has expressed its intent to give a law retroactive effect, that law may not be applied retroactively if it would impair contractual obligations or disturb vested rights.").[1] This Court's prior jurisprudence is consistent that under Louisiana's Constitution, the Legislature has no power to remove a defendant's vested right to plead prescription by reviving prescribed claims.

Arguments were made that prescription, unlike peremption, lacks "finality" because the running of prescription may be tolled by doctrines such as *contra non valentem*. It was further argued that because of this lack of "finality," the running of prescription (as opposed to

[1] *See Unwired Telecom Corp. v. Par. of Calcasieu*, 03-0732 (La. 2005), 903 So. 2d 392, 404; *Church Mut. Ins. Co. v. Dardar*, 13-2351 (La. 2014), 145 So. 3d 271, 279 n.10, 281; *Morial v. Smith & Wesson Corp.*, 00-1132 (La. 2001), 785 So. 2d 1, 10; *La. Health Serv. & Indem. Co. v. McNamara*, 561 So.2d 712, 718 (La. 1990); *Keith v. U.S. Fid. & Guar. Co.*, 96-2075 (La. 1997), 694 So. 2d 180, 183.

peremption) does not create any vested right. This theory has never been adopted by any Louisiana court and was not adopted by the original decision of this Court. No Louisiana court has held that prescription is too tentative or incomplete to give rise to a vested right once the prescriptive period has run.

An additional misinterpretation of an earlier decision is made by the plaintiff's characterization of *State v. All Property & Casualty Insurance Carriers*, 06-2030 (La. 8/25/06), 937 So.2d 313 (see Plaintiff's application for rehearing at p. 13). The plaintiff claims that the legislature has the authority to affect vested rights of any nature (plaintiff's application for rehearing at p. 13). The language of *All Property* suggests just the opposite. It states "[t]his court has held that 'even where the legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair actual rights or disturb vested rights.'" 937 So.2d 313, 322 (quoting *Morial*, 785 So. 2d 1, p. 10, and *Segura v. Frank* 937 So. 2d 1271, p. 9). The majority decision was and remains correct when it found that there was no jurisprudential basis for reversing "nearly a half of century's jurisprudence that recognizes the unique nature of vested rights associated with liberative prescription." Slip opinion at p. 14.

It is noted that the Attorney General ("AG") is charged with the duty to protect all legislative acts from constitutionality challenges. With all due respect to the AG's concern for judicial policy making and concern for maintaining traditional separation of powers, a reversal of the Court's majority position would upset the delicate balance of separation of powers immeasurably. The Supreme Court would be abdicating its duty to assess the constitutionality of statutes and would permit the legislature to obtain the unbridled power to pass unconstitutional statutes. Justice Griffin properly explains the aforementioned separation of powers in her concurrence on p. 1 of the Slip opinion: "I write separately to emphasize the necessity to adhere to the fundamental tenets of our Constitution which requires each branch of government to respect the powers bestowed. See La. Const. art. II, §§ 1 and 2. Our founding fathers brilliantly established three co-equal branches of government: the legislative, executive and judicial branch. These branches have separate and distinct powers, yet the branches must work together toward preventing the forming of any type of tyranny. The powers granted by the framers are not without limitation, and all actions must be examined within the constitutional safeguards provided by both the State and Federal Constitutions."

The Louisiana Supreme Court has repeatedly and specifically referred to *prescription* as a vested right that the Legislature cannot violate. *See, e.g.*, *Bouterie v. Crane*, 616 So.2d 657, 664 n.15 (La. 1993) ("LSA-C.C. art. 3496.1 was amended in 1992 to extend to three years the liberative *prescriptive* period against a person for abuse of a minor. *Bouterie* cannot benefit from the 1992 amendment because it could not operate retroactively to revive an already *prescribed* cause of action.") (emphasis added); *Elevating Boats, Inc. v. St. Bernard Parish*, 2000-3518 (La. 9/5/01), 795 So. 2d 1153, 1164 (La. 9/5/01) ("[T]he Legislature is without the authority to revive a *prescribed* claim.") (emphasis added).

