COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11844
APPEALS COURT No. 2012-P-1483

ROSANNE SLINEY,
Plaintiff-Appellant

v.

DOMENIC A. PREVITE, JR.,
Defendant-Appellee

ON APPEAL FROM DECISIONS OF THE
APPEALS COURT

Brief Of *Amici Curiae* National Center for Victims of Crime, Massachusetts Citizens for Children, BishopAccountability.org, Survivors Network of those Abused by Priests, Child Justice, Foundation to Abolish Child Sex Abuse, Horace Mann Action Coalition, and Male Survivor

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Dated: September 21, 2015

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STATEMENT OF INTEREST

The National Center for Victims of Crime ("NCVC"), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, NCVC, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. NCVC is particularly interested in this brief because of its commitment to victims of sexual assault and child abuse.

Massachusetts Citizens for Children ("MassKids") is the nation's oldest statewide, citizen-based child advocacy organization. Its mission since 1959 has been to speak out on behalf of the state's most vulnerable children. From its work in the 1960s to remove children from adult psychiatric facilities, its exposé in the 1970s on issues of teen depression and suicide and the problem of drug-addicted newborns, its program in the 1980s to prevent HIV among homeless and

runaway youth, to its more recent work to establish benchmarks to reduce child poverty, prevent infant death and disability from Shaken Baby Syndrome and prevent child sexual abuse, MassKids has been a recognized leader and effective advocate for children. In 2002 with a 5-year grant from the U.S. Centers for Disease Control and Prevention, MassKids developed the Enough Abuse Campaign, a community mobilization and citizen education initiative that is being implemented currently in six states to prevent child sexual abuse. MassKids' interest in this brief is to advocate for the accountability of perpetrators of child sexual abuse.

BishopAccountability.org is a § 501(c)(3) corporation that maintains a library in Waltham, MA, and a large online archive of documents, reports, and newspaper articles documenting the sexual abuse of children by persons employed by religious institutions, and the mismanagement by religious leaders of abuse allegations. Its collection of newspaper articles covers sexual abuse in all religions and denominations worldwide. Its document and report collections focus on sexual abuse and

mismanagement by employees of Roman Catholic dioceses in the United States, Europe, and Australia, but the institutional problems revealed by those documents and reports are common to all religious organizations and to corporations and institutions generally. The document collection includes over 30,000 pages of Boston Archdiocesan files, which extensively document the challenges that survivors of abuse face in coming forward. BishopAccountability.org also maintains an extensive database of Catholic priests, brothers, nuns, deacons, and seminarians who have been accused of abuse. Its collection offers ample documentation, for Massachusetts and elsewhere, of the barriers that victims of child sexual abuse encounter in coming forward and seeking justice in the courts, and the growing awareness in recent years that institutions have covered up the sexual abuse of children by their personnel and thereby created risk for children in the future.

The Survivors Network of those Abused by Priests ("SNAP") is a not-for-profit organization providing support, healing and information to survivors of abuse and their loved-ones. SNAP is the oldest and largest

self-help support group run by and for survivors, with over 9,000 members in 65 cities in the United States. The mission of the organization is to promote healing for the wounded and protection for the vulnerable. Services are provided through support groups and peer counseling and are provided in person, on the telephone, by regular mail and email. SNAP also hosts conferences and gatherings and provides education and advocacy regarding clergy sexual abuse and related topics. SNAP members seek to ensure the protection of children today as well as future generations by working to change structures within the churches and society that have failed to stop and prevent clergy abuse. SNAP has an interest in this case as many perpetrators of crimes against its members still pose a risk to children, and the ultimate ruling in this case may impact the ability to expose those perpetrators.

Child Justice is a national organization that advocates for the safety, dignity and self-hood of abused, neglected, and at-risk children. Child Justice's mission is to protect and serve the rights of children in cases in which child sexual, physical

abuse, or domestic violence is present. Child Justice works with local, state and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children by providing public policy recommendations, community service referrals, court watching services, research and education. Child Justice also serves important public interests by securing pro bono representation for protective parents in financial distress and by seeking appropriate judicial solutions to the threats facing abused, neglected and at-risk children. As adults, these individuals deserve the right to pursue legal redress, damages and accountability from the persons who abused and violated them.

The Foundation to Abolish Child Sex Abuse ("FACSA") is an I.R.C. § 501(c)(4) nonprofit that has a mission to influence state and federal governments, courts, the criminal justice system and the media to (1) protect children from sexual abuse; (2) hold those who sexually abuse children accountable; (3) hold institutions that condone and enable the sexual abuse of children accountable; and (4) help child sex abuse victims find justice. FACSA's interests in this case

are directly correlated with its mission to eliminate barriers to justice for child sex abuse victims who have been harmed by individuals and religious organizations.

The Horace Mann Action Coalition ("HMAC") is a non-profit alumni organization incorporated in response to the decades-long sexual abuse inflicted by multiple teachers on students at the Horace Mann School. HMAC's mission is to support survivors with referral care, address the cover-up and culture, and provide a comprehensive report to prevent sexual abuse throughout the broader community. HMAC's interest is the retroactive provision of this case since most survivors don’t come forward until adulthood. Granting access to justice for recent survivors in the future while denying it to current adult survivors is unequal protection that leaves children at risk to known abusers and rewards institutions which misled and intimidated those who made timely reports. Allowing survivors retroactive access to civil justice corrects the cover-up incentive that short statutes of limitations have provided to institutions.

MaleSurvivor is a 501(c)(3) non-profit charitable organization that provides critical resources to male survivors of sexual trauma and all their partners in recovery by building communities of hope, healing, & support. A significant proportion of the survivors who have come through our organization experienced sexual abuse at the hands of religious leaders, and many of these have faced significant obstacles to justice and healing as a result of statutes of limitation that shield perpetrators from criminal and civil accountability. MaleSurvivor's interest in this case is to ensure that our laws make it easier to hold organizations and individuals accountable for the abuse of children.

ARGUMENT

The Defendant-Appellee in this case has challenged the applicability of Massachusetts retroactive legislation,[1] Mass. Gen. Laws ch. 260, § 4C

[1] Before Massachusetts enacted retroactive legislation, such legislation was enacted to address child sex abuse in California, Connecticut, Delaware, Hawai'i, Minnesota, Montana, Oregon, and South Dakota. See, Del. Code Ann. 10 § 8145 (Del. 2007), Cal. Code Civ. Proc. § 340.1(c)(Cal. 2003), Conn. Gen. Stat. § 52-577d (Conn. 2002), Haw. Rev. Stat. § 657-1.8 (Haw. 2012, 2014), Minnesota Child Victims Act, 2012 Minn. Stat. § 541.073 (formerly, S.B. 534 & H.B. 681)

and § 4C ½ (2014), which changed one procedural element of the civil law governing child sex abuse: the timing of bringing a civil lawsuit. It did not alter the timing of criminal prosecutions, the burdens on the parties, or the penalties for defendants who commit or create the conditions for the sexual abuse of children.[2] The plaintiff still bears the initial

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(Minn. 2013), Mont. Code Ann. 27-2-216(1)(b)(1989), Or. Rev. Stat. § 12.117 (Or. 1991), S.D. Cod. Laws § 26-10-25 (S.D. 1991).

Windows also have been enacted to address mass torts in Delaware, New York, Minnesota, and California. Mergenthaler v. Asbestos Corp. of America, Inc., 534 A.2d 272, 276-277 (Del. Super. Ct. 1987) (distinguished by Nationwide General Ins. Co. v. Hertz Corp., No. 05C-12-008-FSS, 2006 WL 2673057 (Del. Super. Ct.2006)); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1079-80 (N.Y. 1989); In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 811-812 (E.D.N.Y. 1984); Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990); 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 633 (Cal. Ct. App. 2001).

[2] The constitutionality of civil retroactive legislation for victims of child sexual abuse has been upheld as a proper exercise of legislative power repeatedly. See, Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. at 439-40; John Roe No. 8, et. al v. Ram, No. 14-00027 LEK-RLP, slip op. (D. Haw. Aug, 29, 2014) (order denying defendant's motion to dismiss), available at http://sol-reform.com/News/wp-content/uploads/2014-/08/order-denying-motion-to-dismiss.pdf; Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247 (Del. 2011); Deutsch v. Masonic Homes of California, Inc., 80 Cal. Rptr. 3d 368 (Cal. Ct. App. 2008), Melanie H. v. Defendant Doe, No. 04-1596-WQH-(WMc), slip op.(S.D. Cal. Dec. 20, 2005);

burden of proof, and if he or she lacks evidence, the case does not go forward.

I. MASS. GEN. LAWS CH. 260, §§ 4C & 4C ½ EXPRESSLY APPLY TO SEXUAL ABUSE RELATED CLAIMS THAT OCCURRED PRIOR TO THEIR ENACTMENT.

A. The Plain Language of Sections 4C and 4C ½ Requires Retroactive Application.

The plain language of a statute that is a clear statement of legislative intent controls its interpretation. Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 390(2005).[3] In Massachusetts, "where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008) (citing Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 839 (1986)).

Stratmeyer v. Stratmeyer, 567 N.W.2d 220, 223-24 (S.D. 1997); Cosgriffe, 864 P.2d 776; A.K.H. v. R.C.T., 822 P.2d 135 (Or. 1992). See also, Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 414, 418-420 (Minn. 2002); K.E. v. Hoffman, 452 N.W.2d 509, 512-14 (Minn. Ct. App. 1990).

[3] Federal courts applying Massachusetts law have placed even greater weight on plain meaning. See United States v. Commonwealth Energy Sys. & Subsidiary Cos., 235 F.3d 11, 15 (1st Cir. 2000) ("We look first to whether the statutory language is plain and unambiguous. In the absence of ambiguity, we generally do not look beyond the statutory language. However, when ambiguity exists, we may seek evidence of congressional intent in the legislative history.") (internal citations omitted).

> [T]he general rule of statutory construction that a statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated."

Kobrin v. Gastfriend, 443 Mass. 327, 331 (Mass. 2005), (quoting Triplett v. Oxford, 439 Mass. 720, 723(Mass. 2003) (quoting Bd. of Educ. v. Assessor of Worcester, 368 Mass. 511, 513 (1975))). Sections 4C and 4C½ explicitly require application to acts that occurred prior to enactment, and the legislature expressly intended them to do so.

Section 4C applies to the damages caused by a myriad of crimes relating to the sexual abuse of children, and far more than just assault and battery.[4] It applies to damage claims arising out of the

[4] See, Mass. Gen. Laws ch. 260, § 4C (2014).("For purposes of this section, 'sexual abuse' shall mean the commission of any act against a minor as set forth in section thirteen B, 13B½, 13B¾, thirteen H, twenty–two, twenty–two A, 22B, 22C, twenty–three, 23A, 23B, twenty–four, 24B or subsection (b) of section 50 of chapter two hundred and sixty–five or section two, three, four, four A, four B, seven, eight, thirteen, seventeen, twenty–nine A, thirty–four, thirty–five or thirty–five A of chapter two hundred and seventy–two.")

following crimes: Indecent Assault and Battery, Rape of a Child, Rape and Abuse of Child, Assault with Intent to Commit Rape, Assault with Intent to Commit Rape, Human Trafficking/Sexual Servitude, Abduction of Persons for the Purpose of Prostitution or Unlawful Sexual Intercourse, Administering of Drugs (for such purposes), Enticing to Unlawful Intercourse, Promoting Child Prostitution, Deriving Support from Child Prostitution, Deriving Support from an Inmate of a House of Prostitution, Soliciting, Detaining a Person in House of Prostitution, Child Pornography, and Obscene Acts or Art involving minors.[5] Section 4C

[5] See, Mass. Gen. Laws, ch. 265, § 13B. Indecent Assault and Battery on Child Under Fourteen, § 13B½. Indecent Assault and Battery on Child Under Fourteen – Aggravating Factors, § 13B¾. Indecent Assault and Battery on Child Under Fourteen – Previous Youthful Offender, § 13H. Indecent Assault and Battery on Person Over Fourteen, § 22. Rape, § 22A. Rape of Child, § 22B. Rape of Child – Aggravating Factors, § 22C. Rape of Child – Previous Youthful Offender, § 23. Rape and Abuse of Child, § 23A. Rape and Abuse of Child – Aggravating Factors, § 23B. Rape and Abuse of Child – Previous Youthful Offender, § 24. Assault with Intent to Commit Rape, § 24B. Assault on Child under Sixteen with Intent to Commit Rape, § 50(b). Human Trafficking – Sexual Servitude (of a person under age 18); see also, Mass. Gen. Laws ch. 272, § 2. Abduction of Persons for the Purpose of Prostitution or Unlawful Sexual Intercourse, § 3. Administering Drug, § 4. Enticing to Unlawful Intercourse, § 4A. Promoting Child Prostitution; Mandatory Sentence, § 4B. Deriving Support from Child Prostitution; Mandatory Sentence,

applies retroactively due to the following language: "[S]ections 4 to 6, inclusive, of this act shall apply regardless of when any such action or claim shall have accrued or been filed and regardless of whether it may have lapsed or otherwise be barred by time under the law of the commonwealth." 2014 Mass. Acts Ch. 145 §7, 2013 Mass. H.B. 4126 §8.[6]

The newly created section 4C ½, which applies to third-parties for "negligent supervision" or other situations where the third-party "defendant's conduct caused or contributed to the sexual abuse of a minor by another person," also is intended by the Act's plain language to be applied to past acts: "[c]lause (ii) of said section 4C ½ of said chapter 260...of this act shall apply regardless of when any such action or claim shall have accrued or been filed and

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§ 7. Deriving Support from an Inmate of a House of Prostitution, § 8. Soliciting, § 13. Detaining a Person in House of Prostitution, § 17. Incest, § 29A. Child Pornography – Enticement, Solicitation, Employment of Children, § 34. Obscene Material/Acts – Sodomy and Buggery, § 35. Obscene Material/Acts – Unnatural and Lascivious Acts, § 35A. Obscene Material/Acts – Acts with Child under Sixteen.

[6] "Sections 4-6 inclusive" of the Act referred to in Section 8 reflect the new language added to Section 4C. See, 2014 Mass. Acts Ch. 145, 2013 Mass. H.B. 4126, §§ 4-6, now known as, Mass. Gen. Laws ch. 260, § 4C (2014).

regardless of whether it may have lapsed or otherwise be barred by time under the law of the commonwealth." 2014 Mass. Acts Ch. 145 §7, 2013 Mass. H.B. 4126 §8.[7]

The retroactive applicability of §§ 4C and 4C ½ is expressly provided by the language of Section 7 of 2014 Mass. Acts Ch. 145:

> Clause (ii) of said section 4C ½ of said chapter 260 and sections 4 to 6, inclusive, of this act ***shall apply regardless of when any such action or claim shall have accrued or been filed and regardless of whether it may have lapsed or otherwise be barred by time*** under the law of the commonwealth.