It is certainly true that *before prescription has run*, it may be delayed or suspended on various grounds, including *contra non valentem*. But "[o]nce prescription occurs, it cannot be interrupted." *Rizer v. Am. Sur. and Fidelity Ins. Co.*, 95-1200 (La. 3/8/96), 669 So.2d 387, 391 (La. 1996) (quotation omitted); *see Geiger v. State ex rel. Dep't of Health and Hosp.*, 2001-2206 (La. 4/12/02), 815 So.2d 80, 83 ("[P]rescription cannot be suspended after it has run.").

In the *Lousteau* case cited by both parties, the Eastern District relied on Louisiana Supreme Court precedent in rejecting this same argument that Plaintiff makes, explaining that "[c]ivilian prescriptive periods act to extinguish the civil obligation to which they apply. Importantly, the patrimony of the obligor is increased when a claim prescribes."[2] While acknowledging that unaccrued prescription may be subject to *contra non valentem*, renunciation, interruption, or suspension, the Eastern District explained that "once liberative prescription accrues, prescription loses its inchoate nature because only the defendant can renounce prescription, and interruption and suspension no longer apply to a prescribed claim. *Contra non valentem* likewise does not apply to a prescribed claim because it only applies to delay the commencement of prescription, not the running of prescription. In other words, unaccrued prescription may be inchoate in nature but accrued prescription is not."[3]

III. This Court's Original Decision Correctly Identified the Doctrine of *Contra Non Valentem* as an Available Avenue of Redress

If prescription is interrupted or suspended, then by definition it has not accrued. Similarly, if *contra non valentem* applies, then prescription has not run and has not accrued. Moreover, renunciation does not change the finality of a prescription defense. Any right may be waived,

[2] *Lousteau v. Congregation of Holy Cross S. Province, Inc.*, CV 21-1457, 2022 WL 2065539, at *13 (E.D. La. June 8, 2022).
[3] *Id.*, 2022 WL 2065539 at *16.

renounced, or not asserted by a party, including other vested rights such as a cause of action (*e.g.*, a plaintiff may choose not to sue).

Arguments distinguishing peremption and prescription by arguing what makes peremption different, and therefore a vested right, misunderstand how prescription works and which obligations are being extinguished. While a natural obligation may continue to exist after prescription has accrued, such an obligation is not judicially enforceable[4] precisely because prescription extinguishes all legal obligations of the defendant. *La. Health Serv. and Indem. Co. v. McNamara*, 561 So. 2d 712, 718 (La. 1990) ("Unlike statutes of limitations at common law, which are merely procedural bars to the enforcement of obligations, civilian *prescriptive periods act to extinguish the civil obligation to which they apply*. The patrimony of the obligor is increased when a claim prescribes, and his *right to plead prescription in defense to a claim on the obligation is itself property that cannot be taken from him*.") (emphasis added). The Supreme Court's rule in *McNamara* is consistent with the Louisiana Civil Code, which refers to "civil obligations" being "extinguished by prescription." *See* La. C.C. art. 1762(1) ("When a civil obligation has been extinguished by prescription…"); *see also* La. C.C. art. 3453 ("Creditors and other persons having an interest…in the extinction of a claim or of a real right by prescription may plead prescription").

The Eastern District of Louisiana explained this clearly in *Lousteau*, stating: "When a defendant pleads liberative prescription in defense to a prescribed claim, a judge has no discretion to compel the defendant to perform a natural obligation even if the equities of the case would seem to demand it. Once liberative prescription accrues, the right to plead the defense is 'absolute, complete, unconditional, and independent of a contingency,' and it is therefore vested."[5]

In *Bouterie,* the Louisiana Supreme Court held that the doctrine of *contra non valentem* suspended prescription and reversed a lower court judgment granting an exception of prescription. *Bouterie*, 616 So.2d 657. The Court expressly explained, however, that the doctrine of *contra non valentem* was necessary to its decision because, while the applicable prescriptive period "was amended in 1992 to extend to three years the liberative prescriptive period against a person for abuse of a minor[,] Bouterie cannot benefit from the 1992 amendment because it could not operate retroactively to revive an already prescribed cause of action." *See id.* at n. 15.