2014 Mass. Acts Ch. 145 §7 (emphasis added).[8]

The General Assembly's grammatical choice to use two distinct phrases in the operative retroactive section — "have accrued or been filed" and "have lapsed or otherwise be barred by time"— both times separated by the word, "or," shows legislative intent to include cases which had merely been dismissed for "time" without being heard on the merits as well. Id.

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[7] Mass. Gen. Laws ch. 260, § 4C ½ (ii) ("7 years of the time the victim discovered or reasonably should have discovered that an emotional or psychological injury or condition was caused by such act".)

[8] Sections 4-6 of the 2013 Mass. H.B. 4126 referred to in Section 8 reflect the new language added to Section 4C. Thus, Section 4C is fully retroactive in application by clear legislative intent. See, 2014 Mass. Acts Ch. 145, 2013 Mass. H.B. 4126.

In grammatical statutory construction and interpretation, the use of “or” is disjunctive and indicates that the terms separated by it have separate meaning and separate significance. Garcia v. United States, 469 U.S. 70, 73, 105 S. Ct. 479, 481(1984). See also, United States v. Woods, 134 S. Ct. 557, 567, 187 L. Ed. 2d 472, 484 (2013) (noting as to the word “or” that “its ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings”); Reiter v. Sonotone Corp., 442 U.S. 330, 338, 99 S. Ct. 2326, 2331 (1979) (noting that the Court cannot “ignore the disjunctive or" in interpretation of a statute); FCC v. Pacifica Found., 438 U.S. 726, 739-740, 98 S. Ct. 3026, 3035 (1978) (“The words...are written in the disjunctive, implying that each has a separate meaning). See also, Attanasio v. Division of Compliance, Office of Health Maintenance Organizations etc., 728 F. Supp. 812, 816 (D. Mass. 1990) (“The admitted rules of statutory construction declare that a Legislature is presumed to have used no superfluous words.") Thus the General Assembly's distinct use of both “accrued” and “been filed” — each of which has a distinct ordinary meaning

— in the retroactive applicability language establishes that those terms are to be interpreted to have separate meanings and give separate significant effects to the reach of the retroactivity clause. "Accrued" merely refers to when the statute of limitations begins to run; it is a fixed date in time— in Massachusetts, usually the date which causal discovery of the abuse is factually held to have occurred. Ross v. Garabedian, 433 Mass. 360 (Mass. 2001); Phinney v. Morgan, 39 Mass. App. Ct. 202 (Mass. App. Ct. 1995), review denied, 421 Mass. 1104 (Mass. 1995). The filing of an action is a distinct event, requiring the service and filing of a complaint, and can occur years after accrual. Thus, under the retroactivity clause of 2014 Mass. Ch. 145, the fact that an action had been filed in court, or that proceedings had started, or even that a court had issued a procedural ruling, does not exclude a survivor from access to justice.

Also telling as to the legislative intent regarding the case at bar is the use of both "have lapsed" and "otherwise be barred" by the legislature. By choosing to include both phrases in the scope of

retroactivity language, the General Assembly was stating its intent to include in Section 4C's retroactive ambit both those survivors who had never acted on their "lapsed" cause of action and those survivors by whom cases had been filed, but were merely "barred by time." "Lapsed" refers merely to the running and expiration of the previously applicable statute of limitations. "Otherwise barred by time," since made distinct by an "or" from mere lapsing, appears to apply directly to survivors in Ms. Sliney's position, i.e. those who filed claims that were never heard on the merits due to the unfairly short statute of limitations the legislature was expressly trying to correct via enactment of the 2014 revival law. That victims in Ms. Sliney's situation were considered by the legislature in enacting Section 4C and 4C ½ is apparent by the plain language of the law. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254, 112 S.Ct. 1146 (1992); Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502 (1980).

B. Even If The Text Were Ambiguous, Reference to the Whole Act Clarifies Legislative Intent and Confirms the Intended Retroactive Effect

Even if the language of the retroactive applicability text were ambiguous, its meaning can be clarified by reference to the whole Act. United States v. Fisher, 6 U.S. (2 Cranch) 358, 2 L. Ed. 304 (1805). The goal of the whole act rule is coherence:

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.

Kokoszka v. Belford, 417 U.S. 642, 650, 94 S. Ct. 2431, 2436 (1974) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 15 L. Ed. 595 (1857)). See, Pielech v. Massasoit Greyhound, Inc., 47 Mass. App. Ct. 322, 326 (Mass. App. Ct. 1999), review denied, 430 Mass. 1108 (1999) ("Even if we thought there to be ambiguity in the retroactivity provision, and resorted to attempting to ascertain the intent of the Legislature, we would again arrive at retroactive application to this case. That intent is ascertained from all [the words of the statute]... considered in connection with

the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.") (internal citations omitted).

The emergency preamble included by the legislature also clarifies the desired effect and intent of Sections 4C and 4C ½, as enacted. "The emergency preamble of the Act specifically stated that its purpose was to increase forthwith the statute of limitations in civil child sexual abuse cases." Embry v. President & Fellows of Harvard College, No. MICV2013-01338, 2014 Mass. Super. LEXIS 206, *10, 32 Mass. L. Rep. 430 (Mass. Super. Ct. 2014)(internal citation omitted). See also, Sutton v. United Air Lines, 527 U.S. 471, 494-495, 119 S. Ct. 2139, 2152 (1999)(Ginsburg, J. concurring).

Finally, to read the operative portion of the statute as to collapse both "accrued or been filed" and "lapsed or otherwise barred by time" into the same meaning would be to make the legislature's words redundant. Courts are obliged to give effect to every word chosen by the legislature, wherever possible.

Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 2331 (1979) (citing United States v. Menasche, 348 U.S. 528, 538-539, 75 S. Ct. 513, 519-520 (1955)); Rutanen v. Baylis (In re Baylis), 313 F.3d 9, 20 (1st Cir. 2002) (quoting Reiter, 442 U.S. at 339)("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); Attanasio v. Div. of Compliance, Office of Health Maintenance Orgs. etc., 728 F. Supp. 812, 816 (D. Mass. 1990) ("This Court is obliged...to give effect, if possible, to every word Congress used.")(internal citations omitted). Thus, statutory constructions which leave without effect any part of the legislature's chosen language should be rejected. Recovery Group, Inc. v. Comm'r, 652 F.3d 122, 127 (1st Cir. 2011) (rejecting interpretation which "makes a portion of the statutory language seem redundant, and thus fails to give effect to the entire statute") (internal citations omitted); Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 504, 65 S. Ct. 335, 342 (1945); see also, Kungys. v. United States, 485 U.S. 759, 778, 108 S. Ct. 1537, 1550 (1988) (noting it is a "cardinal rule of statutory interpretation that no provision should be construed

to be entirely redundant"). The retroactive reach of Sections 4C and 4C ½ should be held to apply to survivors situated as Ms. Sliney is, in accordance with legislative intent.

C. The Legislative History Supports the Plain Language's Intent to Apply Section 4C and Section 4C½ Retroactively in Harmony with the Whole Act.

In Massachusetts, "[s]tatutes are to be interpreted not based solely on simple, strict meaning of words, but in connection with their development and history, and with the history of the times and prior legislation. Kobrin v. Gastfriend, 443 Mass. 327, 335 (Mass. 2005). The development and legislative history support the plain language of the intended retroactive application of Sections 4C and 4C ½. See, Embry, No. MICV2013-01338, 2014 Mass. Super. LEXIS 206 at *10 ("On June 19, 2014, the date the Senate approved the Act, Senator William Brownsberger stated that it was 'retroactive, [and] applies to all pending lawsuits or ... incidents that have occurred at any time.' S. Journal, 188th Sen., Jun. 19, 2014. This language further indicates that the Legislature intended that §4C 1/2 apply retroactively, *even in cases brought before its enactment.*") (emphasis added).

Other states that have enacted similar legislation can also be a guide. When California first enacted legislation amending its civil statute of limitations for child sexual abuse in 1986, the law expressly applied not only to actions pending on the effective date of the legislation, but to "[a]ny action commenced on or after January 1, 1987, *including any action which would be barred by application of the period of limitation applicable prior to January 1, 1987.*" Cal. Stats. 1986, ch. 914, § 1, pp. 946-947 (emphasis added), as quoted in Liebig v. Superior Court, 257 Cal. Rptr. 574, 209 Cal. App. 3d 828, 831 (Cal. App. 1 Dist. 1989).

In contrast, the Montana legislature, in passing its retroactive statute, chose specifically to limit the reach of its statute to not-yet-filed claims by dictating that it "applies to all causes of action commenced on or after [date of effectiveness], regardless of when the cause of action arose."[9] The Massachusetts General Assembly gave no such limitation

[9]See, 1989 Mt. ALS 158, 1989 Mt. Ch. 158, 1989 Mt. S.B. 157 §5 ("Section 5. Retroactive applicability. This act applies to all causes of action commenced on or after October 1, 1989, regardless of when the cause of action arose. To this extent, this act applies retroactively, within the meaning of 1-2-109.")

in 2014 Mass. Ch. 145, § 7, instead giving access to justice to the suits of survivors "regardless of when any such action or claim shall have accrued or been filed and regardless of whether it may have lapsed or otherwise be barred by time under the law of the commonwealth." Id.

Mass. H.B. 4126 was passed by a unanimous vote of the House of Representatives following an impassioned speech by Rep. John Lawn in which he attributed his motivation in bringing the bill to a constituent. That constituent was the appellant, Rosanne Sliney. She had come to him after being told "that despite the evidence[,] that she had missed her chance because the statute of limitations had expired." App. 78 (Remarks of Rep. John Lawn to the House of Representatives, June 18, 2014). Rep. Lawn told his fellow representatives that the bill would give Ms. Sliney and others "a chance to heal on their own terms." Id. at pp. 78-79. When the bill reached the Senate floor, Sen. William Brownsberger told his fellow senators, "as to perpetrators, this change is retroactive so that if you were abused when you were 13, and you are 38 today, you now have the ability to bring your

lawsuit, even though that lawsuit previously expired under the old law." App. 82 (Remarks of Sen. William Brownsberger to the Senate, June 19, 2014). Sen. Brownsberger also explained that H.B. 4126:

> also chang[es] what's called the discovery rule, and under the discovery rule, even if the statute of limitations has expired, if you are unaware of the harm that occurred to you, you have three years from the date [] when you become fully appreciative of the harm that occurred to you. In the case of child sexual abuse where in fact that coming into awareness, sort of coming out to yourself in terms of the harm you experienced may take decades, may go through stages, we are extending the statute time for discovery from three years to seven years. *That extension is retroactive, applies to all pending lawsuits or the incidents that have occurred at any time.*

Id. at pp. 82-83 (emphasis added).

D. The Amendments to Massachusetts' Statutes of Limitations for Child Sexual Abuse, and Their Retroactive Application, are Consistent With a National Trend to Give Survivors Access to Justice.

Massachusetts' extension of its civil statute of limitations for child sexual abuse followed a national trend to give survivors of child sexual abuse more time to bring their claims because legislators have found that the limitations in place routinely yield injustice. As in the other states that have extended their statutes of limitations, there were three

compelling reasons the General Assembly both extended the civil statute of limitations for child sexual abuse and made the extension retroactive, and each of these compelling state interests merits this Court's deference to the legislature on the constitutionality of this law. Commonwealth v. Kenney, 449 Mass. 840, 848 (Mass. 2007).

First, there is an extensive and persuasive body of scientific evidence establishing that child sex abuse victims are harmed in a way that makes it extremely difficult for them to come forward. Therefore, victims typically need decades to do so.[10] As one clinician has explained:

[10] See generally Ramona Alaggia MSW, PhD, RSW, An Ecological Analysis of Child Sexual Abuse Disclosure: Considerations for Child and Adolescent Mental Health, 19 J. Can. Acad. Child Adolesc. Psychiatry 32, 32 (2010) ("By some estimates between 60-80% of CSA victims withhold disclosure. . . ."); Richard L. Sjoberg & Frank Lindblad, M.D., Ph.D., Limited Disclosure of Sexual Abuse in Children Whose Experiences Were Documented by Video Tape, 159 Am. J. Psychiatry 312, 312-13 (2002) ("[T]here [i]s a significant tendency of . . . abused children to deny or belittle their experiences."); Mary L. Paine & David J. Hansen, Factors Influencing Children to Self-Disclose Sexual Abuse, 22 Clinical Psychol. Rev. 271, 271-75 (2002) (discussing shame and embarrassment about abuse, making victim feel to blame for abuse); Guy R. Holmes, See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in

> Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later and can have a difficult time connecting his adulthood problems with his past.

Mic Hunter, Abused Boys, 59 (1991). These delayed effects result in part from coping mechanisms adopted by abused children that cause them to avoid, minimize, and otherwise dissociate from the abuse in a way that makes it psychologically impossible to disclose their abuse at or near the time it is occurring.[11] This is

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Adulthood?, 17(1) Clinical Psychol. Rev. 69, 69-88 (1997); David Lisak, The Psychological Impact of Sexual Abuse: Content Analysis of Interviews with Male Survivors, 7(4) J. of Traumatic Stress 525, 525-526, 544 (1994) (noting that unlike victim of a toxic tort, there is no medical necessity that abuse will lead to scientifically dispositive injury. Child sex abuse victims simply do not apprehend that the abuse, which they may not even experience as abuse, could lead to devastating effects in adulthood.).

[11] In fact, most children never tell anyone that they have been abused. This process is known in professional literature as "child sexual abuse accommodation syndrome (CSAAS), a theoretical model that posits that sexually abused children frequently display secrecy, tentative disclosures, and retractions of abuse[.]" Kamala London et al., Disclosure of Child Sexual Abuse: What Does the Research Tell us About the Ways That Children Tell?, 11 Psychol. Pub. Pol'y & L. 194, 195 (2005). In a review of eleven studies of child sex abuse disclosure rates, "the modal childhood disclosure rate (in 6 of the 11 studies) is just over 33%." Id. at 199. That

particularly so when – as in most cases – the abuser is someone the child knows and trusts.[12]

Second, the success of retroactive legislation in identifying child predators has been remarkable. After California passed legislation creating a window of time in which previously expired civil claims could be brought, over 300 previously unidentified perpetrators were disclosed to the public.[13] Since most perpetrators abuse multiple children throughout their lives,[14] identification of even aged perpetrators is a

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means of the adults willing to admit being abused as children, only one-third reported it at the time.