[4] "A natural obligation is not enforceable by judicial action," and thus, no civil obligation remains after prescription. La. C.C. art. 1761.
[5] *Lousteau, supra*, 2022 WL 2065539 at *16.

(citing *Hall v. Hall,* 516 So.2d 119 (La. 1987)). In other words, had prescription actually accrued, the prescribed claim could not have been revived by the Legislature.

Moreover, there is no inconsistency in a ruling which finds that expired claims cannot be revived but also recognizes the doctrine of *contra non valentem*. As the majority recognized as well as Justice Crichton in his concurring opinion, prescription is subject to suspension under the doctrine of *contra non valentem*. (p. 7, 8, 14; Crichton at p. 2 – 3). Again, plaintiffs have missed the boat by not appreciating the differences between vested prescription rights and *contra non valentem*. Courts can still determine if *contra non valentem* applies and thereby rule as to whether the clock was stopped or never started, and prescription thereby was suspended. *Contra non valentem* does not take away a vested right as the right never vested due to the suspension of time to file. If *contra non valentem* applies, the prescription period has not expired and, therefore, there is no prescribed claim to revive. Stated differently, if any of the four *contra non valentem* factors are met in this or any other abuse case, there is no need for reliance on this unconstitutional revival statute.

Claiming that the majority opinion suggests that *contra non valentem* "divests" accrued prescription is yet another misstatement and/or misunderstanding of the majority opinion. The majority found no such thing as it proclaimed "likewise, *contra non valentem* does not apply to a prescribed claim because it only applies to suspend prescription." Slip opinion at 8.

Because doctrines such as *contra non valentem* are potentially applicable, determining the moment when prescription has run may not be a simple task in every case. However, prescription is not the only vested right whose precise bounds are sometimes difficult to determine, and such difficulty does not lead to the conclusion that these rights are non-existent. For comparison, this Court has long held that "[o]nce a party's cause of action accrues, it becomes a vested property right that may not constitutionally be divested." *Cole v. Celotex Corp.*, 599 So.2d 1058, 1963 (La. 1992). A cause of action does not accrue until injury or damage "has manifested itself with sufficient certainty." *See Cole v. Celotex Corp.*, 620 So.2d 1154, 1156 (La. 1993). In some cases, the "inability to pinpoint when injuries were sustained . . . renders determining the date on which a plaintiff's cause of action accrued a herculean task." *Cole*, 599 So.2d at 1066. Yet the Supreme Court's jurisprudence confirms that accrual of a cause of action creates a vested right even if the calculation of precise dates is sometimes difficult. Similarly, just because there may be difficulty

in determining whether prescription has finally accrued does not negate the status of an accrued prescription defense as a vested right.

IV. This Court's Original Decision Provided Predictability for the Availability and Affordability of Insurance in a State Presently Facing an Insurance Crisis

By its very nature, tort law deals with horrible situations—for example, accidents resulting in serious injuries that have a dramatic impact on a person's life, products that allegedly cause a person's death, and diseases that may have been contracted through exposure to toxic substances. Prescriptive periods exist in these situations because such limits are "fundamental to a well-ordered judicial system." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). "Prescription statutes find their justification in the desire to avoid unfair prejudice to the defendant by requiring him to defend a stale claim and to be put to a defense after memories have faded, witnesses are gone, and evidence has been lost; and to avoid prejudice to a defendant who was in ignorance of the asserted obligation." *Odessa House v. Goss*, 453 So. 2d 299, 302 (La. App. 3 Cir. 1984). If the courts are forced to cease enforcing the prescriptive periods applicable at the time a cause of action arose because the Legislature decides to revive prescribed causes of action, vested right defenses on which businesses and employers have relied for decades, and even centuries, will disappear. The result is that the right to fair civil trials will be drastically undermined.