[12] E.g., Howard N. Snyder, Sexual assault of young children as reported to law enforcement: Victim, incident, and offender characteristics at 10 (US DOJ 2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/-saycrle.pdf (last visited September 19, 2015).

[13] Archdiocese of Los Angeles, Report to the People of God: Clergy Sexual Abuse, 1930-2003, 28-34 (February 17, 2004) and addenda, available at http://www.bishop-accountability.org/AtAGlance/lists.htm (last accessed September 19, 2015), along with the lists of accused clergy posted by dozens of other dioceses and religious orders.

[14] Kenneth V. Lanning, Child Molesters: A Behavioral Analysis, 52 (5th ed. 2010), available at http://www.missingkids.org/en_US/publications/NC70.pdf ("Although a variety of individuals sexually abuse children, preferential-type sex offenders, and especially pedophiles, are the primary acquaintance sexual exploiters of children. A preferential-acquaintance child molester might molest 10, 50, hundreds, or even thousands of children in a lifetime, depending on the offender and how broadly or narrowly child molestation is defined. Although pedophiles vary

public safety interest of the first order. Other states have taken similar approaches to California, opening a "window" of time to bring previously expired claims. The Delaware window was open from 2007-2009. Hawai'i and Minnesota's windows are still open through 2016, and in 2014, Hawai'i extended its two year window to four years.[15] Montana and South Dakota took an approach similar to the one taken by Massachusetts by passing laws that tolled accrual of claims for child sexual abuse until a victim discovers the harm caused by the abuse and making the change retroactive.[16] Connecticut took a similar approach,

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greatly, their sexual behavior is repetitive and highly predictable.")(last accessed September 19, 2015).

[15] Haw. Rev. Stat. § 657-1.8 (Haw. 2012, 2014).

[16] Mont. Code Ann. 27-2-216(1)(b)(Mont. 1989) ("An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than: (b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse."); S.D. Cod. Laws § 26-10-25(S.D. 1991) ("three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act, whichever period expires later. However, no person who has reached the age of forty years may recover damages from any person or entity other than the person who perpetrated the actual act of sexual abuse."); see, 1991 S.D. A.L.S. 219, 1991 S.D. Ch. 219, 1991 S.D. SB 247 § 5 ("Section 5. As used in THIS ACT, childhood sexual abuse is any

enacting a fully retroactive statute through victim's age forty-eight (48).[17]

Third, there was a burgeoning awareness that institutions had routinely covered up abuse and concealed abusers' identities, making legal reform necessary.[18] See, e.g., Betrayal: The Crisis in the Catholic Church (Little, Brown and Company, 2002)

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act committed by the defendant against the complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 22-22 or prior laws of similar effect at the time the act was committed which act would have constituted a felony.") See also, Cosgriffe, 864 P.2d 776 (upholding revival of previously barred claim); Stratmeyer v. Stratmeyer, 567 N.W.2d at 223-24 (upholding revival of previously barred claim).

[17] See, 2002 Ct. ALS 138, 2002 Ct. P.A. 138, 2002 Ct. HB 5680, §§ 2-3 (2002)(Both Section 2 and Section 3 of the Act state they are "[e]ffective from passage and applicable to any cause of action arising from an incident committed prior to, on or after said date"). See also, Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357 (upholding revival of previously barred claim).

[18] See, Timothy Lytton, Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Sexual Abuse (Harvard University Press, 2008) (detailing that civil tort claims have been the only means by which survivors of clergy abuse have been able to obtain any justice); Marci A. Hamilton, Justice Denied: What America Must Do to Protect Its Children (Cambridge University Press 2008, 2012). See generally, Russell G. Donaldson, J.D., Annotation, Running of limitations against action for civil damages for sexual abuse of child, 9 A.L.R.5th 321 (1993); James T. O'Reilly and Dr. Margaret S.P. Chalmers, The Clergy Sex Abuse Crisis and the Legal Responses (Oxford University Press 2014).

(detailing Boston Globe investigative staff's exposure of institutional cover-up in the Archdiocese of Boston).

II. SECTIONS 4C and 4C ½ ARE CONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION.

The United States Supreme Court has rejected the proposition that retroactive elimination of a viable civil statute of limitations defense constitutes a denial of due process.[19] In Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S. Ct. 1137 (1945), an action to recover the purchase price of securities sold fraudulently and in violation of the Minnesota Blue Sky Law, the Court held that a Minnesota statute which abolished any defense the defendant might previously have had under the state statutes of limitation did not deprive the defendant of property without due process of law in violation of the Fourteenth Amendment. In so holding, the Court stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent

[19] C.f., Stogner v. California, 539 U.S. 607, 610, 123 S. Ct. 2446, 2449 (2003) (retroactive application of a criminal statute of limitations to revive a previously time-barred prosecution violates the *Ex Post Facto* Clause of the United States Constitution).

> expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. at 314. See also, Kienzler v. Dalkon Shield Claimants Trust, 426 Mass. 87, 89 (1997) (“The sole issue is whether the statute falls within the legislative power to enact, not whether it comports with a court's idea of wise or efficient legislation.”).

The United States Supreme Court reaffirmed in Landgraf v. USI Film Prods., 511 U.S. 244, 267, 114 S. Ct. 1483, 1498 (1994), that retroactive civil legislation is constitutional if the legislative intent is clear and the change is procedural. The

Landgraf Court explained the duty of judicial deference as follows: "legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments." Landgraf, 511 U.S. at 272. The Court went on to observe that "the *constitutional* impediments to retroactive civil legislation are now modest. . . . Requiring clear intent [of retroactive application] assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." Id. at 272-73 (emphasis in original).

The requirement of clear intent of retroactive application can be readily overcome by express legislative language. "[T]he antiretroactivity presumption is just that — a presumption, rather than a constitutional command." Republic of Austria v. Altmann, 541 U.S. 677, 692-93, 124 S. Ct. 2240, 2249-50 (2004) (declined to extend Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749 (2006)). See also Landgraf, 511 U.S. at 267-68. When retroactive intent is clear,

as it is for Sections 4C and 4C ½, the antiretroactivity presumption is overcome.

The revival of expired statutes of limitations is something no legislature should take lightly, and the General Assembly did not do so in 2014 when it made the application of Sections 4C and 4C ½ retroactive for child sex abuse victims. Rather, it distinguished between actions against perpetrators of the abuse and those whose negligently supervision of the perpetrators resulted in the abuse. This Court should defer to the General Assembly's careful judgment, as the Montana Supreme Court did in upholding the retroactive application of its statute of limitations for child sexual abuse-related tort claims:

> [T]he statute plainly reflects awareness of the difficulty sexual abuse victims have in identifying and recognizing their injuries immediately. Research shows victims of sexual abuse may repress the memory of such incidents, and not discover the actual source of their problems for many years. [Footnote omitted.] In acknowledging this problem, the legislature...limits the possibility of the general statute of limitation barring a claim for sexual abuse, and holds the sexual abuser liable for his offenses. Because we are not in a position to judge the wisdom of the legislature, where, as here, the statute has a reasonable relation to the state's legitimate purpose

> of affording sexual abuse victims a remedy, we reject respondents' due process claims.

Cosgriffe v. Cosgriffe, 864 P.2d 776, 779 (Mont. 1993) (quoting K.E. v. Hoffman, 452 N.W.2d 509, 513-14 (Minn. Ct. App. 1990)).