The defense of prescription is essential to any person seeking a stable landscape for conducting business. Without the legal finality of knowing prescribed claims are barred, there can be no future security for businesses or their insurers. Prescriptive periods allow businesses and other organizations to accurately gauge their liability exposure and make financial, insurance-coverage, and document-retention decisions accordingly. If prior claims of any type—other torts, breaches of contract, federal claims that rely on state law for state prescriptive periods, and any other type of claim allowed under Louisiana law—from any time in the past can be revived in the future, then businesses, government entities, and their insurers will find it difficult to quantify and calculate risks over extended time periods. This is an uncertainty that will impact not only the availability and affordability of insurance but also the public at large as affected entities are forced to reduce or discontinue important services.

Businesses and other organizations would be forced to maintain all documents and keep track of all potentially relevant employees over the course of innumerable decades, a herculean if not impossible task. And this measure alone, even if successfully undertaken, would provide a

woefully inadequate guarantee of due process, since witnesses may be dead or otherwise unavailable, and any memories of decades-old events are likely unreliable. Nor is the time period of such revived claims limited by the lifespan of particular plaintiffs.

The loss of security and stability is particularly problematic with respect to insurance. By assuming and managing risk, insurers play an indispensable role in modern life. But a necessary precondition to "managing" risk is the ability to identify and quantify it to establish reserves sufficient to cover all potential exposure for all covered types of losses. Although access to historical data and sophisticated statistical models allows insurers to perform this complex task with ever-increasing accuracy and efficiency, the process still depends on a measure of predictability and stability. Insurers must be able to locate a point at which historically distant events no longer pose a current and future risk—where "the past" is definitively and conclusively past.

Amici also call this Court's attention to the very real impact that allowing prescribed claims to be revived would have on the very ability to insure. Both individuals and businesses need insurance coverage to live their lives and function without fear of bankruptcy or dissolution. In the insurance world, the one factor that must exist for insurance to be written is some degree of predictability. If the Legislature is permitted to revive previously prescribed claims, that predictability disappears. With that loss of predictability, the ability and willingness of insurers to underwrite, assess risk, and calculate necessary premium could be compromised. Allowing prescription rules to be changed in the middle of the game (actually, after the game is over) creates the clear and present danger of jeopardizing insurance availability. Allowing previously prescribed claims of any sort to be revived creates the potential to seriously upset the insurance market, adversely affect the availability and affordability of insurance, and endanger the ability of Louisiana citizens and businesses to affordably insure or perhaps even expensively insure themselves.

Permitting the revival of time-barred claims would also place Louisiana outside the legal mainstream with respect to due-process protections. The "great preponderance" of state appellate courts, like this Court, have long rejected legislation purporting to revive time-barred claims. *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996). These courts often reason that doing so violates due process. *See, e.g.*, *Mitchell v. Roberts*, 469 P.3d 901, 903 (Utah 2020).

As several state high courts have recognized, the majority rule among jurisdictions continues to be that a legislature cannot adopt retroactive laws that revive a time-barred claim without violating defendants' due process rights.[6] These states generally apply a vested-rights analysis consistent with Louisiana law, whether they do so through applying due process safeguards, a remedies clause, a specific state-constitutional provision prohibiting retroactive legislation, or another state-constitutional provision.[7] Courts have also applied these constitutional principles to reject the legislative revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others. Additionally, recent sister state appellate courts, like the original majority opinion, have reached the conclusion that a revival of prescribed actions is not permitted. See, *Aurora Public Schools v. Saupe*, 531 P.3d 1036 (Colo. 2023), *Thompson v. Killary*, No. 2022-SC-0308, 2024 WL 646733 (Ky. Feb 15, 2024), *Mitchell v. Roberts*, 469 P.3d 901 (Utah 2020).