III. SECTIONS 4C and 4C 1/2 ARE CONSTITUTIONAL UNDER THE MASSACHUSETTS CONSTITUTION

Every state permits retroactive application of laws to some degree, and many states have addressed the more particular facial constitutional question presented in this case: whether revival of a statute of limitations is constitutional. Of the 45 jurisdictions that have considered constitutional challenges to the application of revival legislation to a cause of action, twenty-four states plus the District of Columbia have expressly upheld the facial constitutionality of retroactive revival.[20]

[20] Twenty-four states and the District of Columbia have expressly held retroactive application of revival legislation to be Constitutional. In five states, the matter is still an open question. Catholic Bishop of N. Alaska v. Does, 141 P.3d 719, 722-25 (Alaska 2006) (open question); Chevron Chemical Co. v. Superior Court, 641 P.2d 1275, 1284 (Ariz. 1982); City of Tucson v. Clear Channel Outdoor, Inc., 105 P.3d 1163, 1167, 1170 (Ariz. 2005)(barred by statute, Ariz. Rev. Stat. Ann. § 12-505 (Ariz. 2010)); Mudd v. McColgan, 183 P.2d 10, 13 (Cal. 1947); 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 632 (Cal. Ct. App. 2001), cert. denied, 535 U.S. 1033, 122 S. Ct.

1788(2002); Shell W. E&P, Inc. v. Dolores Cnty. Bd. of Comm’rs, 948 P.2d 1002, 1011-13 (Colo. 1997); Rossi v. Osage Highland Dev., LLC, 219 P.3d 319, 322 (Col. App. 2009) (citing In re Estate of Randall, 441 P.2d 153, 155 (Col. 1968)); Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. at 439-40; Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1258-60 (Del. 2011); Riggs Nat'l Bank v. District of Columbia, 581 A.2d 1229, 1241 (D.C. 1990); Canton Textile Mills, Inc. v. Lathem, 317 S.E.2d 189, 193 (Ga. 1984); Vaughn v. Vulcan Materials Co., 465 S.E.2d 661, 662 (Ga. 1996); Roe v. Doe, 581 P.2d 310, 316 (Haw. 1978); Gov’t Employees Ins. Co. v. Hyman, 975 P.2d 211 (Haw. 1999); Hecla Mining Co. v. Idaho State Tax Comm'n, 697 P.2d 1161, 1164 (Idaho 1985); Peterson v. Peterson, 320 P.3d 1244, 1250 (Idaho 2014); Metro Holding Co. v. Mitchell, 589 N.E.2d 217, 219 (Ind. 1992); Harding v. K.C. Wall Products, Inc., 831 P.2d 958, 967-968 (Kan. 1992); Ripley v. Tolbert, 921 P.2d 1210, 1219 (Kan. 1996); Allstate Ins. Co. v. Kim, 829 A.2d 611, 622-23 (Md. 2003); Doe v. Roe, 20 A.3d 787, 797-799 (Md. 2011) (open question); Boston v. Keene Corp., 406 Mass. At 312-13; Kienzler, 426 Mass. at 88-89; Rookledge v. Garwood, 65 N.W.2d 785, 790-92 (Mich. 1954); Pryber v. Marriott Corp., 296 N.W.2d 597, 600-01 (Mich. Ct. App. 1980), aff'd, 307 N.W.2d 333 (Mich. 1981) (per curiam); Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 416 (Minn. 2002); In re Individual 35W Bridge Litigation, 806 N.W.2d 820, 830-31 (Minn. 2011); Cosgriffe v. Cosgriffe, 864 P.2d at 778; Alsenz v. Twin Lakes Village, 843 P.2d 834, 837-838 (Nev. 1992), aff’d, 864 P.2d 285 (Nev. 1993) (open question); Panzino v. Continental Can Co., 364 A.2d 1043, 1046 (N.J. 1976); Bunton v. Abernathy, 73 P.2d 810, 811-12 (N.M. 1937); Orman v. Van Arsdell, 78 P. 48, 48(N.M. 1904); Gallewski v. Hentz & Co., 93 N.E.2d 620, 624-25 (N.Y. 1950); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1079-80 (N.Y. 1989); In Interest of W.M.V., 268 N.W.2d 781, 786 (N.D. 1978); Pratte v. Stewart, 929 N.E.2d 415, 423 (Ohio 2010) (open question); McFadden v. Dryvit Systems, Inc., 112 P.3d 1191, 1195 (Or. 2005); Owens v. Maass, 918 P.2d 808, 813 (Or. 1996); Bible v. Dep't of Labor & Indus., 696 A.2d 1149, 1156 (Pa. 1997); McDonald v. Redevelopment Auth. of Allegheny Cnty., 952 A.2d 713,

Massachusetts is a member of this majority category. Kienzler, 426 Mass. at 88-89 (noting that a statute of limitations with a "legitimate public purpose" may constitutionally revive expired claims); Boston v. Keene Corp., 406 Mass. 301, 313 (1989) ("Consequently, the running of the limitations period on [asbestos] claims does not create a vested right which cannot constitutionally be taken away by subsequent statutory revival of the barred remedy."); American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., 374 Mass. 181, 193 (1978) (holding retroactive application constitutional against a vested rights challenge while noting "[t]he plaintiffs here claim vested rights under the same [insurance contracts] which, in many instances, gave

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718(Pa. Commw. Ct. 2008), appeal denied, 968 A.2d 234 (Pa. 2009); Stratmeyer v. Stratmeyer, 567 N.W.2d at 223; Lane v. Dep't of Labor & Indus., 151 P.2d 440, 443 (Wash. 1944); Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 146 P.3d 914, 922 (Wash. 2006), superseded in part by statute Wash. Rev. Code 25.15.303, as recognized in Chadwick Farms Owners Ass'n v. FHC, LLC, 160 P.3d 1061, 1064 (Wash. 2007), overruled in part by 207 P.3d 1251 (Wash. 2009); Pankovich v. SWCC, 163 W. Va., 259 S.E.2d 127, 131-32 (W. Va. 1979); Shelby J.S. v. George L.H., 381 S.E.2d 269, 273 (W. Va. 1989); Neiman v. Am. Nat'l Prop. & Cas. Co., 613 N.W.2d 160, 164 (Wis. 2000); Society Ins. v. Labor & Industrial Review Commission, 786 N.W.2d 385, 399-401 (Wis. 2010) (open question); Vigil v. Tafoya, 600 P.2d 721, 725 (Wyo. 1979); RM v. State, 891 P.2d 791, 792 (Wyo. 1995).

rise to the [rate levels] which, in legislative judgment, necessitated a legislative remedy.").

2014 Mass. Ch. 145 enjoys a presumption of constitutionality, and "a reviewing court must grant all rational presumptions in favor of the constitutionality of a legislative enactment." Kienzler, 426 Mass. at 89 (quoting Boston v. Keene Corp., 406 Mass. at 305)); Com. v. Boston Edison Co., 444 Mass. 324, 341 (Mass. 2005). Moreover, "[t]he party challenging the statute's constitutionality must demonstrate beyond a reasonable doubt that there are no conceivable grounds which could support its validity." Kienzler, 546 Mass. at 89 (internal citations omitted). Defendant has failed to carry the burden of overcoming the presumption in favor of the constitutionality of 2014 Mass. Ch. 145, and has failed to demonstrate that there is no triable issue of fact as to the retroactive application of Section 4C (and, alternatively, Section 4C ½) to Plaintiff's claims.