If this Court reverses its original opinion to allow the Legislature to revive sexual abuse claims, the chance that the Legislature will attempt to revive other tort claims will increase dramatically. In other states, legislative revival attempts continue to expand in regard to other torts. Two recent laws enacted in New York purport to revive various environmental claims and claims for sexual abuse of adults, not just minors. See S. 8763A (N.Y. 2022); see also S. 66 (N.Y. 2022). In 2021, Vermont enacted a law to revive expired claims related to physical abuse of minors, not just sexual abuse. See S. 99 (Vt. 2021). A new California law revives claims against

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[6] *See Johnson v. Garlock, Inc.*, 682 So. 2d 25, 28 (Ala. 1996) ("The weight of American authority holds that the bar does create a vested right in the defense."); *Johnson v. Lilly*, 823 S.W. 2d 883, 885 (Ark. 1992) ("[W]e 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."); *Frideres v. Schiltz*, 540 N.W. 2d 261, 266–67 (Iowa 1995) ("[I]n the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute of limitations had run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action."); *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816–17 (Me. 1980) ("The authorities from other jurisdictions are generally in accord with our conclusion" that there is a substantive right in a statute of limitations after the prescribed time has completely run and barred the action); *Doe v. Roman Catholic Diocese*, 862 S.W. 2d 338, 341–42 (Mo. 1993) (recognizing constitutional prohibition of legislative revival of a time-barred claim "appears to be the majority view among jurisdictions with constitutional provisions"); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996) (recognizing the "great preponderance of state appellate courts" reject claims revival laws under due process analysis) (cleaned up); *State of Minn. ex rel. Hove v. Doese*, 501 N.W. 2d 366, 369–71 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and this violates due process.").

[7] *See, e.g.*, *Garlock*, 682 So. 2d at 27–28; *Lilly*, 823 S.W.2d at 885; *Jefferson Cty. Dep't of Social Servs. v. D.A.G.*, 607 P.2d 1004 (Colo. 1980); *Wiley v. Roof*, 641 So.2d 66, 68–69 (Fla. 1994); *Doe A. v. Diocese of Dallas*, 917 N.E. 2d 475, 484–85 (Ill. 2009); *Connell v. Welty*, 725 N.E. 2d 502, 506 (Ind. 2000); *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W. 3d 850, 854–55 (Ky. 2003); *Dobson*, 415 A.2d at 816–17; *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So. 2d 337, 340 (Miss. 2004); *Doe*, 862 S.W. 2d at 341–42; *Givens v. Anchor Packing, Inc.*, 466 N.W. 2d 771, 773–75 (Neb. 1991); *Gould v. Concord Hosp.*, 493 A.2d 1193, 1195–96 (N.H. 1985); *Williams Cos. v. Dunkelgod*, 295 P.3d 1107, 1112 (Okla. 2012); *Doe v. Crooks*, 613 S.E. 2d 536, 538 (S.C. 2005); *Doese*, 501 N.W. 2d at 369–71; *Ford Motor Co. v. Moulton*, 511 S.W. 2d 690, 696–97 (Tenn. 1974); *In re A.D.*, 73 S.W. 3d 244, 248 (Tex. 2002); *Roark v. Crabtree*, 893 P.2d 1058, 1062–63 (Utah 1995); *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 786 N.W. 2d 385, 399–402 (Wis. 2010).

certain physicians for the broad category of "inappropriate contact, communication, or activity of a sexual nature." See A.B. 2777 (Cal. 2022). Maine has considered a bill to retroactively revive products-liability claims, while Oregon has considered a bill to revive expired asbestos claims. See LD 250 (Maine 2019); S.B. 623 (Or. 2011).

Finally, the *amici* submit one last commentary on the importance of predictability and the ability for individuals and institutions to self-insure or insure themselves. Louisiana has an availability and affordability problem with insurance. Both plaintiffs and defendants alike need the ability of individuals and businesses to insure. Without insurance, most victims' claims would have no redress nor compensation. Insurers cannot be forced to write coverage in our state. Taking away a defendant's constitutional right of due process by reviving ancient claims and finding this to be a permissible legislative option would constitute yet another blow against the stability of Louisiana's insurance marketplace. The last thing either plaintiffs or defendants want to happen is for us to kill the goose that lays the golden eggs.

Statutes of limitations and prescriptive periods are essential to a fair and well-ordered civil justice system because some period is needed to balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts from stale claims. Prescriptive periods allow judges and juries to evaluate an individual or business's liability when the best evidence is available. This is especially important when heart-wrenching allegations are involved, as they are here. Louisiana's existing constitutional structure, as affirmed by the majority's recent opinion, provides for and protects this well-ordered system.

It is never easy to tell injured persons that their time to sue has ended. This is why separation of powers and due process prohibits legislatures from acting retrospectively, so that society can appropriately order itself and know the law. Allowing revival of prescribed claims in this case would inevitably lead to future calls to revive claims in other areas of the law, first in those related to physical or economic injuries, but later in myriad other claims that cannot be enumerated here. As a result, individuals and businesses in Louisiana will face the risk of indefinite liability, further exacerbated by the difficulty of judges and juries to accurately evaluate such liability given the loss of witnesses and records, faded memories, and changes in societal expectations.

CONCLUSION

This Court original decision and opinion recognized that altering Louisiana's constitutional analysis to permit the revival of prescribed claims would significantly undermine due process and the finality of prescriptive periods, not just in the context of this case, but in any type of civil suit. The ruling agreed that the determinability of liability in any type of civil action for individuals and organizations to properly evaluate liability risks is paramount for a fair and equitable system of justice. As the district court and this Court correctly held, the jurisprudence cited above clearly prohibits the Legislature from reviving causes of action, no matter how express its intent.

Dated: May 20, 2024

Respectfully submitted,

/s/ Wayne J. Fontana

ROEDEL PARSONS BLACHE FONTANA PIONTEK & PISANO, A L.C.
Wayne J. Fontana, La. Bar No. 5648
Stephen G. Collura, La. Bar No. 36417
1555 Poydras Street, Suite 1700
New Orleans, Louisiana 70112
Telephone: (504) 566-1801
Facsimile: (504) 565-5626
Email: wfontana@roedelparsons.com
scollura@roedelparsons.com
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served by U.S. Mail and/or electronic means to the following persons on May 20, 2024:

Clerk of Court
Louisiana Third Circuit Court of Appeal
1000 Main Street
Lake Charles, LA 70615

Honorable Anthony J. Saleme, Jr.
16th Judicial District Court
Parish of St. Martin
415 S. Main Street
St. Martinville, LA 70582

Gil H. Dozier
Law Offices of Gil Dozier
625 Jefferson Street
Lafayette, LA 70501
gil@gildozierlaw.com

Chimene St. Amant
Assistant Attorney General
Office of Attorney General Liz Murrill
P.O. Box 94005
Baton Rouge, LA 70802
StAmantC@ag.louisiana.gov

Kevin R. Duck
Duck Law Firm, L.L.C.
5040 Ambassador Caffery Parkway
Abraham Center – 2nd Floor
Lafayette, LA 70508
krd@ducklawfirm.com

Soren Gisleson
Herman, Herman & Katz, L.L.C.
909 Poydras, Suite 1860
New Orleans, LA 70112
sgisleson@hhklawfirm.com

John H. Denenea, Jr.
Shearman-Denenea, L.L.C.
4240 Canal Street
New Orleans, LA 70119
jdenenea@midcitylaw.com

Cle Simon
Simon Law Offices
122 Representative Row
Lafayette, LA 70508
cle@simonlawoffices.com

Richard C. Trahant
2908 Hessmer Avenue
Metairie, LA 70002
trahant@trahantlawoffice.com

/s/ Wayne J. Fontana
WAYNE J. FONTANA