A. There Is No Vested Right in the Running of a Statute of Limitations in Massachusetts.

Like every other state in the country, Massachusetts has permitted the retroactive application of statutes. It also has observed the distinction drawn by the federal courts between procedural and substantive retroactive changes in the law, and has prescribed deference with respect to procedural changes.

In particular, this Court has repeatedly rejected the argument that the retroactive application of lengthened statutes of limitations disturbs rights vested under the Massachusetts Constitution. In Boston v. Keene Corp., 406 Mass. 301 (1989), legislation creating a four-year window during which expired claims for asbestos-related damages could be brought was upheld by this Court:

> The right at issue is the ability of the defendants to avoid claims being brought against them by plaintiffs who have engaged in asbestos corrective measures by arguing that the statute of limitations applicable to those claims has run. To the extent that it applies retroactively, St. 1986, c. 336, effectively divests defendants, and others similarly situated, of this potential defense. However, the defendants' interest in the limitations defense is procedural rather than substantive. We have held that, in cases not involving claims to real

> property, the running of the applicable limitations period bars only the legal remedy, while leaving the underlying cause of action unaffected.

Id. at 312-313.

Similarly, in Kienzler v. Dalkon Shield Claimants Trust, 426 Mass. at 92, the Court rejected a "vested rights" challenge to a special statute of limitations for Dalkon Shield claims, concluding that the law had a “legitimate public purpose” and could therefore constitutionally revive expired claims.

A minority of states (21) clings to the mechanical and outdated vested rights analysis that disables legislatures from serving the public good through the revival of civil statutes of limitations.[21]

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[21] Johnson v. Garlock, Inc., 682 So. 2d 25, 28 (Ala. 1996); Reeves v. State, 288 S.W.3d 577, 581 (Ark. 2008); Wiley v. Roof, 641 So. 2d 66, 68 (Fla. 1994); Doe v. Diocese of Dallas, 917 N.E.2d 475, 484 (Ill. 2009); Frideres v. Schiltz, 540 N.W.2d 261, 266 (Iowa 1995), but see, Schulte v. Wageman, 465 N.W.2d 285, 287 (Iowa 1991); Officeware v. Jackson, 247 S.W.3d 887, 890 (Ky. 2008); Hall v. Hall, 516 So. 2d 119, 120 (La. 1987); Dobson v. Quinn Freight Lines, Inc., 415 A.2d 814, 816 (Me. 1980); Cole v. National Life Ins. Co., 549 So. 2d 1301, 1305 (Miss. 1989); Doe v. Roman Catholic Diocese, 862 S.W.2d 338, 340 (Mo. 1993); Givens v. Anchor Packing, Inc.,466 N.W.2d 771, 781 (Neb. 1991); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 240 S.E.2d 345, 352 (N.C. 1978); Gould v. Concord Hosp., 493 A.2d 1193, 1196 (N.H. 1985); Ellington v. Horwitz Enters., 68 P.3d 983, 984 (Okla. 2003); Kelly v. Marcantonio, 678 A.2d 873, 883

This outdated approach, in which the running of a statute of limitations is found to vest in the defendant and trigger a permanent bar, is sharply at odds with the spirit of the Massachusetts retroactivity cases, and with modern understanding of the procedural nature of statutes of limitations. As states are faced with important public policy issues such as the child sexual abuse epidemic, judicial deference to legislative judgment as to civil retroactivity has become the norm. As the Supreme Court of Connecticut recently stated in upholding retroactive revival of child sex abuse claims:

> [W]e are mindful that state [c]onstitutional provisions must be interpreted within the context of the times. . . .We must interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning. . . . [A] constitution is, in [former United States Supreme Court] Chief Justice John

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(R.I. 1996); Doe v. Crooks, 613 S.E.2d 536, 538 (S.C. 2005); Ford Motor Co. v. Moulton, 511 S.W.2d 690, 697 (Tenn. 1974); Baker Hughes, Inc. v. Keco R. & D., Inc., 12 S.W.3d 1, 4 (Tex. 1999); Roark v. Crabtree, 893 P.2d 1058, 1062-1063 (Utah 1995); Starnes v. Cayouette, 419 S.E.2d 669, 671 (Va. 1992); Murray v. Luzenac Corp., 830 A.2d 1, 3 (Vt. 2003).

> Marshall's words, intended to endure for ages to come
> . . . and, consequently, to be adapted to the various crises of human affairs. . . . In short, the [state] constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness.

Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 406 (Conn. 2015) (internal citations omitted).

The Massachusetts cases are in harmony with the many states adopting the United States Supreme Court's modern, flexible approach to "vested rights" analysis, and this Court need only follow its prior holdings in rejecting the defendant's challenge to the retroactive application of the Sections 4C and 4C ½ to plaintiff's claims.

B. There is no Vested Right To A Trial Court Judgment in Massachusetts.

There are no absolute constitutional rights other than the absolute right to believe. Cantwell v. Conn., 310 U.S. 296, 304, 60 S. Ct. 900, 903-904 (1940); Madsen v. Erwin, 395 Mass. 715, 727 (1985); Murphy v. I.S.K. Con. of New England, Inc., 409 Mass. 842, 851

(1991).[22] Accordingly, if the government can assert an adequate interest, its legislation is upheld against constitutional attack. American Mfrs. Mut. Ins. Co., 374 Mass. at 193 (1978).

Massachusetts does not recognize a "vested right" in a trial court's judgment in one's favor. Pielech v. Massasoit Greyhound, Inc., 47 Mass. App. Ct. at 323-24 (allowing for a retroactive application provided the "period to file an appeal, certiorari petition, petition for rehearing or similar motion has not expired on said effective date.") If vested rights in a trial court judgment existed in Massachusetts, the statute in question in Pielech would have been unconstitutional, but it was upheld and applied. Boston v. Keene Corp., 406 Mass. at 313. See also Fernandez-Vargas v. Gonzales, 548 U.S. 30, 44, 126 S. Ct. 2422, 2432(2006) ("[P]utative claims to relief are not vested rights, a term that describes something more substantial than inchoate expectations and unrealized opportunities." (quoting Pearsall v.

[22] See, Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 1600 (1990); Attorney Gen. v. Bailey, 386 Mass. 367, 374–377 (1982), cert. denied, 459 U.S. 970, 103 S.Ct. 301 (1982).

Great Northern R. Co., 161 U.S. 646, 673, 16 S. Ct. 705(1896))).

The defendant's assertion of a vested right in the trial court judgment in his favor requires that he credibly make an argument that he would not have sexually abused plaintiff had he known the civil statute of limitations would be extended and made retroactive to his actions. "There is no such thing as a vested right to do wrong." Liebovich v. Antonellis, 410 Mass. 568, 579 (1991) (citing Danforth v. Groton Water Co., 178 Mass. 472, 477 (1901)). He cannot overcome the presumption of constitutionality, or demonstrate beyond a reasonable doubt that there are no conceivable grounds which could support the law's validity. Liebovich v. Antonellis, 410 Mass. at 576. Here, as in American Mfrs. Mut. Ins. Co., 374 Mass. at 192-193 (1978),[23] "[t]he validity of the

[23] "The criteria for evaluating the reasonableness of a retroactive statute include three considerations: 'the nature of the public interest which motivated the Legislature to enact the retroactive statute; the nature of the rights affected retroactively; and the extent or scope of the statutory effect or impact. While the first consideration readily could be addressed on the basis of the record before us, the other considerations require examination of factual questions to which our record does not provide adequate answers. Analysis of 'the nature of the

statute -- and the conclusion as to its 'reasonableness'--is also supported by the fact that it is designed to benefit the public." Id. at 193.

Retroactive revival of a claim for child sexual abuse is a rational solution to the injustice created by short statutes of limitations that favor child predators over child safety. Roman Catholic Bishop of Oakland v. Superior Court, 28 Cal. Rptr. 3d 355, 359-360 (Cal. Ct. App. 2005); Melanie H., No. 04-1596-WQH-(WMc), slip op. at 16-18. See also, Cosgriffe, 864 P.2d at 778 (holding retroactive application of statute of limitations for torts based on sexual abuse constitutional against due process challenge because statute was rationally related to the legitimate purpose of the state). In the case of asbestos-related claims, this Court concluded that "[t]he defendants' interest in a procedural bar which does not rise to the level of a vested right must yield to the far weightier public interest of remedying [a] grave public health threat." Boston v. Keene Corp.,

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rights affected retroactively' necessarily involves an examination of whether [the defendant] 'acted in reasonable reliance upon the previous state of the law.'" Pielech v. Massasoit Greyhound, Inc., 47 Mass. App. Ct. at 328 (quoting Leibovich v. Antonellis, 410 Mass. 568, 577 (1991)).

406 Mass. at 313. If asbestos exposure is a grave public health threat, then child sexual abuse is a public health epidemic: it affects one in four girls, and one in six boys in this nation.[24] Historically, 90% of child victims never go to the authorities and the vast majority of claims expire before the victims are capable of getting to court.[25] This is because, as noted above, there is an extensive and persuasive body of scientific evidence establishing that childhood sexual abuse victims are harmed in a way that makes it difficult or impossible to process and cope with the

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[24] American Psychological Association, Understanding Child Sex Abuse, available at http://www.apa.org/pi/about/newsletter/2011/12/sexual-abuse.aspx (last visited Sep. 13, 2015); see also, The National Child Traumatic Stress Network, Child Sexual Abuse Fact Sheet, available at http://nctsn.org/nctsn_assets/pdfs/caring/ChildSexualAbuseFactSheet.pdf (last visited Sep. 13, 2015); National Sexual Violence Resource Center, Understanding Child Sex Abuse Definitions and Rates (Aug. 2012), available at http://www.nsvrc.org/sites/default/files/NSVRC_Publications_TalkingPoints_Understanding-Child-Sexual-Abuse-definitions-rates.pdf (last visited Sep. 13, 2015).

[25] Centers for Disease Control and Prevention, The Adverse Childhood Experiences (ACE) Study, available at http://www.cdc.gov/violenceprevention/acestudy/#1 , See also, U.S. Department of Health and Human Services Administration for Children and Families, Administration on Children, You and Families, and Children's Bureau, Child Maltreatment 2012, available at http://www.acf.hhs.gov/sites/default/files/cb-/cm2012.pdf

abuse, or to self-report it. Victims often need decades to do so.[26] Still, every year, more than three million reports of child abuse are made in the United States involving more than six million children.[27] Statistically, very few of these reports are false claims.[28]

This Court noted in American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.:

> The need for retroactivity, and the reasonableness of the legislative response, become most apparent when the plaintiff claims a vested right arising out of the very [issue] which motivated the Legislature to act.

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[26] Rebecca Campbell, Ph.D., "Neurobiology of Sexual Assault: Explaining Effects on the Brain," National Institute of Justice (2012); R.L. v. Voytac, 199 N.J. 285, 971 A.2d 1074 (N.J. 2009); Bessel A. van der Kolk M.D., et al., Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society (2006).

[27] Child Help, Child Abuse Statistics and Facts, available at https://www.childhelp.org/child-abuse-statistics/ (last visited Sep. 13, 2015)

[28] See, Delphine Collin-Vezina, et al., Lessons Learned from Child Sexual Abuse Research: Prevalence, Outcomes, and Preventive Strategies, Child & Adolesc. Psych. & Mental Health (2013); Merrilyn McDonald, The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases, Court Review (Spring 1998), available at http://www.omsys.com/mmcd/courtrev.htm#Rcr2023; E. Olafson, et al., Modern History of Child Sexual Abuse Awareness: cycles of Discovery and Suppression, 17 Child Abuse Negl. 1, 7-24 (1993).

Id.[29] In this case, the appellant herself was what motivated the legislature to act.

There are three compelling public purposes served by legislation that applies retroactively to expired civil child sexual abuse claims: (1) identifying previously unknown child predators to the public; (2) giving child sex abuse survivors their day in court; and (3) righting the balance of power between perpetrators and victims. The retroactive application of Sections 4C and 4C ½ achieves these purposes, and indeed, is the only way of affording a judicial remedy to the majority of victims of child sexual abuse who cannot come forward for years, because criminal retroactive legislation is unconstitutional. Stogner, 539 U.S. at 610. Even if these legislative enactments were subject to a higher standard of scrutiny than the rational basis standard, it would be difficult to identify more compelling interests that are more narrowly tailored.

[29] See also, Opinion of the Justices, 356 Mass. 775, 794 (1969); Campbell v. Boston, 290 Mass. 427, 430 (1935); United States Trust Co. v. New Jersey, 431 U.S. 1, 23-25, 97 S. Ct. 1505, 1518-19 (1977); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20, 96 S. Ct. 2882, 2891-2894 (1976).

Finally, while "rule 60(b)(6) permits a court to relieve a party from final judgment where there is a post-judgment change in the law having retroactive application[,]" Clean Harbors of Braintree, Inc. v. Bd. of Health, 415 Mass. 876, 884 (1993)(quoting Brown v. Hutton Grp., 795 F.Supp. 1307, 1316 n.7 (S.D.N.Y. 1992)), a ruling on a motion under Rule 60 requires the exercise of judicial discretion. Where, as in this case, discretion is not exercised, deference is not required. Pielech v. Massasoit Greyhound, Inc., 47 Mass. App. Ct. at 325("Here, however, the judge's ruling as to retroactivity is purely one of law and does not reflect an exercise of discretion. It may, therefore, be reviewed for correctness as matter of law, without deferential weighting.")[30]

The General Assembly expressly provided for the retroactive application of Sections 4C and 4C ½, and their judgment is entitled to a presumption of constitutionality. The defendant has failed to meet his burden to overcome that presumption, and the judgment in his favor should be reversed.

[30] See also, Cuzzi v. Bd. of Appeals of Medford, 2 Mass. App. Ct. 887, 888 (Mass. App. Ct. 1974).

CONCLUSION

For the foregoing reasons, *Amici Curiae* request this Court to reverse the trial court's judgment and find that the retroactivity provisions of 2014 Mass. Ch. 145 §8 are a constitutional exercise of the General Assembly's authority, and that they apply to plaintiff's claims.

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RULE 16(k) CERTIFICATION

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.

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CERTIFICATE OF SERVICE

I, Erin K. Olson, of attorneys for *amici curiae* National Center for Victims of Crime, Massachusetts Citizens for Children, BishopAccountability.org, Survivors Network of those Abused by Priests, Child Justice, Foundation to Abolish Child Sex Abuse, Horace Mann Action Coalition, and Male Survivor, certify under oath and under the pains and penalties of perjury that on September 21, 2015, I mailed two true copies of the foregoing brief by prepaid, first-class mail to attorneys of record for each party addressed as follows:

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